

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D80885

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_____AD3d_____

Argued - November 24, 2025

BETSY BARROS, J.P.
HELEN VOUTSINAS
LOURDES M. VENTURA
DONNA-MARIE E. GOLIA, JJ.

2021-08206

DECISION & ORDER

Wellpath Holdings, Inc., appellant, v XL Insurance
America, Inc., et al., respondents, et al., defendants.

(Index No. 54589/21)

Hunton Andrews Kurth LLP, New York, NY (Michael S. Levine and Joseph T. Niczky of counsel), for appellant.

Zelle, LLP, New York, NY (Matthew L. Gonzalez and Laura M. Maletta of counsel), for respondents XL Insurance America, Inc., Everest Indemnity Insurance Company, and Homeland Insurance Company of New York, Kennedys CMK LLP, New York, NY (Jared T. Greisman, Jessica L. Gross, and Joanna L. Young of counsel), for respondents Princeton Excess and Surplus Lines Insurance Company, General Security Indemnity Company of Arizona, and Crum & Forster Specialty Insurance Company, DLA Piper LLP (US), New York, NY (Michael D. Hynes, Anna K. Finger, and Brett David Solberg, pro hac vice, of counsel), for respondents Interstate Fire & Casualty Company, Independent Specialty Insurance Company, and Certain Underwriters at Lloyd's, London Subscribing to Policy No. VPC-CN-0001984-01, Aaronson, Rappaport, Feinstein, and Deutsch, LLP, New York, NY (Peter J. Fazio of counsel), for respondents Certain Underwriters at Lloyd's, London Subscribing to Policy No. AQS-191329, HDI Global Specialty SE, and Safety Specialty Insurance Company, Dentons US LLP, New York, NY (Sandra D. Hauser and Catharine Luo of counsel), for respondent Western World Company (one brief filed).

Robinson & Cole LLP, New York, NY (Wystan M. Ackerman of counsel), for amicus curiae American Property Casualty Insurance Association.

In an action to recover damages for breach of contract and for declaratory relief, the

plaintiff appeals from an order of the Supreme Court, Westchester County (Linda S. Jamieson, J.), dated September 29, 2021. The order granted the separate motions of the defendants XL Insurance America, Inc., Everest Indemnity Insurance Company, and Homeland Insurance Company of New York, the defendant Princeton Excess and Surplus Lines Insurance Company, the defendant Western World Company, the defendants Certain Underwriters at Lloyd's, London Subscribing to Policy No. AQS-191329, HDI Global Specialty SE, and Safety Specialty Insurance Company, the defendant General Security Indemnity Company of Arizona, the defendants Interstate Fire & Casualty Company, Independent Specialty Insurance Company, and Certain Underwriters at Lloyd's, London Subscribing to Policy No. VPC-CN-0001984-01, and the defendant Crum & Forster Specialty Insurance Company pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against each of them.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting those branches of the separate motions of the defendants XL Insurance America, Inc., Everest Indemnity Insurance Company, and Homeland Insurance Company of New York, the defendant Princeton Excess and Surplus Lines Insurance Company, the defendant Western World Company, the defendants Certain Underwriters at Lloyd's, London Subscribing to Policy No. AQS-191329, HDI Global Specialty SE, and Safety Specialty Insurance Company, the defendant General Security Indemnity Company of Arizona, the defendants Interstate Fire & Casualty Company, Independent Specialty Insurance Company, and Certain Underwriters at Lloyd's, London Subscribing to Policy No. VPC-CN-0001984-01, and the defendant Crum & Forster Specialty Insurance Company which were pursuant to CPLR 3211(a) to dismiss the third cause of action in the complaint insofar as asserted against each of them, and adding a provision thereto deeming those branches of the motions to be for a declaratory judgment in favor of each of those defendants, and thereupon granting those branches of the motions; as so modified, the order is affirmed, with costs to the respondents, and the matter is remitted to the Supreme Court, Westchester County, for the entry of a judgment, inter alia, making appropriate declarations in accordance herewith.

The plaintiff commenced this action to recover damages for breach of contract and for a judgment declaring that the defendant insurers were obligated to provide the plaintiff with insurance coverage for alleged injuries. The plaintiff, which owned and operated hundreds of medical and behavioral healthcare facilities across the United States, alleged that it had purchased commercial "all risks" insurance policies for its premises, which provided coverage for "direct physical loss of, or direct physical damage to" the covered properties. The plaintiff further alleged that it suffered direct physical loss of property caused by COVID-19 by it physically altering and transforming the indoor air, as well as rendering the property unsafe for ordinary use, which caused the plaintiff to alter the way it conducted its business operations. The plaintiff also alleged that it suffered direct physical damage to the property because COVID-19 was physically present on and attached to objects and surfaces on the property, and it caused a physical, tangible alteration to the integrity of the property. The plaintiff stated that it submitted claims to its respective insurers, which were denied.

Thereafter, the defendants XL Insurance America, Inc., Everest Indemnity Insurance Company, and Homeland Insurance Company of New York, the defendant Princeton Excess and Surplus Lines Insurance Company, the defendant Western World Company, the defendants Certain

Underwriters at Lloyd's, London Subscribing to Policy No. AQS-191329, HDI Global Specialty SE, and Safety Specialty Insurance Company, the defendant General Security Indemnity Company of Arizona, the defendants Interstate Fire & Casualty Company, Independent Specialty Insurance Company, and Certain Underwriters at Lloyd's, London Subscribing to Policy No. VPC-CN-0001984-01, and the defendant Crum & Forster Specialty Insurance Company (hereinafter collectively the defendants) separately moved pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against each of them. In an order dated September 29, 2021, the Supreme Court granted the separate motions. The plaintiff appeals.

On a motion pursuant to CPLR 3211(a)(7) “to dismiss a complaint for failure to state a cause of action, a court must ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’” (*Doe v Educational Inst. Oholei Torah*, 235 AD3d 843, 844, quoting *Leon v Martinez*, 84 NY2d 83, 87-88). “A motion pursuant to CPLR 3211(a)(1) to dismiss a claim based on documentary evidence may be appropriately granted ‘only where the documentary evidence utterly refutes [the claimant]’s factual allegations, conclusively establishing a defense as a matter of law’” (*Hart 230, Inc. v PennyMac Corp.*, 194 AD3d 789, 790, quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326).

“[A]s with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court” (*S. Donadic, Inc. v Utica Mut. Ins. Co.*, 230 AD3d 606, 608, quoting *Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321). An insurance contract which covers “‘direct physical loss or damage’ requires a material alteration or a complete and persistent dispossession of insured property” (*Consolidated Rest. Operations, Inc. v Westport Ins. Corp.*, 41 NY3d 415, 426). Direct physical loss requires more than “‘impaired functionality’ or ‘loss of use; it requires an actual, complete dispossession’” (*id.* at 428-429; *see Carrols Rest. Group, Inc. v American Guar. & Liab. Ins. Co.*, 225 AD3d 1133, 1134). Similarly, direct physical damage “must be understood to require a material physical alteration to the property—one that is perceptible, even if not visible to the naked eye” (*Consolidated Rest. Operations, Inc. v Westport Ins. Corp.*, 41 NY3d at 428).

Here, the complaint, which alleged, among other things, that the plaintiff was entitled to coverage because more than 100 of its employees were confirmed to be infected with COVID-19, that the presence of COVID-19 on the property rendered it unsafe, unfit and uninhabitable for ordinary functional use, and that the plaintiff incorporated both administrative and engineering controls to aid in hazard mitigation, failed to allege either a material alteration or a complete and permanent dispossession of the property (*see id.* at 423, 431-432; *Envision Healthcare Corp. v XL INS. Am., Inc.*, 230 AD3d 1059, 1059; *Carrols Rest. Group, Inc. v American Guar. & Liab. Ins. Co.*, 225 AD3d at 1134).

Accordingly, the Supreme Court properly granted those branches of the defendants’ separate motions which were pursuant to CPLR 3211(a) to dismiss the causes of action alleging breach of contract insofar as asserted against each of them.

“A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration” (572 *Walt Whitman Rd. Holdings, LLC v Whitman Capital, LLC*, 237 AD3d 878, 880 [internal quotation marks omitted]; see *St. Lawrence Univ. v Trustees of Theol. School of St. Lawrence Univ.*, 20 NY2d 317, 325; *Rockland Light & Power Co. v City of New York*, 289 NY 45, 51). “[U]pon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where no questions of fact are presented [by the controversy]” (*Rosas v Morales*, 235 AD3d 678, 680, quoting *Neuman v City of New York*, 186 AD3d 1523, 1525). “Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action should be treated as one seeking a declaration in [the] defendant’s favor and treated accordingly” (*Feldman v Nassau Life Ins. Co.*, 224 AD3d 801, 803 [internal quotation marks omitted]; see *O’Donnell & Sons, Inc. v New York State Dept. of Taxation & Fin.*, 193 AD3d 1063, 1064).

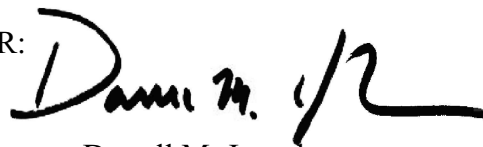
Here, since no questions of fact were presented by the third cause of action, for declaratory relief, and the defendants demonstrated, as a matter of law, that the plaintiff was not entitled to a favorable declaration, the Supreme Court should have deemed those branches of the defendants’ separate motions which were to dismiss the third cause of action insofar as asserted against each of them to be for a declaratory judgment in each of the defendants’ favor, and thereupon granted those branches of the separate motions (see *Matter of 22-50 Jackson Ave. Assoc., L.P. v County of Suffolk*, 216 AD3d 943, 947).

In light of our determination, we need not reach the parties’ remaining contentions.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Westchester County, for the entry of a judgment, inter alia, making appropriate declarations in accordance herewith (see *Lanza v Wagner*, 11 NY2d 317).

BARROS, J.P., VOUTSINAS, VENTURA and GOLIA, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph", followed by a large, stylized flourish or checkmark-like stroke.

Darrell M. Joseph
Clerk of the Court