

**Century 21 Dept. Stores, LLC v Starr Surplus Lines
Ins. Co.**

2022 NY Slip Op 30563(U)

February 18, 2022

Supreme Court, New York County

Docket Number: Index No. 652975/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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CENTURY 21 DEPARTMENT STORES, LLC,66 PEARL
 RETAIL, LLC,66 PEARL RETAIL II, LLC,66 PEARL
 RETAIL ISG, LLC,173 BWAY BLUE LLC,262 MOTT BLUE
 TIC LLC,444 86 BLUE LLC, MIAMI DD 101 BLUE LLC,28
 NEWBURY JSRE TIC LLC, TRUE BLUE ASSOCIATES
 LLC, STAR OF DAVID, IRAYMOND-77 WARREN LLC,
 SABRA ASSOCIATES LLC,315 SEVENTH RETAIL LLC,
 WEBWAY ASSOCIATES LLC, CENTURY 21, INC.

INDEX NO. 652975/2020

MOTION DATE _____

MOTION SEQ. NO. 003 004 006
007 008 009
010 011

Plaintiffs,

**DECISION + ORDER ON
 MOTION**

- v -

STARR SURPLUS LINES INSURANCE CO., ALLIANZ
 GLOBAL RISKS US INSURANCE CO., AXIS SURPLUS
 LINES INSURANCE CO., LIBERTY MUTUAL FIRE
 INSURANCE CO., STEADFAST INSURANCE CO.,
 ENDURANCE AMERICAN SPECIALTY INSURANCE CO.,
 EVANSTON INSURANCE CO., LANDMARK AMERICAN
 INSURANCE CO., QBE SPECIALTY INSURANCE CO.,
 GREAT AMERICAN FIDELITY INSURANCE CO.,
 CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING
 TO POLICY NOS. PG1902704, PG1902346, PG1902696,
 PG1902698, PG1902707, PG1902702, AND PG1902712,

Defendants.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36,
 37, 38, 39, 40, 41, 42, 43, 62, 140

were read on this motion to/for SUBPOENA

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 47, 48,
 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 120, 121, 122, 123, 124, 125, 126, 127, 128,
 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 65, 66, 67, 68, 69,
 70, 71, 160, 161, 162, 163, 184, 185, 186

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 007) 72, 73, 86, 87, 88,
 89, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 142, 143, 144, 145,
 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 179

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were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 74, 75, 164, 180
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 76, 77, 174, 175,
176, 177, 181
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 78, 79, 80, 81, 82,
83, 84, 85, 169, 170, 171, 172, 173, 183
were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 90, 91, 92, 93, 94,
95, 165, 166, 167, 168, 182
were read on this motion to/for DISMISS.

The Defendants' motions to dismiss (mtn. seq. nos. 006-011) must granted because the complaint is predicated on the notion that physical loss or damage was not a predicate for coverage under the Policies (hereinafter defined) or that Covid-19 constitutes physical loss or damage. Neither proposition is correct and the motions therefore must be granted. The Defendants' motion to compel the Plaintiffs to respond to their first set of requests for document production (mtn. seq. no. 003) and the Plaintiffs' motion to compel the Defendants to supplement their discovery responses and provide further documents (mtn. seq. no. 004) are deemed moot.

The Relevant Facts and Circumstances

Century 21 Department Stores LLC (**Century 21**) is the holder of certain insurance policies (the **Policies**) issued by Allianz Global Risks US Insurance Company (**Allianz**), Liberty Mutual Fire Insurance Company (**Liberty Mutual**), Starr Surplus Lines Insurance Company (**Starr Surplus**), Endurance American Specialty Insurance Company (**Endurance American**),

Evanston Insurance Company (**Evanston**), Great American Fidelity Insurance Company (**Great American**), Certain Underwriters at Lloyds of London (**Certain Underwriters at Lloyds**), Landmark American Insurance Company (**Landmark American**), Steadfast Insurance Company (**Steadfast**), QBE Specialty Insurance Company (**QBE**), and Axis Surplus Lines Insurance Company (**Axis**) in the amount of \$350 million. Each of the Plaintiffs in this case was listed as a named insured, additional named insured, or is otherwise covered by each of the Policies. Each of the Policies, other than the policy issued by Allianz, used the same policy form. Significantly, the Policies contained a policy extension for communicable diseases, providing \$5 million of coverage for such events. It is not disputed that the Plaintiffs in this case already recovered under this policy extension.

At issue in this case is whether the Plaintiffs can obtain coverage under the Policies in the amount of \$350 million for losses incurred resulting from Covid-19 when coverage under the Policies is predicated on physical loss of or damage to insured property.

The Plaintiffs allege that, as a result of Covid-19, they incurred losses based on the reduction in sales, their tenants' failure to pay rent, their own inability to pay rent, and extra expenses incurred in an effort to continue operations (*id.*, ¶¶ 55-56). Century 21 submitted a Sworn Statement in Proof of Loss – Partial (the **Partial Loss Statement**, NYSCEF Doc. No. 96) dated May 20, 2020, making claims for business interruption, rental expenses, and rental income in a total amount of \$175,585,799. Plaintiffs allege that their loss continues to grow, but that the Defendants have failed to pay under the Policies. The Plaintiffs sued on July 8, 2020, alleging causes of action for breach of contract (first cause of action) and breach of the implied covenant

of good faith and fair dealing (second cause of action). The Defendants move to dismiss, alleging that they properly denied coverage because the Plaintiffs failed to demonstrate direct physical loss or damage to insured property as required under the Policies and that they had already made payments under the communicable disease policy extension. The Plaintiffs cross-move for leave to amend the complaint to provide more specificity as to the nature and sources of their losses.

Discussion

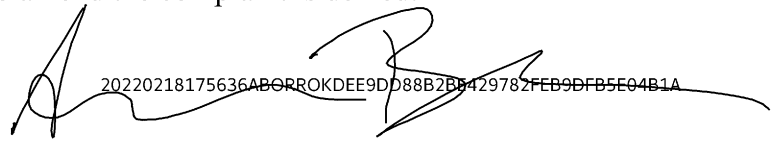
On a motion to dismiss, the court must afford the pleadings a liberal construction, accepting the facts as alleged as true and according the plaintiffs with the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). To grant a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence must resolve all factual issues and dispose of the plaintiffs' claims as a matter of law (*Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]).

All of the motions to dismiss must be granted because the Plaintiffs fail to allege any physical loss or damage caused by Covid-19. Each of the categories of recovery that the Plaintiffs seek require that the loss be caused by physical loss or damage, and Covid-19 and the effects it caused simply do not cover anything covered by the Policies (*Roundabout Theatre Co., Inc. v Continental Cas. Co.*, 302 AD2d 1, 9 [2002]; *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 Ad3d 575, 577 [1st Dept 2021]). Even the provisions which allow for recovery due to civil or military orders require that such orders were issued as a result of physical loss or damage, and those provisions do not cover Covid-19 (*Raymours Furniture Co., Inc. v Lexington Ins. Co.*,

2021 WL 4789148, *1 [Sup Ct, NY County 2021]; *see 10012 Holdings, Inc. v Sentinel Ins. Co., Ltd.*, 21 F.4th 216, 222 [2d Cir 2021] [“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”]; *see also Michael Cetta, Inc. v Admiral Indem. Co.*, 506 F.Supp.3d 168, 179 [SD NY 2020] [“nearly every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property”]).

The cross-motion to amend the complaint is denied. As demonstrated by the proposed amended complaint (NYSCEF Doc. No. 159), the only amendments to the complaint concern the dangers and transmissibility of Covid-19 and the specific impacts that governmental shutdown orders had on the Plaintiffs’ businesses. The added specificity does not change the fact that the nature of the allegations does not trigger coverage under the Policies. Plaintiffs fundamentally fail to allege physical loss or damage that entitles them to coverage under the Policies. Because the proposed amendments are palpably insufficient as a matter of law, the motion must be denied (*Meiterman v Corporate Habitat*, 173 AD3d 593, 594 [1st Dept 2019]).

It is hereby ORDERED that the Defendants’ motions to dismiss are granted in their entirety, the complaint is dismissed, and the cross-motion to amend the complaint is denied.


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2/18/2022
 DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER