SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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FEDERAL INSURANCE COMPANY

Plaintiff,

- v -

BD HOTELS LLC,

Defendant.

INDEX NO. 650856/2021

MOTION DATE 01/14/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65
were read on this motion to DISMISS COUNTERCLAIMS.

This is an insurance coverage dispute arising out of losses allegedly sustained by Defendant BD Hotels LLC ("BDH") due to disruptions caused by the COVID-19 pandemic. BDH tendered a claim for coverage under an insurance policy ("Policy") issued to it by Plaintiff Federal Insurance Company ("Federal") (*see* NYSCEF 1 [summons and compl.]). Federal denied BDH's claim, stating there was no "direct physical loss or damage" as required under the Policy to trigger coverage (*id.* ¶ 13). Then Federal initiated this action, seeking to obtain a declaratory judgment declaring that Federal owes no duty to provide insurance coverage to BDH under the terms of the Policy (*id.* ¶¶ 1-2, 12-18).

In response, BDH filed an Answer and Counterclaims asserting three causes of action against Federal – (1) declaratory relief, (2) breach of contract, and (3) breach of the covenant of good faith and fair dealing – stemming from Federal's coverage refusal (NYSCEF 52). Now,

Federal moves to dismiss all three counterclaims. For the reasons set forth below, the motion is granted.

DISCUSSION

A. BDH Fails to Allege "Direct Physical Loss or Damage."

At the heart of this motion – and this case – is the meaning of the phrase "direct physical loss or damage." All of the relevant Policy provisions require "direct physical loss or damage" as a precondition for coverage (NYSCEF 52 ¶¶ 47, 50, 53, 59). BDH argues that this triggering phrase is ambiguous and may include loss of the use or functionality of the property (*id.* ¶ 24; NYSCEF 60 [BDH's opp. to mot. to dismiss]). Alternatively, BDH contends that even if some physical alteration to property *were* required under the Policy, it has adequately pleaded such effects as a result of the coronavirus (*id.*).

To start, BDH's principal argument is foreclosed under New York law. "[E]very single court interpreting New York law has concluded that Covid-19 and any resulting government orders may result in loss of use, but not physical loss or damage, and therefore do not constitute direct physical loss or damage" (*SJ 1st St. Hotel, LLC v Sompo Am. Ins. Co.*, 2021 NY Slip Op. 32558[U], *3 [Sup Ct, New York County Nov. 30, 2021] [Chan, J.]; *see Roundabout Theatre Co. v Cont'l Cas. Co.*, 302 AD2d 1 [1st Dept 2002] [reading "all risks of direct physical loss or damage to the [insured's] property" to mean "losses involving physical damage to the insured's property"]; *10012 Holdings, Inc. v Sentinel Ins. Co., Ltd.*, 21 F4th 216, 221 [2d Cir 2021] ["[S]tate and federal courts in New York have (at either the motion to dismiss stage or on summary judgment) uniformly applied [*Roundabout Theatre*, 302 AD2d at 1] since the start of the COVID-19 pandemic to deny coverage under similar insurance provisions where the insured property itself was not alleged or shown to have suffered direct physical loss or physical

damage."]). Tellingly, while BDH cites to dictionary definitions and case law from other jurisdictions, it cites to no New York decisions supporting its interpretation of the coverage provision at issue here.[1]

BDH's alternative argument – that the properties were physically altered by the presence of the coronavirus – fares no better under New York law. "New York courts have consistently, and indeed overwhelmingly, held that the presence of COVID . . . does not meet the 'physical loss or damage' requirement, as a matter of law" (*Madison Square Garden Sports Corp., et al. v Factory Mut. Ins. Co., et al.*, Index No. 651521/2021 [NYSCEF 65 at 37 in this case]; *see, e.g.*, *Benny's Famous Pizza Plus Inc. v Sec. Natl. Ins. Co.*, 72 Misc 3d 1209(A) [Sup Ct, Kings County 2021] ["[T]he mere presence of the COVID-19 virus in the air or on surfaces of a covered property does not qualify as damage to the property itself."]; *Mangia Rest. Corp. v Utica First Ins. Co.*, 72 Misc 3d 408, 415 [Sup Ct, Queens County 2021] ["Even had there been proof that the virus 'physically attached to the property,' as plaintiff alleged, that would not have constituted the direct, physical loss or damage required to trigger the policy coverage, because such presence can be eliminated by 'routine cleaning and disinfecting'"]; *Food for Thought Caterers Corp. v Sentinel Ins. Co., Ltd.*, 524 F Supp 3d 242, 249 [SD NY 2021] ["[C]ontamination of the premises by a virus does not constitute a 'direct physical loss' because the virus's presence can be eliminated by 'routine cleaning and disinfecting,' and 'an item or structure that merely needs to be cleaned has not suffered' a direct physical loss."]).

[1] As also noted in *1012 Holdings*, "courts in jurisdictions outside New York may have reached a different conclusion, but all New York courts applying New York law . . . have soundly rejected the argument that business closures . . . due to New York State Executive Orders constitute physical loss or damage to property" (21 F4th at 221).

Finally, BDH contends it has adequately stated a claim for Civil Authority coverage under the Policy. This provision provides coverage when access to the insured's property is prohibited by order of a civil authority due to "physical loss or damage" in the vicinity of the insured property (NYSCEF 52 ¶ 59). For the reasons stated *supra*, BDH fails to sufficiently allege that COVID-19 or any government orders caused tangible damage to either BDH's properties or any other property outside of its premises (*Madison Square Garden Sports Corp., et al. v Factory Mut. Ins. Co., et al.*, Index No. 651521/2021 ["[P]laintiffs have failed to state a claim for civil authority coverage because, again, they do not allege physical damage, as required under the policies and because the stay-at-home orders were not issued in response to physical damage in any particular location."] [NYSCEF 65 at 40]). Moreover, BDH has not sufficiently alleged that access to its properties was "prohibited" by a civil authority. In fact, BDH admits that several of its properties continued to be used during the pandemic, albeit not for their usual purpose (NYSCEF 52 ¶ 37 [explaining that several hotels were "turned into homeless housing"], *id.* ¶¶ 97-99; *see Harry Bassett III Ex'r for Estate of Josephine Alonge v Wesco Ins. Co.*, 2021 NY Slip Op 31981[U], *7 [Sup Ct, Kings County 2021] [dismissing claim under civil authority provision because "Plaintiff has made no claim that the Plaintiff or his tenants were denied access to the Premises"]).

B. <u>BDH's Counterclaims Must Be Dismissed.</u>

BDH's counterclaims for breach of contract, declaratory judgment, and breach of the covenant of good faith and fair dealing all rely on the premise that the pandemic inflicted "direct physical loss or damage" to BDH's properties. Because that argument is foreclosed under New York law for the reasons discussed *supra*, BDH's counterclaims are dismissed in their entirety.

* * * *

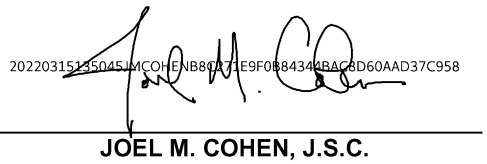
Accordingly, it is

ORDERED that Federal's motion to dismiss BDH's counterclaims is GRANTED and the counterclaims are dismissed; it is further

ORDERED that a declaratory judgment shall be rendered in Federal's favor[2]; it is further

ORDERED that the parties settle a final judgment pursuant to 22 NYCRR 202.48, returnable to the Court on April 5, 2022.

This constitutes the Decision and Order of the Court.



3/15/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:	X	SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

[2] "When a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not to dismiss the complaint, but rather to issue a declaration in favor of the defendant" (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]). It appears to the Court that issuing a declaratory judgment in Federal's favor on BDH's counterclaim would also resolve Federal's sole cause of action for a declaratory judgment in its Complaint, thus disposing of the action (*compare* Compl. ¶ 18 *with* Counterclaims ¶ 105). As such, the parties are directed to settle a final judgment.