

**Peet's Coffee & Tea Holdco Inc. v North Am. Elite
Ins. Co.**

2022 NY Slip Op 31518(U)

May 2, 2022

Supreme Court, Kings County

Docket Number: Index No. 504770/21

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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PEET'S COFFEE & TEA HOLDCO INC.,
Plaintiff, Decision and order

- against - Index No. 504770/21

NORTH AMERICAN ELITE INSURANCE COMPANY,
Defendant, May 2, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendant moves pursuant to CPLR §3211 seeking to dismiss the lawsuit. The plaintiff opposes this motion. Papers were submitted by the parties and after reviewing the arguments this court now makes the following determination.

The plaintiff, a Delaware corporation with a principal place of business in California, commenced this action seeking business interruption insurance resulting from damage caused by COVID-19 as well as the government imposed shut-downs that were imposed in the wake of the COVID-19 pandemic. According to the Complaint the plaintiff is in the coffee business and maintains over 280 retail stores, distribution centers and roasting plants across eleven states including the District of Columbia and New York. The plaintiff purchased comprehensive insurance from the defendant which provided coverage relevant to this lawsuit for "all risks of direct physical loss or damage to insured property" (see, Insurance Policy, ¶A.1). The defendant denied plaintiff's claim seeking to recover for damages sustained as a result of

COVID-19 as well as damages sustained from loss of business due to government imposed shut-down orders. The plaintiff instituted this lawsuit and asserted causes of action for a declaratory judgment, breach of contract, breach of implied covenant of good faith and fair dealing and a breach of General Business Law §349 due to the defendant's failure to pay the claim submitted by the plaintiff. The defendant has now moved seeking to dismiss the lawsuit arguing the plaintiff did not suffer any "direct physical loss or damage" necessary to trigger any coverage. The plaintiff opposes the motion arguing that the complaint alleges they indeed suffered direct physical losses as a result of COVID-19 and the motion must therefore be denied.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc.

v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

First, there is no evidence that COVID-19 existed in any of the plaintiff's locations. While the plaintiff has asserted that many individuals, perhaps over a thousand people, contracted COVID-19 while present in one of the plaintiff's locations, that does not provide any evidence that COVID-19 existed within the locations themselves sufficient to cause physical loss or damage. The contention that "it is more probable than not that COVID-19 was actually present at the Coffee Businesses during the relevant Policy period" (see, Complaint, §94) is mere speculation and a conclusory assertion which is insufficient to survive any motion to dismiss.

However, even assuming that COVID-19 actually existed at the plaintiff's locations as contended, the Complaint still fails to allege any cause of action sufficient to proceed to discovery. The plaintiff argues that COVID-19 caused physical damage and loss "in multiple respects" (see, Memorandum of Law in Opposition, page 5). First, plaintiff asserts the virus caused "physical, tangible alteration to property," whereby the virus "impairs, damages, and alters its value, usefulness, or normal function" (*id.*). This is true because "surfaces to which COVID-19 attaches become capable of carrying and transmitting disease" and "renders the air inside of properties, itself, dangerous" (*id.*).

However, virtually all cases that have addressed this issue have concluded that the existence of the virus upon any materials did not physically damage those materials. 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). The unscientific governmental orders cited in the complaint supporting the contention the presence of COVID-19 does cause physical damage are all dated March and April 2020 when the reach of the damage the virus could cause to window displays, movable items and food, was still unknown and was in constant flux. The consensus at this juncture, as noted, is that no such lasting damage to any such materials is caused by COVID-19. Indeed, 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). Again, recently in East Coast Entertainment of Durham LLC v. Houston Casualty Company, _F.4th_, 2022 WL 1086377 [7th Cir. 2022] the court held that ECE the owner of operators of movie theaters could not recover for any losses due to COVID-19. The court explained that "try as it might, ECE similarly fails to allege a

physical alteration of its property. The mere presence of the virus on surfaces did not physically alter the property, nor did the existence of airborne particles carrying the virus. ECE does not allege that it needed to "repair[], rebuild[d] or replace[]" any structures or items on the premises, or that its business "resumed at a new permanent location," as contemplated in the Policy's "period of restoration" definition" (id).

Thus, the Complaint alleges that COVID-19 caused physical damage "to the Coffee Businesses' roasting, grinding, cooking, frothing, decanting, and storage equipment, coffee machines, espresso machines, blenders, ice and hot water and tea dispensers, signs, menus, ovens, microwaves, refrigerators, freezers, ice machines, lighting fixtures, cash registers, computers, tables, chairs, couches, stools, curtains, blinds, doors, door handles, carts, countertops, display cases, shelving, retail merchandise, custom coffee sleeves, straws and stirrers, napkins, coffee filters, espresso tampers, frothing pitchers, knock-boxes, coffee mugs, tea cups, trays, bags, coffee containers, utensils, sugar pourers, tea ball insurers, lemon wedge bags, creamers, condiment organizers, cups, lids, and straw organizers, measuring cups and spoons, scales, syrup pumps, frothing thermometers, timers, coffee and beverage labeling, aprons and uniforms, floors, windows, fans, mirrors, decorative

items, pictures, frames, sinks, faucets, faucet handles, soap dispensers, paper towels, paper towel holders, toilets, urinals, trash cans, recycling bins, power outlets and receptacles, light switches, as well as the loss of use of all such property" (see, Complaint, ¶ 78).

Significantly, the Complaint does not assert that any of the above mentioned "damaged" items and materials remained damaged or physically altered even when allowed to re-open. Thus, Paragraph 104 of the Complaint states that "because of the physical loss or damage caused by COVID-19, the Coffee Businesses appropriately shut down or partially limited operations. The operations remained closed or limited until it was clear that it was safe to reopen for employees, customers and guests, consistent with adherence to the Coffee Businesses' strict and rigorous protocols and health and safety guidelines in place to prevent the spread of COVID-19 on insured property and to reduce the likelihood of individuals' exposure to COVID-19 and affected property" (id). Further, Paragraphs 117 and 118 of the Complaint likewise state that "the Coffee Businesses' operations remained closed or appropriately limited until it was clear that it was safe to reopen for employees and guests, consistent with adherence to the Coffee Businesses' strict and rigorous protocols and to health and safety guidelines in place to prevent the spread of COVID-19

on insured property and to reduce the likelihood of individuals' exposure to COVID-19 and affected property. Peet's has followed the guidelines, directives, and orders issued by relevant governmental and health authorities to limit the spread of COVID-19, which provide, inter alia, for enhanced cleaning protocols, social distancing, and the use of certain personal protective equipment. In doing so, Peet's has incurred losses and extra expenses and related costs due to the presence of COVID-19 and the related government orders" (id). Notably, the Complaint does not assert that any of the more than seventy items listed in Paragraph 78 had to be replaced since they had been damaged. On the contrary, the Complaint makes plain that all the locations resumed their operations subject to COVID-19 safety protocols. The absence of any claims related to loss of all those materials really undermines the argument there was any physical damage at all.

The plaintiff elides these infirmities by arguing that the virus really damaged the function and value of the plaintiff's businesses which are distinct damages to which insurance is available. The case cited to support this contention, Studio 417, Inc. v. Cincinnati Ins. Co., 478 F.Supp3d 794 [Western District of Missouri 2020] has been rejected as an outlier (see, State Street Restaurant Group, Inc., v. The Cincinnati Casualty

Company, 2022 WL 1198214 [Middle District of Pennsylvania 2022]). Thus, any argument there was any loss of function or value is just another way of arguing there was a loss of use. Concerning the allegation there was a loss of use, the plaintiff argues the virus caused a direct physical loss because they could not access any of the locations. That argument has been roundly rejected since the mere loss of use is not a physical loss (Roundabout Theatre Company v. Continental Casualty Company, 302 AD2d 1, 751 NYS2d 4 [1st Dept., 2002], Benny's Famous Pizza Plus Inc., v. Security National Insurance Company, 72 Misc3d 1209(A), 149 NYS3d 883 [Supreme Court, Kings County 2021]).

Lastly, the case of Pepsico Inc., v. Winterhur International American Insurance Company, 24 AD3d 743, 806 NYS2d 709 [2d Dept., 2005] does not support plaintiff's contention since in that case the soda was actually physically damaged (see, Consolidated Restaurant Operators Inc., v. Westport Insurance Corp., supra).

To be sure, the COVID-19 pandemic and the loss of business suffered has caused hundreds of lawsuits throughout the country seeking insurance coverage. The overwhelming majority of these lawsuits were dismissed under the general premise that there has been no physical loss or damage to any of the goods and that COVID-19 does not cause any physical loss or damage to goods. The plaintiff's allegations fall within well reasoned and

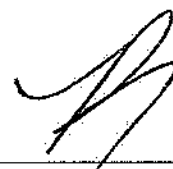
consistent opinions that have rejected these and substantially similar claims. The plaintiff has not presented any new or novel issues that survive a motion to dismiss.

Consequently, based on the foregoing, the motion seeking to dismiss the complaint is granted.

So ordered.

ENTER:

DATED: May 2, 2022
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC