NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X

573 FORDHAM DENTAL, P.C. AND 586 MORRIS DENTAL, P.C.,

Plaintiff,

- against -

SENTINEL INSURANCE COMPANY LTD.,

Defendant.

----------X

Index No. **803069/22E**

Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1 to 5, Read on this motion noticed on 5/20/22, and duly submitted as no. 1 on the Motion Calendar of 5/20/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	4	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law	3,5	

Defendant's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 8/22/2022

Hon. **FIDEL E. GOMEZ, AJSC**

1.CHECK ONE — X CASE DISPOSED — ☐ NON-FINAL DISPOSITION

2. MOTION/CROSS-MOTION IS
- X GRANTED (MOTION)
- ☐ DENIED (CROSS-MOTION)
- ☐ GRANTED IN PART
- ☐ OTHER

3. CHECK IF APPROPRIATE.
- ☐ SETTLE ORDER
- ☐ SUBMIT ORDER
- ☐ DO NOT POST
- ☐ FIDUCIARY APPOINTMENT
- ☐ REFEREE APPOINTMENT
- ☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

573 FORDHAM DENTAL, P.C. AND 586 MORRIS DENTAL, P.C.,

DECISION AND ORDER

Plaintiff(s),

Index No: 803069/22E

- against -

SENTINEL INSURANCE COMPANY LTD.,

Defendant(s).
----------x

In this action for, *inter alia*, declaratory judgment, defendant moves seeking an order dismissing the complaint pursuant to, *inter alia*, CPLR § 3211(a)(7). Defendant avers that because the denial of insurance coverage under the facts pleaded in the complaint - business losses occasioned by the Covid-19 pandemic - has been upheld by numerous courts, including the Appellate Division, First Department, the complaint fails to state a cause of action. Plaintiffs oppose the instant motion, asserting, *inter alia*, that the complaint states a cause of action for declaratory judgment because the language in the relevant insurance policies requires coverage when, as here, plaintiffs lost the use of the premises insured by defendant's policy even if there was no physical damage to said premises.

For the reasons that follow hereinafter, defendant's motion is granted, in part.

The instant action is for declaratory judgment, seeking a declaration that defendant is obligated to cover the business interruption incurred by plaintiffs as a result of the Covid-19 pandemic and for breach of contract premised on defendant's alleged breach of the insurance policy between the parties.

The complaint alleges the following. In December 2019, defendant, an insurance company, issued two All Risk Insurance Policies (policies), one to plaintiff 573 FORDHAM DENTAL P.C. (573), a dental practice, and another to plaintiff 586 MORRIS DENTAL P.C. (586), another dental practice. Both 573 and 586 are operated by nonparty Nishita Gandhi, DDS, a dentist. The foregoing policies provided "business interruption coverage for, among other things, business personal property and income protection & extra expense," and were in effect from February 25, 2020, through February 25, 2021. On June 3, 2020, plaintiffs submitted claims under the policy arising from business losses sustained as a result of the New York Civil Authority Orders, which were issued as a result of "risk to human and property loss from COVID-19." On that same day, defendant denied 586's claim and on June 5, 2020, defendant denied 573's claim. Both claims were denied because the covered premises "did not sustain direct physical loss or damage."

Based on the foregoing, plaintiffs interpose two causes of action. The first is for declaratory judgment. In support thereof, plaintiffs allege that the policies issued by defendant provide coverage for property, business "coverage for personal property, income protection & extra expense, and additional coverages between the period of February 25, 2020 to February 25, 2021." The policies covered the premises owned by 573, located at 573 Fordham Road, Bronx, NY and the premises owned by 586, located at 586 Morris Avenue, Bronx, NY. Moreover, the polices

> extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the Covered Properties is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiffs' Covered Properties. . . . [and] Each aforesaid Policy is an all-risk policy, insofar as it provides that covered causes of loss under the policy means direct physical loss or direct physical damage unless the loss is specifically excluded or limited in the Policy.

Plaintiffs allege that Covid-19 is a virus, a physical substance, "capable of being transmitted and active on floors, walls, furniture, desks, tables, chairs, equipment and other items of property for a period of time." Further, Covid-19 particles render a property unsafe and on physical property, impairs its

value, function, and usefulness. Covid-19 is recognized by the scientific community "as a cause of real physical loss and damage," and per an Emergency Executive Order issued by The City of New York in response to COVID-19, as a virus that "physically is causing property loss and damage."

On March 20, 2020, the Governor, then Andrew Cuomo (Cuomo), a civil authority, issued a stay-at-home order on behalf of the State of New York, also a civil authority, requiring that all non-essential workers stay home as a result of the Covid-19 pandemic. On March 22, 2020, Cuomo ordered that all non-essential businesses close through June 8, 2020. Cuomo allowed essential businesses to remain open, with restrictions. Plaintiffs allege that the foregoing orders are a recognition that "COVID-19 causes damage to property."

Plaintiffs allege that "[a]s a result of the Orders referenced, herein, Plaintiff 573 . . . [and] 586 . . . shut [their] doors to dental patients not receiving emergency care," that the foregoing constituted losses, and that such losses were "a direct consequence of the civil authority stay-at-home orders for public safety issued by the Governor of New York and the State of New York generally." It is alleged that the virus impacted plaintiffs, sufficient to trigger coverage under the

policies issued by defendant "because there was a direct physical loss of and physical damage to property at Plaintiffs' premises that caused a suspension." Because plaintiffs paid their premiums and timely submitted claims covered under the policy, they allege that denial of their claims is improper, contrary to the language of the policies and that "[a]ny effort by defendants to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger the Plaintiffs and the public." As a result, plaintiffs seek a declaration that, *inter alia*, the civil authority triggered coverage under the policy for their business losses. It is also alleged that civil authority coverage under the policies was triggered because "access to the insured premises was specifically prohibited by order of a civil authority as the direct result of direct physical loss or direct physical damage in the immediate area."

Based on the foregoing and because plaintiffs

> suffered a direct physical loss of and damage to its property as a result of COVID-19 and the order of civil authorities, which has resulted in the suspension of its business operations causing Plaintiff to suffer losses of Business Income,

plaintiffs interpose a cause of action for breach of contract.

It is alleged that the policy issued to plaintiffs by defendant, for which plaintiffs paid premiums, required coverage in the event of the foregoing and that defendants, in unjustifiably denying coverage, breached it.

Standard of Review

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366). In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*). The court's role when analyzing the complaint in the context of a motion to dismiss is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the

plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one."]). However, "when evidentiary material [in support of dismissal] is considered the criterion is whether the proponent of the pleading has a cause of action not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Significantly, documentary evidence means judicial records, judgments, orders, contracts, deeds, wills, mortgages and "a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground upon which the motion is based" (*Webster Estate of Webster v State of New York*, 2003 WL 728780, at *1 [Ct Cl Jan. 30, 2003]). Accordingly, much like on a motion seeking dismissal pursuant to CPLR § 3211(a)(1), where affidavits and deposition transcripts are not documentary evidence sufficient to establish a right to dismissal (*Fleming v Kamden Properties, LLC*, 41 AD3d 781, 781 [2d Dept 2007]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]), "affidavits submitted by a defendant [in support of a motion pursuant to CPLR § 3211(a)(7)] will almost never warrant

dismissal under CPLR 3211 unless they *establish conclusively that the plaintiff has no cause of action*" (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010] [internal quotation marks omitted and emphasis added]; *see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976] ["affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action."]; *Matter of Lawrence v Miller*, 11 NY3d 588, 595 [2008]).

CPLR § 3013 states that

> [s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d 688 [2d Dept 2006]; *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland*

Bank, N.A., 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]). While generally, on a motion to dismiss the complaint for its failure to state a cause of action, the facts in the complaint are deemed true, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022 [2d Dept 2007]; *Meyer v Guinta*, 262 AD2d 463, 464 [2d Dept 1999]).

The Law on Interpretation of Insurance Policies

It is well settled that "the interpretative principles applicable to a contract of insurance generally are indistinguishable from those to which courts may resort in treating with other contracts" (*Loblaw v Employers' Liab. Assur. Corp., Ltd.*, 57 NY2d 872, 876 [1982]; *State v Am. Mfrs. Mut. Ins. Co.*, 188 AD2d 152, 154 [3d Dept 1993]). Accordingly, whether coverage exists under the terms of a policy is a question of law to be determined by a court (*Molycorp, Inc. v Aetna Cas. and Sur. Co.*, 78 AD2d 510 [1st Dept 1980]). Indeed, it is the court's responsibility to determine the rights and obligations of the parties under an insurance contract, using the specific language of the policy itself (*Sanabria v Am. Home Assur. Co.*, 68 NY2d

866, 868 [1986]); *State v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]; *Stasack v Capital Dist. Physicians' Health Plan Inc.*, 290 AD2d 866 [3d Dept 2002]).

When the language in an insurance policy is clear and unambiguous, the interpretation of said policy and the determination of the rights and obligations of the parties is a question of law to be adjudicated by the court (*Loblaw* at 876; *Slattery Skanska Inc. v Am. Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]; *Marshall v Tower Ins. Co. of New York*, 44 AD3d 1014, 1015 [2d Dept 2007]; *Raino v Navigators Ins. Co.*, 268 AD2d 419, 419 [2d Dept 2000]; *State v Am. Mfrs. Mut. Ins. Co.*, 188 AD2d 152, 154 [3d Dept 1993]). When language in a policy is ambiguous, the court can use extrinsic evidence to determine the intent of the parties to the policy and if any equivocality can "be resolved wholly without reference to extrinsic evidence the issue is to be determined as a question of law for the court" (*Hartford Acc. & Indem. Co.* at 172; *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32 [1st Dept 1979], *affd sub nom. Stainless, Inc. v Employers' Fire Ins. Co.*, 49 NY2d 924 [1980]). If, however, "determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among

reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury" (*id.* at 172; *Stainless Inc.* at 32). If resort to extrinsic evidence is required and the extrinsic evidence is conclusory, failing to equivocally resolve the ambiguity in a policy, interpretation of the policy remains a question of law for the court to decide and any ambiguities must be decided against the insurer (*State v Home Indem. Co.*, 66 NY2d 669, 671 [1985]).

In interpreting an insurance policy, the language of the policy, when clear and unambiguous, must be given its plain and ordinary meanings (*U.S. Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]; *Sanabria* at 868; *State Farm Mut. Auto. Ins. Co. v Westlake*, 35 NY2d 587, 591 [1974]). Stated differently, the language used in the policy "must be found in the common sense and common speech of the average person" (*Stainless Inc.* at 32-33). Moreover, the policy should be construed in a way "that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect (*Raymond Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]). Significantly, when a policy is clear and unambiguous, a court may not rewrite the agreement (*Slattery Skanska Inc.* at 273). Stated differently, "[c]ourts

may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*id.* at 273). Nor should a court "strain to superimpose an unnatural or unreasonable construction" (*Maurice Goldman & Sons, Inc. v Hanover Ins. Co.*, 80 NY2d 986, 987 [1992]), or "vary the contract of insurance to accomplish its notions of abstract justice or moral obligation" (*Keyspan Gas E. Corp. v Munich Reins. Am., Inc.*, 31 NY3d 51, 63 [2018]. As the Court noted in (*Breed v Ins. Co. of N. Am.* [46 NY2d 351 [1978]), courts do not possess the power to

> make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation, since equitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against

(*id.* at 355). This is particularly important because the failure to strictly construe the terms of an agreement may result in the rewriting of a policy "to bind the insurer to a risk that it did not contemplate and for which it has not been paid" (*Dae Assoc., LLC v AXA Art Ins. Corp.*, 158 AD3d 493, 494 [1st Dept 2018]).

A party seeking or claiming insurance coverage bears the

burden of demonstrating entitlement to coverage (*Consol. Edison Co. of New York, Inc. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]; *Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]; *Meleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]; *Chase Manhattan Bank, N.A. v Travelers Group, Inc.*, 269 AD2d 107, 108 [1st Dept 2000]; *Daniel v Allstate Life Ins. Co.*, 71 AD2d 872 [2d Dept 1979]).

Defendant's Motion to Dismiss the Complaint for Failure to State a Cause of Action

Defendant's motion is granted. Significantly, the record demonstrates that the complaint fails to state a cause of action for declaratory judgment seeking a declaration that the business interruption precipitated by the Covid-19 pandemic and Cuomo's executive orders is a covered loss under the policy issued to plaintiffs because coverage under the relevant policy is premised upon "direct physical loss of or physical damage to property." Here, as a matter of law, neither the Covid-19 pandemic nor Cuomo's executive orders limiting access to property as a result of the Covid-19 pandemic constitute physical damage. For the same reason, the complaint fails to state a cause action for breach contract for defendant's failure to approve plaintiffs'

business interruption claim precipitated by the Covid-19 pandemic and the foregoing executive orders.

In support of its motion, defendant submits copies of the policies it issued to plaintiffs. Section A(5)(o) of both policies is titled Business Income. Section A(5)(o)(1) states

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration'. The suspension must be caused by direct physical loss of or physical damage to property at the 'scheduled premises', including personal property in the open (or in a vehicle) within 1,000 feet of the 'scheduled premises', caused by or resulting from a Covered Cause of Loss.

Section A(5)(p) of both policies is titled Extra Expense. Section A(5)(p)(1) states

> We will pay reasonable and necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or physical damage to property at the 'scheduled premises', including personal property in the open (or in a vehicle) within 1,000 feet, caused by or resulting from a Covered Cause of Loss.

Section A(5)(q) of both policies is titled Civil Authority. Section A(5)(q)(1) states

> This insurance is extended to apply to the actual loss of Business Income you sustain when access to your 'scheduled premises' is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your 'scheduled premises.'

Section A(3), titled Covered Causes of Loss, defines the same as "risks of direct physical loss."

On April 7, 2022, the Appellate Division, First Department, in (*Consol. Rest. Operations, Inc. v Westport Ins. Corp.*, 205 AD3d 76 [1st Dept 2022]), had an opportunity to determine an appeal where the issue before it was whether the Covid-19 pandemic, the virus itself, and Cuomo's executive orders constituted "direct physical loss or damage" under an insurance policy containing said language, and thereby triggered coverage thereunder. Answering that question in the negative, the court held that

> that where a policy specifically states that coverage is triggered only where there is 'direct physical loss or damage' to the insured property, the policy holder'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*. at 78).

In *Consol. Rest. Operations, Inc.*, the plaintiff was the owner and operator of several restaurants when the World Health Organization declared Covid-19 a global pandemic on March 11, 2020 (*id*. at 78). While the plaintiff initially tried to combat the virus at its businesses by implementing enhanced cleaning procedures, when Cuomo issued executive orders limiting or suspending indoor dining, the plaintiff had to suspend all indoor dining operations (*id*. at 78). At the time, plaintiff was covered by an all-risk insurance policy, which included business interruption coverage and "insure[d] all risks of direct physical loss or damage to INSURED PROPERTY" (*id*. at 78). After plaintiff submitted a claim for losses sustained "because [of] the actual or threatened presence of the virus in and on its property," defendant denied it, asserting that "the actual or suspected presence of SARS CoV-2 responsible for COVID-19 does not constitute physical loss or damage to the property, within the meaning of the policy" (*id.* at 79). Plaintiff then commenced an action for breach of contract and declaratory judgment, defendant moved to dismiss the complaint, asserting, *inter alia*, that it failed to state a cause of action, defendant's motion was granted, and plaintiff appealed (*id*. at 79).

In affirming the trial court's decision, the Appellate Division, First Department, applying its own precedent, persuasive federal case law, and well settled principles of insurance policy interpretation, held that when an insurance policy premises coverage resulting from direct physical damage or loss to property, there must exist "some physical problem with the covered property, not just the mere loss of use (*id.* at 82 [internal quotation marks omitted]). Relying on federal authority, the court noted that, in light of the term "physical" in the policy, triggering coverage bereft of any physical change to the property would render that term meaningless (*id.* at 82). Further expanding on what kind of damage is necessary to trigger coverage, the court stated that

> [t]he property must be changed, damaged or affected in some tangible way, making it different from what it was before the claimed event occurred. If the proffered facts do not identify any physical (tangible) difference in the property, then the complaint fails to state a cause of action

(*id.* at 82).

The court further noted that loss of use precipitated by Cuomo's executive orders or by the presence of Covid-19 particles at the property fail to sufficiently satisfy the physical requirement under the policy so as to trigger coverage (*id.* at 85

["Neither the government orders, nor the presence of the coronavirus inflicted 'direct physical loss or damage' to any of these properties for purposes of property insurance coverage."]).

While *Consol. Rest. Operations, Inc.* is the first case where the Appellate Division, First Department had an opportunity to consider whether Covid-19 constitutes physical damage for purposes of business interruption coverage, as that court noted, it was not the first time that it had occasion to determine whether coverage under the terms "direct physical loss or damage," is triggered solely by the loss of use of an otherwise physically unaffected property. In *Roundabout Theatre Co., Inc. v Cont. Cas. Co.* (302 AD2d 1 [1st Dept 2002]), plaintiff initiated an action against the defendant for breach of contract premised on the failure to provide coverage to plaintiff (*id.* at 6). Plaintiff, a theater company insured by defendant, was forced to cease operations when an elevator collapse at a nearby premises collapsed, causing the City of New York to close the street where the theater was located (*id.* at 2-3). The policy issued by defendant to plaintiff contained a provision whereby coverage was triggered upon "direct physical loss or damage to the property" (*id.* at 3). When defendant denied plaintiff's claim under the policy for business interruption, plaintiff

commenced an action, defendant moved to dismiss, the trial court denied the motion, and defendant appealed (*id.* at 4-5). In reversing the trial court's order, the Appellate Division stated that the agreement premised coverage on "loss of, damage to, or destruction of property or facilities . . . contracted by the insured for use in connection with such Production, caused by the perils insured against," and covered "all risks of direct physical loss or damage to the insured's property," and required physical damage to the premises to trigger coverage (*id.* at 8). The court rejected plaintiff's assertion that "loss of" in the policy had to be read to include loss of use, asserting that ascribing plain meaning to "loss use," it meant theft of property or misplacement, events consistent with physical loss of the premises (*id.* at 8). This coupled with the terms in the policy premising coverage upon "direct physical loss or damage to the insured's property," the court held, narrowed the scope of coverage, limiting it to instances where the premises was damaged and excluding instances, where as there, the loss was occasioned by damage to another property (*id.* at 8).

Additionally, as noted by the court in *Consol. Rest. Operations, Inc.*, the issue of whether, in the absence of physical damage to a premises, Covid-19 related business

interruption is covered by a policy premising coverage on "direct physical loss or damage to" the insured premises has been resolved by several federal courts, including by the United States Court of Appeals, Second Circuit.

In *Kim-Chee LLC v Phila. Indem. Ins. Co.* (21-1082-CV, 2022 WL 258569 [2d Cir Jan. 28, 2022]), a case on which the court in *Consol. Rest. Operations, Inc.* relied, the Second Circuit, applying New York law, held that defendant's policy did not cover plaintiff's business interruption claim because the same was premised on the inability to use the premises solely due to Covid-19 and government restrictions resulting therefrom (*Kim-Chee LLC* at *1-2). Significantly, the court held that the policy issued to plaintiff premised coverage on "direct physical loss of or damage to" the insured premises and/or "direct physical loss of or damage to other property in the vicinity of the insured property" (*id.* at *1 [internal quotation marks omitted]), such that plaintiff could not, as urged, trigger coverage merely because it lost possession or access" to the premises (*id.* at *1). Notably, while the court in *Consol. Rest. Operations, Inc.* did not have occasion to opine on the issue of whether physical damage and/or alteration was necessary to trigger civil authority coverage and the court in *Roundabout*

Theatre Co., Inc. never reached that issue either, the court in *Kim-Chee LLC*, as noted above, did, holding that the "direct physical loss of or damage to other property in the vicinity of the insured property" (*id.* at *1 [internal quotation marks omitted]), as opposed to mere loss of use was required.

In *10012 Holdings, Inc. v Sentinel Ins. Co., Ltd.* (21 F4th 216 [2d Cir 2021]), another case upon which the court in *Consol. Rest. Operations, Inc.* relied, the Second Circuit once again, applying New York law, held that

> that under New York law the terms "direct physical loss" and "physical damage" in the Business Income and Extra Expense provisions do not extend to mere loss of use of a premises, where there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's property. We therefore reject 10012 Holdings's argument that "physical loss" must mean "loss of physical possession and/or direct physical deprivation" — in other words, loss of use

(*10012 Holdings, Inc.* at 222). In that case, plaintiff purchased an insurance policy from defendant, which provided coverage for business income, extra expense, and civil authority, premising said coverage upon business losses caused by

> 'direct physical loss of or physical damage to' [plaintiff's property]

> 'caused by or resulting from a Covered Cause of Loss[,]' [a] . . . 'Covered Cause of Loss' [defined] as 'risks of direct physical loss' not otherwise excluded by the Policy. . . . [and]the Civil Authority . . . coverage for business income losses if access to [plaintiff's] premises 'is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of' [plaintiff's] premises

(*id.* at 219). Persuaded by precedential New York law, the court held that since plaintiff, at best, lost the use of its property because of Covid-19 and Cuomo's executive orders essentially shuttering business, the absence of any physical damage to the property precluded coverage under the business and extra expense provision of the policy (*id.* at 223). Holding that plaintiff failed to establish coverage under the civil authority provision, the court rejected plaintiff's assertion that Covid-19 and Cuomo's executive orders "resulted from a risk of direct physical loss to property in the vicinity of [plaintiff's property]" (*id.* at 223). On this issue the court stated

> the executive orders were the result of the COVID-19 pandemic and the harm it posed to human beings, not, as 'risk of direct physical loss' entails, risk of physical damage to property. Shuttering a gallery because of possible human infection does not qualify as a 'risk of direct physical loss'

(*id.* at 223).

Based on the foregoing, the complaint fails to state a cause of action for declaratory judgment.

As noted above, on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), all allegations in the complaint are deemed to be true (*Sokoloff* at 414; *Cron* at 366) and all reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366). However,"when evidentiary material [in support of dismissal] is considered the criterion is whether the proponent of the pleading has a cause of action not whether he has stated one" (*Guggenheimer* at 275). Here, because defendant submitted the insurance policies issued to plaintiffs, this Court's inquiry is not whether plaintiffs have pleaded facts entitling them to a declaratory judgment that defendant must cover their insurance claims, but whether, in light of the relevant policies, plaintiffs are, in fact, entitled to coverage.

Here, within the complaint, plaintiffs plead that Covid-19 is a virus, a physical substance, "capable of being transmitted and active on floors, walls, furniture, desks, tables, chairs, equipment and other items of property for a period of time," that Covid-19 particles render a property unsafe and on physical property, impairs its value, function, and usefulness, that

Covid-19 is recognized by the scientific community "as a cause of real physical loss and damage," and that per an Emergency Executive Order issued by The City of New York in response to COVID-19, as a virus that "physically is causing property loss and damage." They also plead that "[a]s a result of Cuomo's executive orders," plaintiffs had to "shut [their] doors to dental patients not receiving emergency care," that the foregoing constituted losses, and that such losses were "a direct consequence of the Civil Authority stay-at-home orders for public safety issued by the Governor of New York and the State of New York generally." Plaintiffs claim that the virus and the executive orders were sufficient to trigger coverage under the policies issued by defendant "because there was a direct physical loss of and physical damage to property at Plaintiffs' premises that caused a suspension." With regard to civil authority coverage, plaintiffs allege that civil authority coverage under the policies was triggered because "access to the insured premises was specifically prohibited by order of a civil authority as the direct result of direct physical loss or direct physical damage in the immediate area."

A review of the policies evinces that business interruption insurance is premised upon business suspension "caused by direct

physical loss of or physical damage to property," that extra expense coverage will be paid to compensate plaintiffs for losses that they would not have incurred if there had been "no direct physical loss or physical damage to property," and that civil authority coverage is available when access to plaintiffs' premises "is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property." Per the policies a covered cause of loss means a "risk[] of direct physical loss."

The Court notes that the instant policies and more specifically the terms therein are clear and unambiguous. When, as here, the language in an insurance policy is clear and unambiguous, the interpretation of said document and the determination of the rights and obligations of the parties is a question of law to be adjudicated by the court (*Loblaw* at 876; *Slattery Skanska Inc.* at 14; *Marshall* at 1015; *Raino* at 419; *State* at 154), and interpreting the language therein, such language must be given its plain and ordinary meanings (*U.S. Fid. & Guar. Co.* at 232; *Sanabria* at 868; *State Farm Mut. Auto. Ins. Co.* at 591). Stated differently, the language used in the policy "must be found in the common sense and common speech of the average person" (*Stainless Inc.* at 32-33).

Based on the foregoing, on this record, the complaint fails to state a cause of action for declaratory judgment seeking a declaration that defendant must cover plaintiffs for the claims made. Significantly, in the First Department, it is clear that whereas here, an insurance policy which premises coverage on "direct physical loss of or physical damage to property," coverage is only required when the insured property suffers physical damage and not merely when the use of the property is prevented by other reasons (*Roundabout Theatre Co., Inc.* at 8 ["the language in the instant policy clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage. The Insuring Agreement provides coverage for 'loss of, damage to, or destruction of property or facilities ... contracted by the Insured for use in connection with such Production, caused by the perils insured against.' The Perils Insured clause covers 'all risks of direct physical loss or damage to the insured's property,' not otherwise excluded. Reading these provisions together, the only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property."]).

Moreover, in light of *Consol. Rest. Operations, Inc.*, it is now the law in the First Department that, whereas here, an

insurance policy which premises coverage on "direct physical loss of or physical damage to property," coverage is not required when the only alleged physical damage to the insured premises is the presence of Covid-19 as a result of the pandemic (*id.* at 78 ["we hold that where a policy specifically states that coverage is triggered only where there is 'direct physical loss or damage' to the insured property, the 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."]), or Cuomo's executive orders limiting access to a premises, which at best gives rise to a loss of use of premises (*id.* at 85 ["Neither the government orders nor the presence of the coronavirus inflicted "direct physical loss or damage" to any of these properties for purposes of property insurance coverage."]).

With respect to civil authority coverage, while neither *Roundabout Theatre Co., Inc.* or *Consol. Rest. Operations, Inc.* addressed that issue, it is nevertheless clear, based on Second Circuit case law, which the First Department has adopted, that where the policy premises coverage on "direct physical loss of or

damage to" property, civil authority coverage is not available merely because of the presence of Covid-19, which prevents access to or use of a property (*Kim-Chee LLC* at *1 ["Kim-Chee cannot base its business interruption claim on loss of possession or access. Nor can Kim-Chee argue that closure due to the risk of possible human infection can qualify as a risk of direct physical loss. Rather, to survive dismissal, Kim-Chee's complaint must plausibly allege that the virus itself inflicted actual physical loss of or damage to property" [internal citation and quotation marks omitted]; *10012 Holdings, Inc.* at 223 ["the executive orders were the result of the COVID-19 pandemic and the harm it posed to human beings, not, as 'risk of direct physical loss entails, risk of physical damage to property. Shuttering a gallery because of possible human infection does not qualify as a risk of direct physical loss.']).

Based on the foregoing, given the terms of the policies, conditioning business interruption coverage "caused by direct physical loss of or physical damage to property," the complaint, insofar as it pleads that the physical loss and/or damage to the plaintiffs' properties were either the presence of Covid-19 therein, the inability to use the properties by virtue of Cuomo's executive orders, and that these alleged physical losses were

also present at properties near plaintiffs', the complaint fails to establish entitlement to coverage under the policies. Thus, the complaint fails to state a cause of action for declaratory judgment and for breach of contract[1].

Plaintiff opposition is patently without merit.

Significantly, while it is true that the language in the policies at issue and those before the Court in *Consol. Rest. Operations, Inc*. are not identical, in that here, the operative language triggering coverage is "direct physical loss of or physical damage to property," and not "direct physical loss or damage," this does not avail plaintiffs. Contrary to plaintiffs' assertion, "loss of property," is not, as urged, synonymous with loss of use, such that, as urged, coverage here is triggered by plaintiffs' inability to use the premises and absent any physical

[1] The essential elements in an action for breach of contract "are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Dee v Rakower*, 112 AD3d 204, 209 [2d Dept 2013]; *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *Brualdi v IBERIA Lineas Aeraes de España, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Here, where cases such as *Consol. Rest. Operations, Inc.*, *Kim-Chee LLC*, and *10012 Holdings, Inc.*, obviate defendant's obligation to extend coverage, under the circumstances pleaded in the complaint, the complaint fails to establish defendant's breach so as to state a cause of action for breach of contract.

damage to those premises. To be sure, the Second Circuit, upon which the court in *Consol. Rest. Operations, Inc*. relied, in an action with an insurance policy containing language identical to the one in the policies in this case held as much (*10012 Holdings, Inc.* at 222 ["We therefore hold, in accord with Roundabout Theatre and every New York state court to have decided the issue, that under New York law the terms 'direct physical loss and 'physical damage in the Business Income and Extra Expense provisions do not extend to mere loss of use of a premises, where there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's property. We therefore reject 10012 Holdings's argument that 'physical loss' must mean 'loss of physical possession and/or direct physical deprivation' — in other words, loss of use."]).

Plaintiffs' assertion that the failure of the policies to expressly exclude physical loss from the policies' coverage such that loss of use must be covered, is also against the weight of binding case law. To be sure, the absence of an exclusion in a policy is not evidence that what was not expressly excluded from the policy was therefore covered. In other words, "an exclusion from insurance coverage cannot create coverage" where that

coverage does not otherwise exist under the terms of the policy (*Raymond Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 163 [2005]; *Consol. Rest. Operations, Inc*. at 87).

Plaintiffs' argument, that *Roundabout Theatre Co.*, to the extent that it held that "loss of" property did not mean "loss of use," was wrongly decided, because, plaintiffs urge, its holding is at variance with *Cresvale Intern. Inc. v Reuters Am., Inc.* (257 AD2d 502 [1st Dept 1999]), is unavailing. In *Cresvale Intern. Inc.*, the Appellate Division, First Department dismissed a subrogation action against defendant landlord, holding that the agreement between the parties, which stated that defendant waived suborgation arising from "any loss or damage to [its insured's] property . . . resulting from fire or other hazards covered by such fire and extended coverage insurance" (*id*. at 503). The court held that the term "any loss," to the extent it was followed by the word "or," required a broad reading and, therefore excluded business interruption losses incurred by defendant's insured (*id*. at 503). Contrary to plaintiffs' assertion, the foregoing holding is not a variance with *Roundabout Theatre Co.* or with *Consol. Rest. Operations, Inc.*, which adopts the former's holding. To be sure, the language in the policy in *Roundabout Theatre Co.* stated that there was

coverage for "loss of, damage to, or destruction of property," (*id.* at 8). As noted by court, given its plain meaning "loss of" is not synonymous with "loss of use" of the property, as urged, and instead meant theft or misplacement of property (*id.* at 8). This holding is in complete accord with *Cresvale Intern. Inc.*, where "any loss," given its plain meaning, had to be read to include business interruption; particularly in light of the word "or" that came thereafter (*id.* at 505). In *Cresvale Intern. Inc.*, the word "or" broadened coverage, but quite frankly, to the extent that "any loss," necessarily includes the universe of possible losses, superfluously so.

Defendant's Motion to Dismiss Based on Documentary Evidence

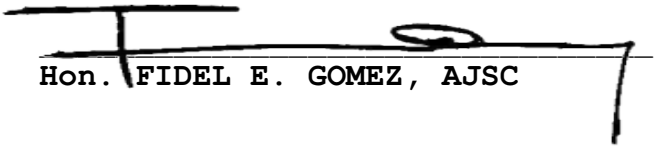
Having granted defendant's motion pursuant to CPLR § 3211(a)(7), defendant's motion pursuant to CPLR § 3211(a)(1) is denied as moot. It is hereby

ORDERED that the complaint be dismissed, with prejudice. It is further

ORDERED that the defendant serve a copy of this Decision and Order with Notice of Entry upon plaintiffs within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated :8/22/22



Hon. FIDEL E. GOMEZ, AJSC