

**JD Cinemas, Inc. v Northfield Ins. Co.**

2021 NY Slip Op 31949(U)

March 5, 2021

Supreme Court, Suffolk County

Docket Number: 609919/2020

Judge: Martha L. Luft

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Short Form Order

Index No. 609919/2020

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:

Hon. Martha L. Luft  
Acting Justice Supreme Court

DECISION AND ORDER  
CASEDISP

\_\_\_\_\_  
JD CINEMAS, INC. d/b/a MOVIELAND  
CINEMAS 112,

Plaintiff,

-against-

NORTHFIELD INSURANCE COMPANY,  
R-T SPECIALTY, LLC, FIVE STAR  
COVERAGE CORP. and WILKINSON &  
KRAUSES,

Defendants.  
\_\_\_\_\_

Mot. Seq. No.: 001 - MG  
Orig. Return Date: 11/06/2020  
Mot. Submit Date: 12/15/2020

Mot. Seq. No.: 002 - MG  
Orig. Return Date: 11/10/2020  
Mot. Submit Date: 12/15/2020

Mot. Seq. No.: 003 - MG  
Orig. Return Date: 12/15/2020  
Mot. Submit Date: 12/15/2020

Mot. Seq. No.: 004 - MD  
Orig. Return Date: 12/22/2020  
Mot. Submit Date: 12/22/2020

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Upon the efiled documents numbered 11-18; 21-36; 38-70, it is

**ORDERED** that Defendants' motions to dismiss (sequence 001, 002, 003) are granted. Plaintiff's complaint is dismissed in all respects. Plaintiff's cross-motion seeking leave to amend its complaint (004) is denied.

The within action arises from denial of a commercial insurance claim submitted by Plaintiff under a policy issued by Northfield Insurance Company ("Northfield") for the policy period May 4, 2019 to May 4, 2020. Plaintiff asserts that the relevant policy number is CP598070 and insurer Northfield asserts that the correct policy number for the year at issue is CP599356. Such policy insured Plaintiff movie theater against certain losses. Plaintiff alleges that the policy was issued through Defendant R-T Specialty, LLC ("R-T") as agent of its co-defendants, although Plaintiff claims that it was not aware of R-T's existence at the time that the transactions occurred ("R-T" is listed as agent on the Declarations Page of the policy). Plaintiff had dealt directly with Five Star Coverage Corp. ("Five Star") in procuring its insurance and had done so from 2013 through 2019. Plaintiff claims that it relied on Five Star's skill and knowledge and that, without Plaintiff's knowledge or consent, Five Star delegated to R-T and Wilkinson & Krause ("Wilkinson") its duty to provide an appropriate insurance policy. Plaintiff alleges that it suffered losses due to Governor' Cuomo's Executive Order 202.3 which, on or about March 16, 2020 mandated closure of movie theaters and other similar businesses in an effort to respond to the COVID-19 health emergency. Plaintiff alleges that it remained closed for an extended period of time as a result of such order and that the closure "...caused Plaintiff to suffer a loss under the terms of the policy" and that the policy provided for coverage if a loss commenced during the policy period. Plaintiff claims that it has received no payment under the policy and seeks to recover damages as against Defendants.

The causes of action are not clearly designated in the complaint but the Court interprets Plaintiff's causes of action as follows: the first cause of action is alleged against Northfield asserting breach of contract in failing to compensate Plaintiff for losses covered by the policy of insurance. The second cause of action seems to assert negligence or negligent misrepresentation against Five Star claiming that, "...acting in its capacity as agent for Plaintiff, carelessly and negligently failed to procure and secure proper and adequate insurance coverage for Plaintiff, as needed, required and understood," that Five Star "...failed and neglected to advise and inform Plaintiff that its business was not adequately, properly and fully insured..." and that Plaintiff relied upon representations about being properly insured, to its detriment. Plaintiff's third cause of action is against Wilkinson and mirrors the allegations in its second cause of action for either

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negligence or negligent misrepresentation. The fourth cause of action is against Five Star (as Defendants' insurance agent) and alleges failure to procure and secure proper and adequate insurance coverage and failure to advise and inform Plaintiff that its business was not properly insured. Plaintiff's fifth cause of action is against Wilkinson (as Defendants' insurance agent) and mirrors the allegations in the fourth cause of action. The sixth cause of action alleges that R-T and Northfield, as principal(s), are liable for the actions of Five Star and/or Wilkinson, as agent(s), such actions being those alleged in Plaintiff's second and third causes of action, that is, negligence or negligent misrepresentation. The seventh cause of action alleges that R-T and Northfield, as principal(s), are liable for the actions of Five Star and/or Wilkinson, as agent(s), such actions being those alleged in Plaintiff's fourth and fifth causes of action, that is, failure to procure and secure proper and adequate insurance coverage and failure to advise and inform Plaintiff that its business was not properly insured. The eighth cause of action is asserted against Five Star and alleges breach of duty of care in procuring insurance coverage. The ninth cause of action is against Wilkinson and it mirrors the eighth cause of action. The tenth cause of action is alleged against R-T and Five Star (as Plaintiff's insurance agents) and asserts failure to procure and secure proper and adequate insurance coverage and failure to advise and inform Plaintiff that its business was not properly insured.

All Defendants now bring pre-answer motions to dismiss (001-003) pursuant to CPLR §3211(a)(1) and/or CPLR §3211(a)(7). Plaintiff cross-moves seeking leave to amend its complaint (004). The arguments of the parties are set forth below. As they are wide-ranging in scope, the assertions are considered only to the extent that they have legitimate bearing on the CPLR §3211(a)(1) and (a)(7) analysis. Any references to "COVID-19" in this order are intended to collectively refer to the disease itself and the severe acute respiratory coronavirus 2 (SARS-CoV-2) that causes it.

#### Motion 001

R-T Specialty, LLC seeks dismissal of Plaintiff's complaint pursuant to CPLR §3211(a)(1) on the basis of documentary evidence and CPLR §3211(a)(7) for failure to state a cause of action. R-T argues that the assertions by Plaintiff in support of its agency theory of liability for the acts of Five Star and Wilkinson are vague and conclusory, that R-T breached no duty because the duty of an insurance agent is limited to obtaining requested coverage for clients within a reasonable time or notifying such client about an inability to do so (therefore any negligence claim must fail) and that Plaintiff is charged with knowing the contents of the policy because it was received 11 months before the Executive Order issued. R-T further asserts that even if it had a duty to obtain coverage for Plaintiff, there is no continuing duty to guide, advise or direct a client to obtain additional coverage unless there is a special relationship. R-T states that Plaintiff bears the burden of establishing such special relationship and that there is no basis for this. R-T further argues that there is no coverage under the policy for the following reasons: the Business Income Coverage provision requires direct physical loss or damage to property resulting from a covered loss; Civil Authority Coverage requires direct physical damage to

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nearby property resulting in a prohibition of access to the insured property being imposed by a civil authority due to that damage; Plaintiff's losses are a result of COVID-19, and the policy contains an explicit exclusion for loss or damage resulting from a virus "capable of inducing physical distress, illness or disease," and, finally, the Ordinance or Law Exclusion precludes coverage from losses that result from compliance with an ordinance or law. In sum, R-T asserts that Plaintiff failed to plead facts supporting plausible entitlement to coverage under the policy. Annexed to R-T's motion is an affidavit of Timothy Ball, Claims Manager of R-T attesting that the copy of the policy submitted with the motion is a true, accurate and complete copy. R-T makes no allegations with respect to whether or not it had a role in procuring the policy (although its name appears on the declaration page of the insurance policy as Agent), so the foundational basis of the affiant's affidavit is questionable; however, Plaintiff annexed a copy of the policy to the complaint and to its opposition and does not contest its admissibility. The sections of the policy cited by R-T are set forth below:

**Business Income (excerpt):**

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 damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. (Business Income (and Extra Expense) Coverage Form Section A (1))

**Additional Coverages excerpt referencing Civil Authority:**

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Business Income (and Extra Expense) Coverage Form Section A(5))

**Exclusion of Loss Due to Virus or Bacteria endorsement:**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.  
EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA - NEW YORK**

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This endorsement modifies insurance provided under the following:  
COMMERCIAL PROPERTY COVERAGE PART  
COMMERCIAL INLAND MARINE COVERAGE PART

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense, rental value or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. However, this exclusion does not apply to loss or damage caused by or resulting from fungus. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

C. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

(Exclusion of Loss Due to Virus or Bacteria endorsement full text)

The Causes of Loss-Special Form Section A entitled Covered Causes of Loss provides:

When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

In opposition, Plaintiff argues that it purchased the policy from Five Star and Wilkinson and R-T's name appeared on the policy as agent. Plaintiff asserts that it didn't know R-T and that since they are listed as agent, they must be the agent of Five Star and Wilkinson. Plaintiff further asserts that it had a long-standing special relationship with Five Star and Wilkinson. Plaintiff also claims that the virus exclusion only applies to the Commercial Property Part of its policy, not the Commercial General Liability Coverage Part. It is unclear why the General Liability portion of the policy would be applicable here. It appears that the losses described would fall under the auspices of the Commercial Property Coverage portion of the policy. Plaintiff has not argued otherwise.

### Motion 002

Defendant Northfield Insurance Company seeks dismissal of Plaintiff's first sixth and seventh causes of action, pursuant to CPLR §3211(a)(7), asserting that Plaintiff has failed to plead facts supporting Plaintiff's entitlement to coverage under the Policy. Northfield asserts that the only potentially relevant provisions under the Policy are Business Income and Civil Authority and that the facts alleged do not support coverage under such provisions. Northfield also draws the distinction that Plaintiff has not alleged that COVID-19 caused the shutdown of its business but that it was forced to shut down in order to comply with Executive Orders relating to the health emergency.

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Northfield argues that for Business Income Coverage to apply, there must be direct physical loss of or damage to property at the insured premises caused by a Covered Loss and a necessary suspension of Plaintiff's operations caused by that loss or damage and that Plaintiff has failed to allege these elements. Northfield further argues that Civil Authority coverage is unavailable because Plaintiff has failed to allege that damage to a location other than the insured premises caused a civil authority to issue an order that prohibited access to the insured premises and that such damage to the other property was caused by a Covered Cause of Loss. Northfield asserts that Plaintiff has failed to state a claim for breach of contract and that even if it had so stated, there would be no coverage due to the Policy's virus exclusion, Ordinance or Law exclusion and loss of use exclusion.

Northfield also argues that the Policy's Acts or Decisions exclusion bars coverage for loss caused by governmental orders and actions. Such provision, states that loss or damage will not be covered (unless it results in a Covered Cause of Loss) if it arises from: Acts or decisions, including the failure to act or decide, of any person, group, including organization or governmental body (Policy- Causes of Loss Special Form B(3)(b)). Additionally, Northfield argues that Plaintiff's sixth and seventh causes of action alleging vicarious liability must fail because Plaintiff has failed to allege any facts establishing a principal-agent relationship between Northfield and either broker and because Plaintiff has failed to state a viable claim against the brokers. Northfield points to the lack of any allegation of a specific request for coverage or any allegation sufficient to give rise to one of the exceptional situations where a special relationship may exist between a broker and an insured. It further asserts that Plaintiff has not pled a viable claim for misrepresentation against Five Star or Wilkinson and that the attorneys' fees claim included in the breach of contract cause of action should be stricken for lack of legal basis.

In opposition, Plaintiff argues in its Memorandum of Law that Northfield's position is a "cynical attempt to deny Plaintiff insurance coverage"... "under the guise of various exclusions inserted into the policy." Plaintiff states that "[t]he documentary evidence in this action is straightforward and obvious" and that "[t]he policy has alleged coverage for various items and multiple exclusions inserted into it so that Defendants can attempt to avoid paying any claims." Plaintiff asserts that an insurance policy is a contract and that denying a claim is a breach of contract. It argues that the virus exclusion only applies to part of the policy (as discussed above in the context of motion 001), that the Government Acts Exclusion has the effect of making the contract "not a contract at all." Plaintiff further asserts that there was a special relationship with Five Star and Wilkinson because it had done business with them for several years and because "...they are and were professional insurance companies which should have had his best interests in mind when they recommended insurance policies and types of coverage to purchase" and because Plaintiff's principal had become friends with Mr. Schuster of Five Star. Plaintiff also asserts that Five Star and Wilkinson were agents of Northfield because Plaintiff's principal Jordan Desner "...was often told that Five Star Coverage Corp. and Wilkinson & Krause represented only the best insurance companies, including Northfield" (Desner affidavit).

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### Motion 003

Five Star Coverage Corp. and Wilkinson & Krause seek dismissal of Plaintiff's complaint pursuant to CPLR §3211(a)(1) and (a)(7). They argue that insurance brokers and agents have a common law duty to obtain requested coverage within a reasonable time or inform clients about their inability to do so. There is no additional obligation to advise, absent a special relationship, and insureds are in the best position to know their personal assets, abilities and needs. They claim that there was no such special relationship and that Plaintiff has failed to allege facts sufficient to assert one, that Plaintiff fails to state what coverage was requested but not delivered and that Plaintiff had possession of the policy for ten months, was advised to review it, and no objection was made to the policy provisions or exclusions. Defendants assert that their duty was fulfilled in that they procured a renewal policy with Northfield at Plaintiff's request and the policy was bound. Five Star and Wilkinson also argue that even if Plaintiff could establish a duty to obtain coverage that would have applied to his current claim, it cannot establish proximate cause for injury. They assert that insurance companies across the country are denying coverage for COVID-19 losses because it is not a covered peril and that Plaintiff does not allege what coverage was available and should have been procured.

In opposition, Plaintiff argues that it had a long standing relationship with Five Star and Wilkinson of at least fourteen years which constituted a special relationship and that he relied on their expertise. It asserts that if Defendants were to prevail, it would mean that its policy was a worthless contract as are other similar policies and it would demonstrate that they only exist to make agents and insurers rich. By extension, the argument seems to be that any exclusion renders an insurance policy worthless, even if the insured did not bargain for the excluded coverage. Plaintiff argues that it requested protection against losses that could force its business to close, implying that the failure to anticipate a global pandemic and to seek out insurance that would cover such a possibility was a breach of duty by Five Star and Wilkinson. Plaintiff does not allege that its principal expressed his concern about such a specific and unusual risk of loss and requested coverage for it, nor does it deny that it requested renewal of the prior Northfield policy and that Plaintiff received the policy many months prior to the shutdown. There is no indication that Plaintiff is aware of the availability of any alternative coverage that might have been procured for him.

### The Law and its Application to Motions 001-003

In order for dismissal to be granted pursuant to CPLR §3211(a)(1), Defendant must submit documentary evidence of undisputed and unambiguous authenticity "that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim" (*Hohwald v. Farm Family Casualty Insurance Company*, 66 NYS3d 316; 155 AD3d 1009 (2d Dept. 2017) quoting *Botach Mgt. Group v. Gurash*, 138 AD3d 771, 772, 31 NYS3d 80 (2d Dept 2016); *Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]). The documentary evidence offered must be unambiguous and authentic, must entirely refute Plaintiff's factual allegations

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and must conclusively establish a defense as a matter of law (*Porat v. Rybina*, 177 AD3d 632, 633, 111 NYS3d 625 [2d Dept. 2019]; *S & J Serv. Ctr., Inc. v. Commerce Commercial Grp., Inc.*, 178 A.D.3d 977, 977, 112 N.Y.S.3d 584 [2d Dept. 2019]). The evidence submitted upon such motion must be documentary; affidavits, letters and deposition testimony do not qualify (*Id.*; *Granada Condo. III Ass'n v. Palomino*, 78 AD3d 996, 996, 913 NYS2d 668, 669 [2d Dept. 2010]; *S&J Serv. Ctr., supra*). Among the documents that do qualify are "... judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as "documentary evidence" in the proper case" (*Fontanetta v. Doe*, 73 AD3d 78, 84–85, 898 NYS2d 569, 574 [2d Dept. 2010] (citing *Siegel, Practice Commentaries*, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22 and 2 N.Y. Prac., Com. Litig. in New York State Courts § 7:60, 2d. ed.); see also *S&J Serv. Ctr., supra*).

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 52, 49 NE3d 1171, 1175 [2016]; *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 774 N.E.2d 1190 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Bare legal conclusions; however, are not presumed to be true and do not receive the benefit of such favorable inference (*Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]). The Court may also consider affidavits submitted to remedy any defects in the complaint in ascertaining whether or not a cause of action exists (*Chanko, supra*; *Leon supra*). "If the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Sokol v. Leader*, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (quoting *Guggenheimer v Ginzburg*, 43 NY2d at 275); *Porat v. Rybina*, 177 AD3d 632, 633, 111 NYS3d 625 [2d Dept. 2019]). "Yet, affidavits submitted by a defendant "will almost never warrant dismissal under CPLR§ 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action" (*Sokol, supra*; *Porat, supra*).

The analysis goes to whether or not a colorable cause of action exists, not whether or not such claim is ultimately likely to prevail on the merits. Although the Court may consider evidentiary material in support of a motion to dismiss on this basis, consideration of whether or not Plaintiff might survive a summary judgment motion is not part of the analysis (*Doe v. Ascend Charter Sch.*, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; *Neuman v. Echevarria*, 171 AD3d 767, 768–69, 97 NYS3d 203, 205–06 [2d Dept. 2019]). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (*Doe, supra*; *McMahan v. McMahan*, 131 AD3d 593, 15 NYS3d 190, 192 [2d Dept. 2015]; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 372 NE2d 17 [1977]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

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Plaintiff's first cause of action asserts breach of contract against Northfield and essentially alleges that the Northfield insurance policy was a valid contract of insurance, that Plaintiff performed all of its obligations under the policy and that Northfield refused to make payment of a claim, resulting in damages. Plaintiff alleges that Northfield's denial of his claim constituted a breach of contract. Annexed to the complaint and incorporated by reference is a copy of the insurance policy at issue. Although Plaintiff does not specify the policy provisions under which it seeks to recover, the loss of Business Income provision of the policy covers actual losses sustained during a period of suspension of operations necessitated by direct physical loss of or damage to property at the insured premises and the Civil Authority Provision covers losses sustained due to a business closure mandated by a civil authority due to damage at a nearby property occasioned by a covered cause of loss and resulting in a dangerous condition. Here, Plaintiff alleges that losses were caused by Executive Orders requiring closure of all movie theaters due to COVID-19.

A breach of contract cause of action requires the following factors: "...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, 208–09, 976 NYS2d 470, 474 [2d Dept.2013]; see also *Magee-Boyle v. Reliastar Life Ins. Co. of New York*, 173 AD3d 1157, 105 NYS3d 90 [2d Dept. 2019]; *Elisa Dreier Reporting Corp. v. Glob. Naps Networks, Inc.*, 84 AD3d 122, 921 NYS2d 329 [2d Dept. 2011]; *Kausal v. Educ. Prod. Info. Exch. Inst.*, 105 AD3d 909, 910–12, 964 NYS2d 550, 552–53 [2d Dept. 2013]).

Where there is a dispute over insurance coverage, unambiguous provisions in an insurance contract, which offer no reasonable basis for differing interpretation, must be attributed their plain and ordinary meaning and the court must refrain from rewriting the agreement (*U.S. Fid. & Guar. Co. v. Annunziata*, 67 NY2d 229, 232, 492 NE2d 1206 [1986]; *White v. Cont'l Cas. Co.*, 9 NY3d 264, 267–68, 878 NE2d 1019, 1021 [2007]; *Jin Ming Chen v. Ins. Co. of the State of Pennsylvania*, No. 77, 2020 WL 6875983, at \*2 [2020]). Ambiguity, however, may be construed against the insurer (*White, supra*). A provision that covers business income loss as a result of direct physical loss of or damage to property at the premises, does not extend to causes of closure which are not due to damage at the premises; actual physical damages are required (*Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 AD2d 1, 6–8, 751 NYS2d 4 [1<sup>st</sup> Dept. 2002]; *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 FSupp3d 323, 330–32 [SDNY 2014]; *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 FSupp 2d 280, 289 [SDNY 2005]). Closure due to an Executive Order mandating temporary cessation of operations in an attempt to reduce spread of COVID-19 does not constitute actual physical damage at the premises (*Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at \*5–13 [SDNY 2020]; *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 2020 WL 7360252, at \*2–4 [SDNY 2020]; *Soundview Cinemas Inc. v. Great Am. Ins. Grp.*, 2021 WL 561854 [Sup. Ct. Nassau Cty 2021]). As such, Plaintiff has failed to allege damage that would be eligible for coverage under the Business Income provision of the insurance agreement. Similarly, the Civil Authority

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Provision, which allows for coverage of business losses in the event that civil authority prohibits access to the insured premises due to damage or continuation of a Covered Cause of Loss which occurred at nearby premises and resulted in dangerous physical conditions, is not implicated by the COVID-19 Executive Orders mandating business closures. Here, Plaintiff has failed to allege a Covered Cause of Loss to nearby premises (*10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 2020 WL 7360252, at \*2–4 [SDNY 2020]; *Soundview, supra*). Additionally, the Ordinance Or Law Exclusion in the policy provides that losses attributable to enforcement or compliance with any ordinance or law are not covered. As Plaintiff's damages are alleged to be the result of compliance with an Executive Order, its damages are excluded from coverage. Based upon Plaintiff's failure to assert the existence of the conditions required to entitle it to coverage for business income losses under the policy of insurance, Plaintiff has failed to state a cause of action for breach of contract against Northfield. Accordingly, Plaintiff's first cause of action is dismissed. The remaining asserted bases for dismissal of Plaintiff's first cause of action need not be addressed.

Plaintiff's second and third causes of action are against Five Star and Wilkinson and assert either negligence or negligent misrepresentation, Plaintiff's fourth and fifth causes of action are against Five Star and Wilkinson and assert failure to properly procure insurance, advise and inform (alleging without articulated basis that Five Star and Wilkinson are agents of Defendants), Plaintiff's eighth and ninth causes of action are against Five Star and Wilkinson and allege breach of a duty of due care by not procuring proper insurance or advising that they were unable to obtain such insurance, Plaintiff's tenth cause of action is against Five Star and R-T and alleges failure to procure proper insurance coverage, Plaintiff's sixth and seventh causes of action are alleged against R-T and Northfield seeking to impute liability to them as principals for the alleged negligent acts of agents Five Star and Wilkinson which are set forth in the second, third, fourth and fifth causes of action. All of these causes of action are essentially contingent upon similar elements, so they will be discussed together. The agency claims against R-T and Northfield involve an additional element but in order to stand, Plaintiff must state sufficient claims against Five Star and Wilkinson; therefore they are considered here as well.

In order to state a negligence cause of action, a party must assert the existence of a duty, along with a breach of that duty, which proximately caused injury and resulted in damages (*Muallem v. City of New York*, 82 AD2d 420, 441 NYS2d 834 [2d Dept. 1981], *aff'd*, 56 NY2d 866, 438 NE2d 1142 [1982]; *Pulka v. Edelman*, 40 NY2d 781, 358 NE2d 1019 [1976]).

“The elements of a cause of action sounding in negligent misrepresentation are (1) a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information” (*Broecker v. Conklin Prop., LLC*, 189 AD3d 751 [2d Dept. 2020]; *Steinberg v. Armstrong Plumbing & Heating, Inc.*, 153 AD3d 1379, 1380, 61 NYS3d 306, 307 [2d Dept. 2017]; *Ginsburg Dev. Companies, LLC v. Carbone*, 134 AD3d 890, 894, 22 NYS3d 485, 490 [2d Dept. 2015]; *Nugent v. Diocese of Rockville Ctr.*, 137 AD3d 760, 761, 26 NYS3d 556, 558

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[2d Dept. 2016]). “[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified. Professionals, such as lawyers and engineers, by virtue of their training and expertise, may have special relationships of confidence and trust with their clients, and in certain situations [the Court of Appeals has] imposed liability for negligent misrepresentation when they have failed to speak with care” (*Kimmell v. Schaefer*, 89 NY2d 257, 260, 675 NE2d 450 [1996]; see also *Murphy v. Kuhn*, 90 NY2d 266, 682 NE2d 972 [1997]; *Krobath v. S. Nassau Communities Hosp.*, 178 AD3d 807, 809, 115 NYS3d 389, 392 [2d Dept. 2019]). In order to impute an exceptional duty to speak with care in a commercial matters, there must be a relationship such that, in consideration of morals and good conscience, one has the right to rely on the other’s speech and such reliance must be justifiable in context (*Kimmell v. Schaefer*, 89 NY2d 257, 260, 675 NE2d 450 [1996]; *Krobath*, *supra*; *Murphy v. Kuhn*, 90 NY2d 266; 682 NE2d 972 [1997]). The existence of a contractual relationship, standing alone, is insufficient to impute a duty of care (*Krobath*, *supra*) as is a “standard consumer-agent insurance placement relationship” even if it is over an extended period of time (*Murphy supra*).

“The common-law rule is that “an insurance broker acting as an agent of its customer has a duty of reasonable care to the customer to obtain [specifically] requested coverage within a reasonable time after the request, or to inform the customer of the agent's inability to do so, [but] the agent owes no continuing duty to advise, guide or direct the customer insured to obtain additional coverage” (*Waters Edge @ Jude Thaddeus Landing, Inc. v. B & G Grp., Inc.*, 129 AD3d 706, 707, 10 NYS3d 563, 565 [2d Dept. 2015] (*quoting Hjemdahl–Monsen v. Faulkner*, 204 AD2d 516); see also *Voss v. Netherlands Ins. Co.*, 22 NY3d 728, 8 NE3d 823 [2014]; *AB Oil Servs., Ltd. v. TCE Ins. Servs., Inc.*, 188 AD3d 624, 133 NYS3d 638 [2d Dept. 2020]; *Broecker v. Conklin Prop.*, LLC, 189 AD3d 751 [2d Dept. 2020]). The nature of the duty is defined by the client’s request (*Verbert v. Garcia*, 63 AD3d 1149, 882 NYS2d 259 [2d Dept. 2009]; *Broecker v. Conklin Prop.*, LLC, 189 AD3d 751 [2d Dept. 2020]). However, under circumstances where a special relationship exists, a broker may be liable for failing to advise about the need for additional coverage, even absent a specific request (*Voss v. Netherlands Ins. Co.*, 22 NY3d 728, 734–36, 8 NE3d 823, 828–29 [2014]; *AB Oil Servs., Ltd.*, *supra*; *Waters Edge @ Jude Thaddeus Landing, Inc.*, *supra*). There are three exceptional situations that may give rise to a special relationship, thereby creating an additional duty of advisement: “(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on” (*Murphy*, *supra* at 272; see also *AB Oil Servs.*, *supra*; *Voss*, *supra*; *Waters Edge @ Jude Thaddeus Landing, Inc.*, *supra*).

Here, Plaintiff alleges that from 2013 through 2019, Five Star evaluated Plaintiff’s insurance needs, gave advice about risks, loss exposure and coverage and procured insurance for Plaintiff and that Plaintiff relied on Five Star’s expertise. Plaintiff also alleges that Wilkinson is connected to and is under the same ownership as Five Star. Plaintiff has claimed that it asked

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whether or not it had sufficient coverage and that Five Star indicated that it did. Plaintiff alleges a special relationship with Five Star in that the relationship between the entities was either six years or about fourteen years (alleged alternately within the record) and that the principal of Plaintiff had become friends with the employee of Five Star who procured his policy. When Plaintiff submitted a claim for Business Income losses due to the mandatory closures imposed by Executive Order due to the COVID-19 health emergency, such claim was denied as excluded from coverage. Plaintiff claims that its special relationship with Five Star required the agency to anticipate its needs and implies that Five Star was required to ensure that coverage was available for any possible loss, including closures imposed due to global pandemics.

Plaintiff has not contested that it sought a renewal of the Northfield policy nor has it alleged that Five Star and Wilkinson failed to procure such policy. The issue before the Court is whether or not Plaintiff has stated sufficient facts to allege a heightened duty of advisement. Plaintiff has not alleged that Five Star and Wilkinson received special compensation for consultation or that there was some interaction regarding a specific coverage issue. The only allegation is that the relationship was ongoing for several years. This is insufficient to establish a special relationship (*Murphy v. Kuhn*, 90 NY2d 266; 682 NE2d 972 [1997]). “Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act” (*Murphy*, *supra* at 273). There is no allegation that Plaintiff made Five Star and Wilkinson aware of any special need for the coverage it lacked or that Five Star and Wilkinson were in a position to anticipate the possibility of the type of losses here at issue. As Plaintiff has failed to set forth sufficient facts to state a claim that Defendants breached any duty owed to it, its remaining causes of action are dismissed pursuant to CPLR §3211(a)(7). Based upon the Court’s determination, the additional arguments asserted by Defendants in support of dismissal need not be considered.

#### Motion 004

Plaintiff cross-moves to amend its complaint to add a cause of action against Northfield for violation of General Business Law §349(a). As the statutory provision cited is a declaratory statement about unlawful practices, the Court presumes that Plaintiff intended to cite GBL§349(h) which creates a private right of action for deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.

Leave to amend pleadings should be freely granted unless amendment would result in unfair surprise or prejudice or the proposed amendment is palpably insufficient or patently devoid of merit (*Adduci v. 1829 Park Place, LLC*, 176 AD3d 658, 107 NYS3d 690, 691 [2d Dept. 2019]; *Maldonado v. Newport Gardens, Inc.*, 91 AD3d 731, 937 NYS2d 260 [2d Dept. 2012]; *Rosicki, Rosicki & Assocs., P.C. v. Cochems*, 59 AD3d 512, 514, 873 NYS2d 184 [2d Dept. 2009]; *Bank of Smithtown v. 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept. 2013]; *Leibowitz v. Plaza 400 Owners' Corp.*, 226 AD2d 681, 641 NYS2d 718 [2d Dept. 1996]; *McCasky, Davies and Associates, Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755, 450 NE2d 240, 463 NYS2d 434 [1983]). A motion to amend should be denied when the lack of merit of the proposed amendment is clear and free from doubt (*Lucido v. Mancuso*,

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49 AD3d 220, 851 NYS2d 238 [2d Dept. 2008]).

To state a claim for violation of General Business Law §349(h), "... a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v. Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621–23, 911 NE2d 834 [2009]; see also *Barry's Auto Body of NY, LLC v. Allstate Fire & Cas. Ins. Co.*, 190 AD3d 807 [2d Dept. 2021]; *Koch v. Acker, Merrall & Condit Co.*, 18 NY3d 940, 967 NE2d 675 [2012]; *Plavin v. Grp. Health Inc.*, 35 NY3d 1, 5, 146 NE3d 1164, 1165, *reargument denied*, 35 NY3d 1007, 149 NE3d 442 [2020]; *Krobath v. S. Nassau Communities Hosp.*, 178 AD3d 807, 115 NYS3d 389 [2d Dept. 2019]). Conduct complained of must have a broader impact on consumers at large; private business disputes do not fall under the statute (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 NY2d 20, 24–27, 647 NE2d 741, 744–45 [1995]; *Plavin, supra*).

Plaintiff's proposed additional cause of action alleges that Northfield engaged in deceptive acts and practices in the conduct of its business "...by selling insurance policies which are voidable at Northfield's option." This allegation is based upon the presence of a clause in the policy which excludes coverage for "Acts or decision [sic] including the failure to act or decide, of any person, group, organization or governmental body." A review of the insurance policy which was incorporated by reference and annexed to the original complaint reveals the cited provision to read as follows:

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

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b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body. (Causes of Loss-Special Form Section B3(b)-subsections a and c omitted)

The above provision states that if the excluded cause of loss (the "acts or decisions") results in a Covered Cause of Loss, then Northfield will pay for the loss or damage caused by the Covered Cause of Loss. It is difficult to construe this as a provision that renders the policy "voidable" at Northfield's option. Furthermore, Plaintiff has not articulated a Covered Cause of Loss in its complaint; therefore, no coverage is available for business income losses under the plain language of the policy, regardless of the presence or absence of this provision. Although Plaintiff's allegations up until this point have largely been dependent upon the premise that its relationship with Defendants was individualized and that it was owed a special standard of care, Plaintiff's proposed eleventh cause of action requires an assertion that the offending actions of Northfield are consumer-oriented, which is defined as having a broader impact on consumers at large (*Oswego Laborers' Local 214 Pension Fund, supra*). This element is articulated in the proposed amended complaint as, "Northfield's conduct is consumer oriented in that they sell insurance policies which appear to provide insurance but do not and are designed to mislead the

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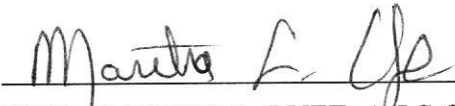
public.” The GBL §349 cause of action also requires an allegation of a materially misleading act. Plaintiff alleges that the inclusion of the plain language contractual exclusion set forth above constitutes the misleading act, as it renders such policy “voidable,” as discussed above. There is no allegation that the provision was undisclosed in the copy of the policy provided to Plaintiff and no allegation of any other act, omission or representation by Northfield. It is unclear how Northfield having incorporated the “acts or decisions” exclusion into its policy materially misled the consuming public in such way as a reasonable consumer is likely to be misled (*Id.*; *Barry's Auto Body of NY, LLC, supra*). Plaintiff’s allegation of injury, which is also required in order to state a cause of action, is augmented by Plaintiff’s memorandum of law in reply. It is asserted that the damages suffered were pecuniary due to the mandated shutdown, loss of business and “...denial of the claim for coverage believed purchased from Northfield.”

As the motion presently before the Court is one seeking leave to amend the complaint, the issue is narrow. It is not for the Court to determine whether or not Plaintiff could prevail on the merits but whether or not the proposed amendment is patently devoid of merit. Here, the proposed claim is essentially that Northfield was generally deceptive toward the public because the insurance policy issued to Plaintiff contained an exclusion which denied coverage to Plaintiff, resulting in damage. Plaintiff has failed to sufficiently allege the necessary elements of a GBL§349 claim. Furthermore, the fact remains that Plaintiff has not alleged any direct physical damage to the premises, which is required in order for coverage to be available under the policy as written. As such, the cited provision which is the cornerstone of Plaintiff’s claim of being misled, cannot be the cause of Plaintiff’s loss. Based upon the foregoing, the Court finds Plaintiff’s proposed amended complaint to be patently devoid of merit. Accordingly, Plaintiff’s cross-motion to amend its complaint is denied.

Based upon the foregoing, Defendants’ motions to dismiss are granted and Plaintiff’s complaint is dismissed in all respects. Plaintiff’s cross-motion seeking leave to amend its complaint is denied.

ENTER

Date: March 5, 2021  
Riverhead, New York

  
HON. MARTHA L. LUFT, A.J.S.C.

Final Disposition

Non-Final Disposition