

Rainbow USA Inc. v Zurich Am. Ins. Co.

2022 NY Slip Op 31270(U)

April 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 513649/20

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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RAINBOW USA INC., AIJJ ENTERPRISES INC.,
ET AL,

Plaintiffs, Decision and order

- against -

Index No. 513649/20

ZURICH AMERICAN INSURANCE COMPANY,
Defendant,

April 18, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff moves pursuant to CPLR §2221 seeking to reargue a decision and order dated January 27, 2022 which dismissed the lawsuit. The defendant opposes this motion. Papers were submitted by the parties and after reviewing the arguments this court now makes the following determination.

As recorded in the prior decision, the plaintiff, a New York corporation with a principal place of business in Brooklyn, commenced this action seeking business interruption insurance resulting from the government imposed shutdowns due to the COVID-19 pandemic. The court dismissed the lawsuit finding, essentially, that the plaintiff failed to demonstrate it suffered any direct physical loss as a result of the shut-down orders and thus could not recover under the terms of the policy. The court noted that this was the overwhelming consensus of other cases that have considered the issue and the plain language of the insurance policy itself compelled this conclusion. Within the

decision the court noted that "the Verified Complaint in this case merely recites, in conclusory fashion, that damage from COVID-19 "both existed on surfaces found within the insureds and surrounding premises as well as in the breathable air circulating within the insureds and surrounding premises" (see, Complaint, ¶101)" (see, Rainbow USA Inc., v. Zurich American Insurance Company, 74 Misc3d 653, _NYS3d_ [Supreme Court Kings County 2022]). The plaintiff now argues the court overlooked expert affidavits submitted which supplemented the verified complaint and raise non-conclusory assertions the presence of COVID-19 physically damaged the goods demanding a reinstatement of the complaint. As noted, the defendant has opposed the motion.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

The plaintiff submitted a report by Dr. Aleksandr Aravkin dated November 4, 2021. That report does not state that COVID-19 existed in any of plaintiff's stores at all. Rather, the report is a lengthy statistical analysis of the prevalence of COVID-19 virtually everywhere, based upon data where the virus was found

to exist in March 2020 at the time of the governmental shut-down orders and in all likelihood existed in plaintiff's locations as well. More importantly, the report does not state that the presence of COVID-19, if it even was present at any of plaintiff's stores, constituted a physical loss of any goods. Therefore, that report cannot support any contention the court overlooked any evidence in reaching its conclusion the verified complaint was conclusory.

Even assuming that COVID-19 actually existed in the plaintiff's locations, the plaintiff also submitted a report by Dr. Michael Sulzinsky dated November 4, 2021. On page 3 of that report Dr. Sulzinsky concludes that "during March 2020, the presence of virus SARS-CoV-2 and the communicable disease COVID-19 caused physical loss or damage to clothing stores, department stores, retail and outlet shops, home improvement stores, toy stores, supermarkets, and indeed, all retail and wholesale outlets ranging in size from "big box" type stores, to small "mom and pop" stores" and that COVID-19's "physical presence materially changed and damaged the property, rendering it dangerous and unusable" (id).

However, all cases that have addressed this issue have concluded that the existence of the virus upon any materials did not physically damage the item. For example, in Sandy Point

Dental P.C. v. Cincinnati Insurance Company, 20 F4th 327 [7th Cir. 2021] the court noted that "even if the virus was present and physically attached itself to Sandy Point's premises, Sandy Point does not allege that the virus altered the physical structures to which it attached, and there is no reason to think that it could have done so. While the impact of the virus on the world over the last year and a half can hardly be overstated, its impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days" (id). Again, in Kim-Chee LLC v. Philadelphia Indemnity Insurance Company, 2022 WL 258569 [2d Cir. 2022] the court dismissed allegations that the mere presence of COVID-19 itself was the cause of damage sustained. The court explained that "the complaint does not allege that any part of its building or anything within it was damaged—let alone to the point of repair, replacement, or total loss. Nor does Kim-Chee explain how, other than by the denial of access, any of its property could no longer serve its insured function. To the contrary, we agree with the district court that the virus's inability to physically alter or persistently contaminate property differentiates it from radiation, chemical dust, gas, asbestos, and other contaminants whose presence could trigger coverage under Kim-Chee's policy" (id).

Notwithstanding these clear and obvious pronouncements about the observable truism that COVID-19 does not cause any physical damage to goods, clothing in this case, Dr. Sulzinsky has opined otherwise and asserts the virus did indeed physically damage the goods. However, recently, in Consolidated Restaurant Operators Inc., v. Westport Insurance Corp., _AD3d_, _NYS3d_, 2022 WL 1040367 [1st Dept., 2022] the court explained that in order to succeed upon a claim of physical damage, "the property must be changed, damaged or affected in some tangible way, making it different from what it was before the claimed event occurred. If the proffered facts do not identify any physical (tangible) difference in the property, then the complaint fails to state a cause of action" (id). Thus, Dr. Sulzinsky has failed to demonstrate, other than in a conclusory manner, the way in which the goods have been changed by COVID-19. Indeed, Dr. Sulzinsky does not "identify any physical change, transformation, or difference in any of its property" (id).

Moreover, the plaintiff does not even allege a physical loss of its inventory at all. The Complaint only alleges lost revenue (¶ 124) and lost sales (¶¶ 126,127). Indeed, the plaintiff's reimbursable losses by State/locality through May 30, 2020 (submitted as NYSCEF #4) only lists retail losses and real estate losses but no losses of any inventory or goods. Surely, if the


plaintiff in fact suffered physical losses of the goods those claims surely would have been presented (see, Consolidated Restaurant Operators Inc., v. Westport Insurance Corp., (supra)). Thus, the failure to seek any claims for lost inventory undermines the expert's opinion that such physical damage occurred and in fact any opinion in that regard is wholly irrelevant.

Therefore, there is no basis upon which to reargue the prior decision. Consequently, the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: April 18, 2022
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC