2021 WL 6061917
Only the Westlaw citation is currently available.
United States District Court, E.D. Louisiana.

DICKIE BRENNAN & CO., LLC, et al.
v.
ZURICH AMERICAN INSURANCE CO., et al.

CIVIL ACTION NO. 21-434
|
Signed 12/20/2021

Attorneys and Law Firms

Gary J. Elkins, Thomas Matthew Beh, Yvonne Chalker, Elkins, PLC, New Orleans, LA, for Dickie Brennan and Company, LLC, Cousins Restaurants, Inc., 716 Iberville LLC.

SECTION: "A" (4)

ORDER AND REASONS

JAY C. ZAINEY, UNITED STATES DISTRICT JUDGE

***1** The following motions are before the Court: **Motion to Dismiss (Rec. Doc. 11)** filed by defendant Zurich American Insurance Co. ("Zurich"); **Motion to Dismiss (Rec. Doc. 12)** filed by defendant American Guarantee and Liability Insurance Co. ("AGLIC"). The plaintiffs, Dickie Brennan and Co., LLC, Cousins Restaurant, Inc., and 716 Iberville, LLC, oppose the motions. [1] The motions, noticed for submission on September 1, 2021, are before the Court on the briefs without oral argument. For the reasons that follow, the motions are GRANTED.

I.

Plaintiffs own and operate several restaurants located in the City of New Orleans. Plaintiffs contend that their businesses sustained millions of dollars of lost income as a result of the COVID-19 pandemic due to the shutdowns and restrictions on their operations imposed by various governmental COVID-19 orders. Plaintiffs had in place during all times relevant a first party property policy issued by AGLIC, namely The Zurich EDGE Policy, no. ERP-0534504-02 ("the Policy"). Plaintiffs sought coverage for their pandemic-related economic losses and expenses under this property policy citing various elements of coverage. AGLIC denied their claim contending that their business interruption losses were not covered by the Policy because Plaintiffs did not experience a "direct physical loss or damage" to their property as required (according to AGLIC) to trigger coverage, and besides that, certain exclusions applied. This lawsuit followed. Plaintiffs seek coverage for their pandemic-related economic losses as well as damages and penalties pursuant to La. R.S. § 1973 for breach of the duty of good faith and fair dealing that an insurer owes to its insured.

Courts across the country have been inundated with coverage lawsuits similar to the one at hand, and while Plaintiffs acknowledge that in the majority of cases motions like this one are decided favorably to the insurer, Plaintiffs urge the Court to focus only on the facts alleged in this case and the Policy.

AGLIC now moves to dismiss all claims pursuant to Rule 12(b)(6) arguing that Plaintiffs do not allege facts sufficient to state a claim for relief because purely economic loss is not covered by the Policy, and amendments to the complaint cannot cure the problem. [2] AGLIC's position is that regardless of which of the Policy's coverage provisions Plaintiffs rely upon for their claim, each of the coverages applies only to losses attributable to "direct physical loss of or damage to" covered property, and that the lack of such physical loss or damage is dispositive of the coverage question. In support of its Rule 12(b)(6) motion, and recognizing that Plaintiffs allege that COVID-19 *did* cause property damage, AGLIC argues that Plaintiffs have not alleged *facts* to support that assertion.

II.

***2** In the context of a motion to dismiss the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (citing *Tellabs, Inc. v. Makor Issues & Rights*, Ltd., 551 U.S. 308 (2007); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Lovick v. Ritemoney, Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004)). However, the foregoing tenet is inapplicable to legal conclusions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,

1949 (2009). Thread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550, U.S. 544, 555 (2007)).

The central issue in a Rule 12(b)(6) motion to dismiss is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (quoting *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008)). To avoid dismissal, a plaintiff must plead sufficient facts to "state a claim for relief that is plausible on its face." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Id.* (quoting *Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)). Legal conclusions must be supported by factual allegations. *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950).

The Louisiana Supreme Court has explained the legal principles that apply when analyzing insurance policies to determine issues of coverage:

> [A]n insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code. *LeBlanc v. Aysenne,* 921 So. 2d 85, 89 (La. 2006); *Edwards v. Daugherty,* 883 So. 2d 932 (La. 2004), 940; *Cadwallader v. Allstate Insurance Co.,* 848 So. 2d 577, 580 (La. 2003); *Louisiana Insurance Guaranty Association v. Interstate Fire & Casualty Co.,* 630 So. 2d 759, 763 (La. 1994).
>
> According to those rules, the responsibility of the judiciary in interpreting insurance contracts is to determine the parties' common intent. *See* La. Civ. Code art. 2045; *Edwards,* 883 So. 2d at 940; *Cadwallader,* 848 So. 2d at 580; *Blackburn v. National Union Fire Insurance Co. of Pittsburgh*, 784 So. 2d 637, 641 (La. 2001). Courts begin their analysis of the parties' common intent by examining the words of the insurance contract itself. *See* La. Civ. Code art. 2046; *Succession of Fannaly v. Lafayette Insurance Co.*, 805 So.2d 1134, 1137 (La. 2002); *Blackburn,* 784 So. 2d at 641 ("[T]he initial determination of the parties' intent is found in the insurance policy itself."). In ascertaining the common intent, words and phrases in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning, in which case the words must be ascribed their technical meaning. *See* La. Civ. Code art. 2047; *Edwards,* 883 So. 2d at 940–41; *Cadwallader*, 848 So. 2d at 580; *Succession of Fannaly,* 805 So. 2d at 1137.
>
> An insurance contract is to be construed as a whole and each provision in the contract must be interpreted in light of the other provisions. One provision of the contract should not be construed separately at the expense of disregarding other provisions. *See* La. Civ. Code art. 2050; *Hill v. Shelter Mutual Insurance Co.,* 935 So. 2d 691, 694 (La. 2006); *Succession of Fannaly,* 805 So. 2d at 1137; *Peterson v. Schimek,* 729 So. 2d 1024, 1029 (La. 1999). Neither should an insurance policy be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. *LeBlanc,* 921 So. 2d at 89; *Edwards,* 883 So. 2d at 941; *Cadwallader,* 848 So. 2d at 580; *Peterson,* 729 So. 2d at 1028.
>
> ***3** When the words of an insurance contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent and courts must enforce the contract as written. *See* La. Civ. Code art. 2046; *Hill,* 935 So. 2d at 694; *Peterson,* 729 So. 2d at 1028. Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation when the policy's provisions are couched in unambiguous terms. *Cadwallader,* 848 So. 2d at 580; *Succession of Fannaly,* 805 So. 2d at 1138. The rules of contractual interpretation simply do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clarity the parties' intent. *Edwards,* 883 So. 2d at 941;

Succession of Fannaly, 805 So. 2d at 1138; *Peterson,* 729 So. 2d at 1029.

Nevertheless, if, after applying the general rules of contractual interpretation to an insurance contract, an ambiguity remains, the ambiguous contractual provision is generally construed against the insurer and in favor of coverage. *See* La. Civ. Code art. 2056; *Succession of Fannaly,* 805 So. 2d at 1138; *Peterson,* 729 So. 2d at 1029. Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. *Edwards,* 883 So. 2d at 941; *Cadwallader,* 848 So. 2d at 580; *Carrier v. Reliance Insurance Co.*, 759 So. 2d 37, 43 (La. 2000). This strict construction principle applies, however, only if the ambiguous policy provision is susceptible to two or more reasonable interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable. *Edwards,* 883 So. 2d at 941; *Cadwallader,* 848 So. 2d at 580; *Carrier,* 759 So. 2d at 43.

Sims v. Mulhearn Funeral Home, Inc., 956 So. 2d 583, 588–90 (La. 2007). [3]

Furthermore, to recover on an insurance policy, an insured must prove coverage by demonstrating that his loss falls within the policy's terms. *Maldonado v. Kiewit La. Co.*, 146 F. 3d 210, 218 (La. App. 1st Cir. 2014) (citing *Miller v. Superior Shipyard & Fab., Inc.*, 859 So. 2d 159, 162 (La. App. 1st Cir. 2014)); *Palmer v. Martinez*, 42 So. 3d 1147, 1151 (La. App. 2d Cir. 2010). However, the insurer bears the burden of proving that one of the policy's exclusions applies to negate coverage. [4] *Smith v. Reliance Ins. Co.*, 807 So. 2d 1010, 1018 (La. App. 5th Cir. 2002).

With the foregoing legal principles in mind, the Court turns to an examination of the Policy to determine, if accepting all of Plaintiffs' well-pleaded factual allegations as true, whether the Policy affords coverage for Plaintiffs' economic losses related to COVID-19.

III.

***4** Section I of the Policy, entitled POLICY APPLICABILITY, includes the Policy's INSURING AGREEMENT. The Insuring Agreement states in relevant part:

> This Policy Insures against direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property, at an Insured Location described in Section II-2.01, all subject to the terms, conditions and exclusions stated in this Policy.

(Rec. Doc. 1-2 at 17, Policy Section I – Policy Applicability § 1.01) (bold in original).

The Policy defines **Covered Cause of Loss** as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." (Rec. Doc. 1-2 at 62, Policy Section VII – Definitions § 7.11).

Section III of the Policy, entitled PROPERTY DAMAGE, includes the enumeration of Covered Property referenced in the Insuring Agreement and provides in relevant part:

> 3.01 COVERED PROPERTY
>
> This Policy insures the following property, unless otherwise excluded elsewhere in this Policy, located at an Insured Location or within 1,000 feet thereof or as otherwise provided for in this Policy.
>
> 3.01.01 The Insured's interest in buildings (or structures) including new construction, additions, alterations, and repairs that the Insured owns, occupies, leases or rents.
>
> 3.01.02 The Insured's interest in Personal Property, including **Improvements and Betterments.**
>
> ...
>
> 3.01.04 Personal Property of officers and employees of the Insured.

(Rec. Doc. 1-2 at 24, Policy Section III – Property Damage § 3.01) (emphasis in original).

Subsection 3.03 EXCLUSIONS, provides in relevant part that the Policy excludes "[l]oss or damage resulting from

the Insured's suspension of business activities, except to the extent provided by this Policy." (*Id.* § 3.03.02.05) (emphasis added).

In addition to the Policy's Insuring Agreement, Plaintiffs contend that the relevant coverage sections are Time Element, Extra Expense, and Special Coverages.

Section IV of the Policy, entitled TIME ELEMENT, includes the following LOSS INSURED section, which provides in relevant part:

> The Company will pay for the actual Time Element loss the Insured sustains, as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary **Suspension** of the Insured's business activities at an Insured Location. The **Suspension** must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location**, or as provided in Off Premises Storage for Property Under Construction Coverages.
>
> The Company will also pay for the actual Time Element loss sustained by the Insured, during the Period of Liability at other Insured Locations. The Time Element loss must result from the necessary **Suspension** of the Insured's business activities at the other Insured Locations. Such other Location must depend on the continuation of business activities at the **Location** that sustained direct physical loss or damage caused by a **Covered Cause of Loss**.

(Rec. Doc. 1-2 at 28, Policy Section IV – Loss Insured § 4.01) (bold emphasis in original, underline emphasis added).

The Policy defines **Suspension (Suspended)** in relevant part as "[t]he slowdown or cessation of the Insured's business activities...." (Rec. Doc. 1-2 at 67, Policy Section VII – Definitions § 7.56.01).

> ***5** In determining the Time Element loss, the Company will evaluate the experience of the business before and after the loss or damage and the probable experience had no direct physical loss or damage occurred at an Insured Location during the Period of Liability.

(Rec. Doc. 1-2 at 28, Policy Section IV – Loss Insured § 4.01.05) (emphasis added).

EXTRA EXPENSE coverage is part of the Time Element section:

> The Company will pay for the reasonable and necessary Extra Expenses incurred by the Insured, during the Period of Liability, to resume and continue as nearly as practicable the Insured's normal business activities that otherwise would be necessarily suspended, due to direct physical loss of or damage caused by a **Covered Cause of Loss** to Property of the type insurable under this policy at a **Location.**

Id. § 4.02.03 (bold emphasis in original, underline emphasis added).

The Period of Liability applying to all Time Element Coverages, is as follows:

> For building and equipment: The period starting from the time of physical loss or damage of the type insured against and ending when with due diligence and dispatch the building and equipment could be repaired or replaced, and made ready for operations under the same or equivalent physical and operating conditions that existed prior to the damage.

(Rec. Doc. 1-2 at 32, PERIOD OF LIABILITY § 4.03.01.01) (emphasis added).

Section V of the Policy, entitled SPECIAL COVERAGES & DESCRIBED CAUSES OF LOSS, includes the following CIVIL OR MILITARY AUTHORITY section, which states:

> The Company will pay for the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if the Suspension is caused by order of civil or military authority that prohibits access to the **Location.** That order must result from a civil authority's response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations. The Company will pay for the actual Time Element loss sustained, subject to the deductible provisions that would have applied had the physical loss or damage occurred at the Insured Location, during the time the order remains in effect, but not to exceed the number of consecutive days following such order as stated in the Declarations up to the limit applying to this Coverage.

(Rec. Doc. 1-2 at 34, Policy Section V – Civil or Military Authority § 5.02.03) (bold emphasis in original, underline emphasis added).

AGLIC does not contest Insured Location status. AGLIC does not dispute that Plaintiffs incurred actual business interruption economic losses at their Insured Locations when they suspended operations, in whole or in part.

Plaintiffs allege that COVID-19 is carried and transmitted by individuals, that it is airborne, and that it readily attaches to surfaces and objects, on which it can remain for indeterminant periods of time. (Rec. Doc. 1, Comp. ¶ 34). Plaintiffs allege that COVID-19 physically intruded into businesses and properties throughout the City, including within their restaurants. (*Id.* ¶ 46). Plaintiffs allege that because of the physical intrusion of COVID-19 into their properties, their Insured Locations were rendered uninhabitable in that they could not safely be used for their intended purposes of providing food and beverage for consumption on the premises. (*Id.* ¶ 48). In further factual support of their theory that their properties were physically intruded by COVID-19, Plaintiffs allege that on March 7, 2020, one of their employees at the Steakhouse was infected and symptomatic. (*Id.* ¶¶ 39-41). Recognizing that it was the Closure Orders issued by the Mayor and Governor that prevented Plaintiffs from providing food and beverage for consumption on-premises, Plaintiffs allege that the Closure Orders were issued because of the physical intrusion of COVID-19 into the Insured Locations and based on the determination underlying the Closure Orders that property within the State and the City would suffer damage in the absence of the Closure Orders. [5] (*Id.* ¶ 48).

***6** The Policy does not contain a virus exclusion. Therefore, if COVID-19 can damage property, it cannot be rejected as a Covered Cause of Loss in the posture of a Rule 12(b)(6) motion to dismiss. [6]

AGLIC argues the COVID-19 does not cause either direct physical loss of or damage to property because property where COVID-19 is present does not undergo any change from an initial satisfactory state to an unsatisfactory state because of some external event, *i.e.*, a distinct, demonstrable, physical alteration of the property. *See* *Trinity Indus., Inc. v. Insurance Co. of N. Am.*, 916 F.2d 267, 270-71 (5th Cir. 1990).

Plaintiffs concede that infiltration by COVID-19 does not result in a physical or structural alteration to property. But Plaintiffs' position is that the Policy, which provides no definition for either "direct physical loss" or "damage," does not expressly require such an alteration for coverage to trigger. Plaintiffs argue that the Policy's Insuring Agreement, quoted above, is ambiguous because the terms "direct physical loss of" or "damage caused by a Covered Cause of Loss to Covered Property" can reasonably be interpreted to encompass situations in which property is rendered unfit for its intended and insured purpose due to a risk not excluded under the Policy, *i.e.*, a virus.

At the outset, the Court does not find the Policy to be ambiguous. Even assuming arguendo that the Insuring Agreement could reasonably be interpreted in such a manner that the presence of a virus constitutes "direct physical loss of or damage ... to Covered Property," Time Element Coverage and Extra Expense Coverage only attach when the suspension of business activities is due to "direct physical loss of or damage to Property," and both coverages are subject to the Period of Liability. The Period of Liability specifically refers to repair and replacement, which supports the interpretation of physical "altered" property damage argued by AGLIC and described in *Trinity Industries, supra*. Further, even if the Covered Property could be considered "damaged" with the presence of a virus, it was the governmental Closure Orders and not the virus itself that precluded on-premises dining. Absent the Closure Orders, the "repair" for having a virus present on the property would simply be disinfecting the premises and resuming operations and not complete suspension of business activities during the entire duration of the Closure Orders.

Coverage under the Civil or Military Authority section is not applicable because that coverage expressly applies when access to an Insured Location is prohibited because of damage to property "not owned, occupied, leased, or rented by the Insured or insured under this Policy." (Rec. Doc. 1-2 at 34, Civil or Military Authority § 5.02.03) (emphasis added). The Covered Property in this case does not fall into that category.

In sum, for the reasons argued by AGLIC, the Policy does not cover Plaintiffs' strictly economic losses. Amending the complaint would be futile.

***7** Zurich's motion to dismiss is likewise granted. The Policy expressly states that American Guarantee and Liability Insurance Company provides the insurance and that its proportionate share for any loss or damage is 100%. (Rec. Doc. 1-2 at 16). The Policy includes "Zurich" in its name but there is nothing to suggest that the movant Zurich American Insurance Co. issued the Policy or has any obligations under the Policy.

Accordingly, and for the foregoing reasons;

IT IS ORDERED that the **Motion to Dismiss (Rec. Doc. 11)** filed by defendant Zurich American Insurance Co. is **GRANTED.**

IT IS FURTHER ORDERED that the **Motion to Dismiss (Rec. Doc. 12)** filed by defendant American Guarantee and Liability Insurance Co.is **GRANTED**.

IT IS FURTHER ORDERED that the complaint is dismissed with prejudice.

All Citations

Slip Copy, 2021 WL 6061917

Footnotes

1 Plaintiffs originally sought leave to file a 54 page opposition to AGLIC's motion. The Court denied leave given that AGLIC's motion is brought pursuant to Rule 12(b)(6) and therefore does not involve consideration of any evidence. (Rec. Doc. 20, Order). Upon reviewing the refiled opposition (Rec. Doc. 21) it appears to the Court that counsel representing the plaintiffs has reduced the font size on the refiled opposition.

2 Zurich's motion to dismiss is grounded on the contention that Zurich did not issue the Policy and therefore has no obligations under the Policy; the policy identified in the complaint was issued by AGLIC. Plaintiffs on the other hand believe that the Policy might have been issued jointly by Zurich and AGLIC.

3 Insurance coverage disputes may be resolved via a Rule 12(b)(6) motion when the underlying claims are clearly not covered by the policy. *I&C Earthmovers Corp. v. WESCO Ins. Co.*, No. 15-21597, 2016 WL 4097558 at *4 n.5 (S.D. Fla. 2/1/2016). The better procedural mechanism may be a Rule 12(c) motion for judgment on the pleadings, *id.*, but the motions would be subject to the same standard of review, *Doe*

v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008) (citing *Johnson v. Johnson,* 385 F.3d 503, 529 (5th Cir. 2004)).

4 As part of its motion to dismiss, AGLIC also argues that at least three policy exclusions apply to preclude coverage. Given that an insurer bears the burden of proving that an exclusion applies, *Schafer v. Summers*, 113 So. 3d 219, 224 (La. App. 1st Cir. 2013) (citing *Tunstall v. Stierwald*, 809 So. 2d 916, 921 (La. 2002)), the Court would be less inclined to dismiss a case on the pleadings if the factual allegations suggested that the claim otherwise fell within the policy's insuring language.

5 The Court finds this particular allegation contained in paragraph 48, in which Plaintiffs strive to create a nexus between preventing property damage and the governmental Closure Orders, to be facially implausible. In other words, the Closure Orders were not issued to prevent property damage.

6 In conjunction with this Rule 12(b)(6) motion to dismiss, the Court does not delve into the accuracy of Plaintiffs' contentions regarding the scientific and medical communities' theories regarding COVID-19's ability to live on surfaces or how transmission occurs.

End of Document