

Chicken Kitchen USA, LLC v Zurich Am. Ins. Co.

2022 NY Slip Op 31180(U)

April 6, 2022

Supreme Court, New York County

Docket Number: Index No. 654846/2020

Judge: Andrea Masley

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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 48

-----X	
CHICKEN KITCHEN USA, LLC,	INDEX NO. <u>654846/2020</u>
Plaintiff,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>002</u>
ZURICH AMERICAN INSURANCE COMPANY,	
Defendant.	DECISION + ORDER ON MOTION
-----X	Amended

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 48, 49, 50, 53, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for DISMISS.

In motion sequence number 002, defendant Zurich American Insurance Company (Zurich) moves to dismiss plaintiff Chicken Kitchen USA, LLC's (Chicken Kitchen) amended complaint pursuant to CPLR 3211(a)(1) and (7).

Background

This is one of many nationwide business interruption insurance actions brought by policyholders seeking coverage of losses sustained as a result of the COVID-19 pandemic. Zurich, a New York corporation that sells insurance in Florida, issued an all-risk Property Portfolio Protection Policy, No. CPO 1067182-02 (Policy) to Chicken Kitchen, a Florida limited liability corporation that owns and operates eighteen restaurants throughout Miami-Dade and Broward Counties in Florida.¹ (NYSCEF Doc.

¹ The Policy, effective November 8, 2019 through November 8, 2020, was an automatic renewal of policy number CPO 106182-01, effective November 8, 2018 through November 8, 2019. (NYSCEF 12, Amended Complaint ¶ 42.) The Policy was renewed, bearing the policy number CPO 1067182-03, with policy dates effective November 8, 2019 through November 8, 2020. **654846/2020 CHICKEN KITCHEN USA, LLC vs. ZURICH AMERICAN INSURANCE** Page 1 of 9
 Motion No. 002

No. [NYSCEF] 12, Amended Complaint [AC] ¶¶ 4-6.) On August 18, 2020, Chicken Kitchen submitted a claim for coverage under the Policy arising out of loss of business income and incurred extra expenses, which was denied by Zurich on October 27, 2020. (*Id.* ¶¶ 30-31, 34.) Chicken Kitchen initially brought this action for a declaration that the Policy's stated monetary limitation of \$25,000 for "Additional Coverage for Microorganisms – Business Income" applies to all of Chicken Kitchen's eighteen locations on an individual basis rather than as an aggregate. (NYSCEF 1, Summons and Complaint ¶¶ 28-34.) However, following Zurich's denial of Chicken Kitchen's claims, Chicken Kitchen amended its complaint, alleging that Zurich breached the Policy by failing to indemnify Chicken Kitchen for losses caused by COVID-19. (NYSCEF 12, AC ¶¶ 20, 38-41.) In its amended complaint, Chicken Kitchen seeks (i) damages arising from Zurich's breach of the Policy and (ii) for reformation of CPO 1067182-01, CPO 1067182-02, and CPO 1067182-03's "Additional Coverage for Microorganisms – Business Income" provision due to mistake.

Policy Provisions

Chicken Kitchen seeks coverage under various provisions of the Policy identified and repeated in relevant part below. Chicken Kitchen invokes coverage under Section A of the Business Income Coverage Form, which states,

"[w]e 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 a 'premises' at which a Limit of Insurance is shown on the Declarations for Business Income. The loss or damage must be directly caused by a 'covered cause of loss'. We will not pay more than the

2020 through November 8, 2021. (*Id.*) Both CPO 106182-01 and CPO 1067182-03 are Property Portfolio Protection policies. (*Id.*)

applicable Limit of Insurance shown on the Declarations for Business Income at that 'premises'."

(NYSCEF 13, Policy at 150².)

Section B of the Business Income Coverage Form of the Policy identifies an array of additional coverages for the loss of business income.

"1. Civil Authority

We will pay for the actual loss of 'business income' you sustain for up to the number of days shown on the Declarations for Civil Authority resulting from the necessary 'suspension', or delay in the start, of your 'operations' if the 'suspension' or delay is caused by order of civil authority that prohibits access to the 'premises' or 'unreported scheduled premises.' That order must result from a civil authority's response to direct physical loss of or damage to property scheduled within one mile from the 'premises' or 'reported unscheduled premises' which sustains a 'business income' loss. The loss or damage must be directly caused by a 'covered cause of loss'.

4. Expense to Reduce Loss

We will pay reasonable and necessary expenses you incur, except the cost of extinguishing a fire, to reduce the amount of loss of 'business income'. We will pay for such expenses to the extent that they do not exceed the amount of loss that otherwise would have been payable under this Coverage Form and subject to the applicable Limit of Insurance shown on the Declarations for Business Income at that 'premises' or 'reported unscheduled premises'. The Policy sets out the relevant limits (monetary and time) of insurance for each coverage provision.

5. Extended Period of Indemnity

If the necessary 'suspension' of your 'operations' produces a 'business income' loss payable under this Coverage Form, and you resume 'operations' with reasonable speed, we will pay for the actual loss of 'business income' you sustain during the 'extended period of indemnity'.

The most we will pay under this Additional Coverage is the Limit of Insurance shown on the Declarations for Business Income at the 'premises' or 'reported unscheduled premises' where the direct physical loss or damage occurred.

² Pages refer to NYSCEF generated pagination.

The Limit for this Additional Coverage is included in, and not in addition to, the applicable Limit of Insurance.

8. Microorganisms

We will pay for the actual loss of 'business income' you sustain due to the:

- a. Necessary 'suspension' of your 'operations' from direct physical loss of or damage to Covered Property caused by 'microorganisms' when the 'microorganisms' are the result of a 'covered cause of loss'; or
- b. Prolonged 'period of restoration' due to the remediation of 'microorganisms' from a covered loss.

The most we will pay under this Additional Coverage in any one policy year is the Annual Aggregate Limit of Insurance shown on the Declarations for Microorganisms-Business Income. Regardless of the number of claims, this Limit of Insurance is the most we will pay for the total of all loss, even if the 'microorganisms' continue to be present, active, or recur."

(*Id.* at 150-152.) The Policy sets out the limits of insurance for Additional Coverages.

(See *id.* at 48-52 for the limits; see *a/so* NYSCEF 12, AC ¶ 18.)

The Policy also provides Extra Expense Coverage.

"We will pay for the actual and necessary 'extra expense' you incur due to direct physical loss of or damage to property at a 'premises' at which a Limit of Insurance is shown for Extra Expense on the Declarations. The loss or damage must be directly caused by a 'covered cause of loss'. We will not pay more than the applicable Limit of Insurance shown on the Declarations for Extra Expense at that 'premises'."

(NYSCEF 13, Policy at 159.) This category also provides additional coverage for extra expenses incurred as a result of an order of civil authority. (*Id.*)

The Policy further provides the following definitions, in relevant part,

"14. 'Covered cause of loss' means a fortuitous cause or event, not otherwise excluded, which actually occurs during this policy period.

'Covered cause of loss' does not mean:

a. A fortuitous cause or event, whether or not excluded, which actually occurred prior to this policy period, regardless of the date on which it first becomes manifest or is first discovered; or

b. damage.

44. 'Microorganism' means any type or form of organism of microscopic or ultramicroscopic size including, but not limited to, 'fungus', wet or dry rot, virus, algae, or bacteria, or any by-product."

(*Id.* at 68-69, 73.)

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the 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." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, "bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; see also CPLR 3211[a][1].) To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st, Dept 2002] [citation omitted].)

Choice of Law

In the amended complaint, Chicken Kitchen asserts that Florida law governs disputes under the Policy. (NYSCEF 12, AC ¶ 6.) Zurich vacillated. (NYSCEF 28,

Zurich's Memo of Law at 8, n 1; NYSCEF 60, tr at 3:18-24.) Accordingly, for the purposes of this motion, and in the absence of opposition, Florida law applies.

Each provision Chicken Kitchen claims coverage under requires there be "direct physical loss or damage" and that such "loss or damage must be directly caused by a 'covered cause of loss.'"³ Thus, the central question is whether Chicken Kitchen sufficiently alleged a "direct physical loss or damage" to survive a motion to dismiss. Chicken Kitchen asserts that (i) there is no uniform nationwide rule for interpreting this phrase and/or its variations; (ii) under Florida law, this phrase is not limited to only structural damage, and thus, property that has suffered a diminution in value also constitutes "direct physical loss or damage"; and (iii) alternatively, if physical loss or damage is required, Chicken Kitchen has sufficiently pleaded such damage. Zurich takes the position that Florida state and federal courts, in the context of COVID-19 business interruption cases, have concluded that this phrase requires an actual change in the property, such a change that renders the property unsatisfactory for future use.

Upon review of Florida law, the phrase "direct physical loss or damage" requires actual, concrete damage beyond pure economic damages, such as diminished value or a reduction in right of full ownership. (*DAB Dental PLLC v Main Street American Protection Ins. Co.*, 2020 WL 7137138, *4 [Fla Cir Ct, Highlands County, Nov. 10, 2020, No. 20-CA-5504]; see also *Catlin Dental, P.A. v The Cincinnati Indem. Co.*, 2020 WL

³ This point is conceded by Chicken Kitchen in its opposition brief: "Count I alleges Zurich breached an all-risk policy with Business Income and Extra Expense Coverage (including various additional coverages, such as Civil Authority and Microorganism). These coverages are triggered by 'direct physical loss or damage to property,' when the 'loss or damage' is 'directly caused by a "covered cause of loss.'" (NYSCEF 29, Chicken Kitchen Opposition Brief at 11 [citations omitted].)

817333, *5 [Fla Cir Ct, Lee County, Dec. 11, 2020, No. 20-CA-004555] [“[T]here needs to be a distinct, demonstrable, physical alteration of the structural integrity of the property in order to have direct physical loss or damage to the property. Airborne particles and the mere presence of a virus in the community do not constitute direct physical loss to the property.”] [citations omitted].) The Florida federal courts, interpreting Florida state law, have not departed from the prevailing view.⁴ (See *R.T.G. Furniture Corp v Hallmark Speciality Insur. Co.*, 2021 WL 686864, at *3 [MD Fla, Jan. 22, 2021, No. 8:20-cv-2323] [concluding that the mere presence of the coronavirus on [plaintiff’s] property does not constitute physical damage or loss]; *TL Goodson, LLC v Southern-Owner Insur. Co.*, 2022 WL 795431, at *3 [ND Fla, Mar. 14, 2022, No. 3:21-cv-178] [rejecting plaintiff’s argument that the undefined term, “loss,” could be reasonably construed as the “diminution of value” that occurred from the inability to use the property due to closures or the presence of virus].)⁵ In fact, Florida courts have consistently defined “direct physical loss” as requiring a “physical alteration of the property” in the context of COVID-19 business interruption cases. (See *Dime Fitness, LLC v Markel Ins. Co.*, 2020 WL 6691467, at *3 [Fla Cir Ct, Hillsborough County, Nov. 10, 2020, No. 20-CA-5467], *affd* 823 F Appx 868, 880 [11th Cir 2020], *cert denied*, 141

⁴ Chicken Kitchen argues that Zurich provides no controlling case law in support of certain arguments. While Florida federal courts interpreting state law is persuasive authority, nonetheless, this court finds that the federal cases are more persuasive—given that they are factually analogous—than the case law Chicken Kitchen relies on, i.e., *Henderson Rd. Rest. Sys., Inc., v Zurich Am. Insur. Co.*, a case from the Northern District of Ohio.

⁵ Both the cited Florida state and federal cases are factually similar to the case here. In addition, the arguments posited by Chicken Kitchen are substantially similar to the arguments made by similarly situated plaintiffs (and rejected by the courts) in the cited cases, and this court sees no reason to diverge from these well-reasoned decisions.

S Ct 1737 [2021].) Thus, Chicken Kitchen’s alternative argument that it adequately alleges that it suffered physical loss of or damage to its property when it experienced a diminution of property value by “rendering such property unsafe for use and/or occupation” due to the presence of the COVID-19 virus on its premises fails. (See NYSCEF 12, AC ¶¶ 25-27.)

Turning to Chicken Kitchen’s claim for Civil Authority coverage under the Policy, it too fails for similar reasons, namely that Chicken Kitchen fails to include even one allegation that there was (i) a civil authority (ii) in response to direct physical loss of or damage to property (iii) scheduled within one mile from the premises which (iv) results in a business income loss. (NYSCEF 13, Policy at 150, 159.)

Because the court finds that Chicken Kitchen did not adequately allege a physical loss or damage necessary to trigger the coverage provisions under the Policy, the court does not reach the question of whether COVID-19 is a “covered cause of loss.”⁶ (*TL Goodson*, 2022 WL 795431, at *5 [plaintiff “has not alleged facts showing that its property was directly and physically damaged, there is no need to consider the policy exclusions.”] [citation omitted].) Given the overwhelming case law in Florida on the issue and discussed here, the court grants the motion with prejudice as the defects in Chicken Kitchen’s claims are substantive so amendment would be futile. (See *Park Union Condominium v 910 Union Street, LLC*, 196 AD3d 427, 427 [1st Dept 2021].)

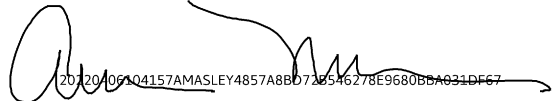
⁶ Briefly, Zurich argues, in the alternative, that the Policy includes a “Microorganism Exclusion” that operates to exclude coverage for losses that are directly or indirectly caused by a virus. (See NYSCEF 13, Policy at 88.) Chicken Kitchen, in its pleadings, concedes that COVID-19 is a virus that precludes coverage.

Under Florida contract law, a cause of action for reformation must include allegations of (i) mutual mistake or unilateral mistake by one party coupled with the inequitable conduct of the other party and (ii) the contract fails to express the agreement of the parties. (*White v Fort Myers Beach Fire Control Dist.*, 302 S.3d 1064, 1072 [Fla Dist Ct App 2020].) Chicken Kitchen’s amended complaint is devoid of allegations of inequitable conduct by Zurich. Chicken Kitchen, instead, insufficiently alleges that “Zurich knew or should have known that [it] wanted broad coverage for its eighteen restaurants in South Florida.” (NYSCEF 12, Amended Compl. ¶ 50.)

All other remaining arguments have been considered and are unavailing.

Accordingly, it is

ORDERED that defendant’s motion to dismiss is granted with prejudice with costs and disbursements to the defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant.



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4/6/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

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APPLICATION:

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