SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

THE WILLIAM VALE HOTEL, LLC; and
ESPRESSO HOSPITALITY MANAGEMENT, LLC,
Plaintiffs, Decision and order

- against - Index No. 505724/2022

FIREMAN'S FUND INSURANCE COMPANY;
ALLIANZ GLOBAL CORPORATE AND
SPECIALTY; and RSG UNDERWRITING
MANAGERS OPERATING AS SUITELIFE
UNDERWRITING MANAGERS,
Defendants April 18, 2023

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #3

The plaintiffs have moved seeking a stay of the present lawsuit pending a determination by the Court of Appeals in another case that may definitively resolve the issues in this lawsuit. The defendants opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

This lawsuit concerns losses sustained by the plaintiff hotel due to government mandated shut-downs imposed in the wake of the COVID-19 pandemic. The defendants rejected a claim for lost income due to the shut-downs and this lawsuit was then commenced. According to the Amended Complaint the plaintiff maintained an insurance policy with the defendants which included coverage for, among other claims, claims "caused by or resulting from a covered communicable disease event" (see, Amended Complaint, ¶14 [NYSCEF Doc. No. 10]). The defendants filed a motion to dismiss and the

plaintiffs filed a cross-motion seeking to file an amended complaint. The motions were adjourned and now the plaintiffs filed the instant motion seeking to stay the proceeding on the grounds a decision of the First Department, Consolidated Restaurant Operators Inc., v. Westport Insurance Corp., 205 AD3d 76, 167 NYS3d 15, 2022 WL 1040367 [1st Dept., 2022] will soon be decided by the Court of Appeals (leave to appeal granted, 39 NY3d 943, 177 NYS2d 545 [2022]). The plaintiffs assert an imminent Court of Appeals determination will resolve the motion to dismiss in this case and that a stay is appropriate. Specifically, the Court of Appeals will consider the extent of the "direct physical loss or damage" provision which is at the heart of most of the COVID insurance cases. Consolidated Restaurant Operators Inc., v. Westport Insurance Corp. (supra) held that the presence of COVID-19 did not cause any direct physical loss or damage to any property. The court stated that a "policyholder's inability to fully use its premises as intended because of COVID-19, without any actual, discernable, quantifiable change constituting "physical" difference to the property from what it was before exposure to the virus, fails to state a cause of action for a covered loss" (id). Likewise, in this case, the defendant denied plaintiff's claims on the grounds mere loss of use did not constitute any physical damage and has moved seeking to dismiss the lawsuit on that basis. The plaintiff's seek a stay of this proceeding awaiting the decision

from the Court of Appeals as the definitive ruling regarding whether the mere loss of use is covered under a policy providing for the coverage of the physical damage to property. The defendants oppose the motion arguing it has no merit and the request fo a stay should be denied.

Conclusions of Law

CPLR §2201 permits a court to stay proceedings "in a proper case, upon such terms as may be just" (id).

In Assenzio v. A.O. Smith Water Products, 2015 WL 5283301 [Supreme Court New York County 2015] the court held that it was appropriate to stay an action while waiting for an appellate determination in a different case that would have a "significant impact" in the current case. Thus, in Islay v. Garde, 2022 WL 17475676 [Supreme Court New York County 2022] the court stayed the proceedings while waiting for a decision in another case pending before the Court of Appeals. The court explained that whether the arguments before the Court of Appeals was imminent was not dispositive. Rather, the key issue was whether that determination would have a significant impact upon the stayed action. Again, in Castillo v. Saheet Construction Corp., 2022 WL 6409689 [Supreme Court Queens County 2022] the court noted that staying a proceeding while waiting for the Court of Appeals to render a decision in another matter that would impact the current litigation should be

done sparingly and only when the decision is imminent. The court in Castillo (supra) stayed the action because the Court of Appeals decision would bind the parties in the present litigation.

While the timing of any decision in Consolidated Restaurant Operators Inc., v. Westport Insurance Corp. (supra) is, of course, unknown a determination in that case may resolve this action as well. The plaintiff points out that precisely for this very reason at least five courts have stayed the proceedings pending a determination in Consolidated Restaurant Operators Inc., v. Westport Insurance Corp. (see, Memorandum of Law in Support, page 11 [NYSCEF Doc. No. 41]).

The defendants note that the plaintiffs have failed to satisfy the strict procedural requirements necessary to warrant a stay. Substantively, the defendants assert that a decision in Consolidated Restaurant Operators Inc., v. Westport Insurance Corp. would not even resolve the issues presented in this action.

Thus, an examination of the specific claims must be examined. The crux of the claims in this lawsuit are expressed in Paragraph 12 of plaintiff's proposed second amended complaint. The plaintiffs allege five distinct losses they sustained as a result of the COVID-19 pandemic. First, expenses incurred disinfecting and sanitizing the hotel. Second, loss of income due to the closure of the hotel. Third, loss of income due to governmental prohibitions regarding travel. Fourth, loss of income due to

governmental limitations regarding public gathering. Lastly, loss of income due to governmental mandated quarantines (see, Proposed Second Amended Complaint, ¶12 [NYSCEF Doc. No. 32]).

While those claims do not contain much elaboration they are all rooted in the fact the inability to remain operational during the COVID-19 shut-downs caused them to suffer losses. The defendants moved to dismiss those claims on the grounds the plaintiffs failed to establish any direct physical loss or damage and that therefore the plaintiffs were not entitled to any coverage. Indeed, a review of the defendant's memorandum in support of motion to dismiss highlights this legal impediment repeatedly (see, Memorandum of Law [NYSCEF Doc. No. 12]). In the current motion the defendants argue that even if the Court of Appeals were to hold that the presence of COVID-19 constitutes a direct physical loss there is still no need for a stay because the plaintiff will still be unable to establish their claims. This is true because the complaint never alleges any physical loss at all. The proposed second amended complaint alleges losses as a result of "respiratory droplets (i.e., droplets larger than 5 10 pm) that were expelled from infected individuals and have landed on, and then adhered to, surfaces and objects at the Vale property, such as doors, beds, windows and furniture, thereby structurally changing said surfaces and objects and/or causing damage thereto by becoming a part of said surfaces and objects, rendering them unusable as

potential physical contact with said surfaces and objects would be hazardous" (see, Proposed Second Amended Complaint, ¶12 [NYSCEF Doc. No. 32]). First, it is difficult to discern how the COVID-19 virus structurally changed any surfaces or objects. Moreover, even the passing reference to 'causing damage' within the above noted paragraph does not really allege physical damage as a result of the virus. Rather, it alleges damage resulted by the virus "becoming a part of said surfaces and objects, rendering them unusable as potential physical contact with said surfaces and objects would be hazardous" (id). Thus, the proposed second amended complaint only alleges damage in the context of the hazard the virus may cause as a result of physical contact and not any physical loss or damage by the virus itself. In any event, the proposed second amended complaint is not the governing pleading at this juncture. The Amended Complaint, the operative pleading at this time, does not even allege this vague claim of loss. Rather, the Amended Complaint only contains claims for the cost of cleaning and losses sustained as a result of governmental shut-downs, without any reference to any physical damage or loss at all. It must be emphasized that these conclusions do not address the merits of the motion to dismiss or the motion to amend the complaint. These conclusions merely confirm that the Court of Appeals decision in Consolidated Restaurant Operators Inc., v. Westport Insurance Corp. (supra) would not even resolve the issues presented in this action.

Thus, the only issues to be decided in this lawsuit is whether the plaintiffs may pursue claims against the defendants for the loss of business as a result of governmental shutdowns and expenses incurred for cleaning and disinfection. The Court of Appeals will not be deciding those issues in Consolidated Restaurant Operators Inc., v. Westport Insurance Corp. (supra). That case will decide whether an insured can claim losses without any direct physical loss or damage. While the overwhelming consensus of cases throughout New York state as well as the country have concluded that COVID-19 does not constitute any direct physical damage or loss the Court of Appeals will now address this issue. That issue, as noted, has no relevance to this case at all.

Therefore, there is no basis to stay this proceeding. Consequently, the motion seeking a stay is denied.

So ordered.

ENTER:

DATED: April 18, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC