

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

2023 NY Slip Op 30491(U)

February 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 504770/2021

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, February 15, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Sequence #4

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a portion of a decision and order dated May 2, 2022. The defendant opposes this motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, 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. The court dismissed the lawsuit finding that the presence of COVID-19 at any of the plaintiff's locations did not result in any physical loss or damage and consequently could not recover for any business interruption insurance.

Upon reargument the plaintiff asserts the court failed to consider relief sought pursuant to communicable disease response coverage which does not require any showing of any physical loss.

or damage. Further, the plaintiff also argues the court, in the prior decision, impermissibly failed to consider the facts of the complaint as true, which alleged the existence of COVID-19 at many of the plaintiff's locations and concluded, without the benefit of discovery, that there was no evidence of such presence of COVID-19 at any of the locations. The defendant argues that insurance provision was never triggered therefore that language does not permit any recovery and in any event the motion seeking reargument must be denied.

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 insurance provision in question states that "if an INSURED LOCATION owned, leased or rented by the Insured has the actual not suspected presence of COMMUNICABLE DISEASE and access to such INSURED LOCATION is limited, restricted or prohibited by:

- a. an order of an authorized governmental agency regulating the actual not suspected presence of COMMUNICABLE DISEASE; or
- b. a decision of an Officer of the Insured as a result of the actual not suspected presence of COMMUNICABLE DISEASE" then such

coverage is available (see, Insurance Policy, page 37 [NYSCEF Doc. No. 2]). The complaint only alleges coverage based upon governmental shut-down orders and not the decision of any officer of the insured to close the locations. Thus, Section 8 of the complaint which introduces paragraphs 152-157 states that "COVID-19 and the Resulting Governmental Orders Triggered the Policy's Interruption by Communicable Disease Coverage" (id). Any other language in the complaint suggesting the locations remained closed due to independent decisions of an officer of the insured as required by option b of the insurance contract are unavailing. First, 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). However, that paragraph does not state the shut-down was the result of a decision imposed by an officer of the insured. Rather, the requirement any location shut down or curtail its business was solely the result of governmental

shut-down orders. While the plaintiff may have maintained rigorous procedures for re-opening, those standards were implemented to satisfy governmental prerequisites for reopening and no location was permitted to reopen without government approval. Again, paragraph 117 states 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" (see, Complaint ¶117). Protocols employed by the insured to safeguard the public upon reopening does not mean an officer of the insured ordered the shut-down in the first place. Paragraph 154 which states that "access to those locations has been limited, restricted, or prohibited both because of the orders by authorized governmental agencies and because of decisions by officers of the Coffee Businesses as a result of the actual presence of COVID-19" (see, Complaint ¶154) is conclusory with regard to any officer of the insured and does not raise any questions whether that option was ever employed. Thus, there is no contention the insured ordered any shut-down at all.

Therefore, in order for the plaintiff to avail itself of this coverage the plaintiff must demonstrate the governmental shut-down orders were issued due to "specifically confirmed COVID-19 cases on plaintiffs' properties" (Broadwall Management Corp., v. Affiliated FM Insurance Company, 2022 WL 3030315 [S.D.N.Y. 2022]). Moreover, the plaintiff must demonstrate the government required shut-downs specifically due to the presence of COVID-19, not because shut-down orders were issued to all non-essential locations whether or not any COVID-19 existed at any particular location (see, Spirit Realty Capital Inc., v. Westport Insurance Corporation, 568 F.Supp2d 470 [S.D.N.Y. 2021]). As the court noted in Dakota Girls LLC v. Philadelphia Indemnity Insurance Company, 524 F.Supp3d 762 [Southern District of Ohio Eastern Division 2021] "these provisions contemplate an outbreak of communicable disease on the insured's premises, not an outbreak affecting the public at large" (id). That decision was affirmed (see, Dakota Girls LLC v. Philadelphia Indemnity Insurance Company, 17 F4th 645 [6th Cir. 2022]) wherein the court stated that "Dakota Girls also never alleged that Ohio's statewide shutdown order arose 'directly' (or even indirectly) from an illness at the premises. Nor could it have. The Director of Health's order was framed in general terms and applied to all 'Facilities Providing Child Care Services.' It was also couched

as a prophylactic measure 'to avoid an imminent threat with a high probability of widespread exposure to COVID-19,' not as a response to a specific illness discovered at appellants' preschools or anywhere else" (id., see, also, Salon XL Color and Design Group LLC v. West Bend Mutual Insurance Company, 589 F.Supp3d 590 [Eastern District of Michigan Southern Division 2022]).

First, a careful review of the complaint demonstrates the plaintiff never asserted the unequivocal presence of COVID-19 at the locations or that governmental orders were directed at any of plaintiff's locations. Paragraph 72 of the complaint stated that since COVID-19 was a pandemic its presence was "presumed to be present everywhere" (see, Complaint, ¶72 [NYSCEF Doc. No. 1]). The next paragraph of the complaint asserted that as a pandemic, COVID-19 was "statistically certain" to be present in the plaintiff's locations (id at ¶72). Paragraphs 82 and 83 of the complaint assert that there were 273 employees confirmed with COVID-19 and 1,719 COVID-19 incidents reported at the locations thus demonstrating the existence of the disease at the location. However, there is no unequivocal assertion that COVID-19 existed at any of the plaintiff's locations. Even if the above assertions were sufficient to definitively allege the existence of COVID-19 at any of the locations the complaint does not assert

that any governmental authority required shut-downs due to any specific presence of COVID-19 at any of the plaintiff's locations. The plaintiff's locations, like numerous stores throughout the country, were shut down regardless of any actual COVID-19 at any of the locations and without the knowledge of such presence of COVID-19, if any.

The plaintiff insists that "there is no law, as NAEIC self-servingly suggests, that 'general' statewide orders limiting access to insured properties at which communicable disease was present cannot trigger the Communicable Disease Coverages" (see, Memorandum in Reply, page 3 [NYSCEF Doc. No. 90]). It is true that no law prohibits this insurance coverage where general governmental orders are issued. However, it is also true that the language of the specific insurance policy and its interpretation must be examined. Thus, courts that have considered similar language to the one in this case have all uniformly held that in order for this provision to be applicable the shut-down order must be directed at the specific locations in question and not to the public in general. Thus, in Paradigm Care and Enrichment Center LLC v. West Bend Mutual Insurance Company, 529 F.Supp3d 927 [Easter District of Wisconsin 2021] the court rejected the arguments presented here that the phrase "at the insured premises" must be read so narrowly and so against the

interests of the policyholder that a nationwide pandemic clearly alleged to have affected [Plaintiffs'] operations somehow excludes premises affected by the shutdown orders within their geographic areas" (id). The court concluded those arguments "gloss over the plain meaning of the terms of the Communicable Disease provision" (id). The Seventh Circuit affirmed that determination (see, Paradigm Care and Enrichment Center LLC v. West Bend Mutual Insurance Company, 33 F4th 417 [7th Cir. 2022]). The court explained the policy in that case stated the insurance would be available if the government shut-down orders were "due to" the existence of a communicable disease at the location. While the policy did not define the phrase "due to" the court noted that some connection between the disease at the premises and the shut-down orders was surely implied. The court stated that "in no sense were the executive orders at issue here caused by a COVID-19 outbreak at the Centers (or, for that matter, at any other specific location). Rather, the orders were general prophylactic measures taken to slow, suppress, and stop the spread of COVID-19. These same executive orders would have been promulgated verbatim even if the Centers had not existed. Thus, the orders were not issued "due to" conditions at the Centers' premises" (id). Again, in Crestwood Child Care & Learning Center v. West Bend Mutual Insurance Company, 2022 WL 625087 [Western

District of Kentucky Louisville Division 2022] Crestwood a day care center sought communicable disease coverage similar to plaintiff in this case. The court denied such coverage holding that "Crestwood failed to allege that the Commonwealth imposed the shutdown order due to any outbreak that occurred at the daycare itself...Because the text of the communicable-disease outbreak provision is unambiguous, Crestwood could not have any 'reasonable expectation' in remuneration for losses outside of the policy's reach" (id). Finally, in Terry Black's Barbeque LLC v. State Automobile Mutual Insurance Company, 22 F4th 450 [5th Cir. 2022] the court held the communicable disease coverage was unavailable where the governmental restrictions did not "result from" the presence of any COVID-19 at the premises. The court explained that "TBB alleges the civil authority orders were issued 'following' guidance from the Centers for Disease Control and Prevention advising individuals to social distance and take other precautions to prevent the spread of COVID-19. This does not allege the requisite causal relationship between the civil authority orders and TBB's exposure to COVID-19 to trigger REE coverage. And from a common sense understanding of the onset of the pandemic, the civil authority orders were not caused, even tangentially, by TBB's alleged or actual exposure to a contagious disease. The civil authority orders "resulted from" the global

pandemic and the need to take measures to contain and prevent the spread of COVID-19. The language in the orders indicates that they were enacted to avoid exposure to COVID-19, not because of exposure to COVID-19. In fact, those orders say as much in the introductory declarations" (id).


Likewise, in this case the plain reading of the communicable disease provision implies a connection between the disease, the location and the governmental shut-down orders (see, Green Beginnings LLC v. West Bend Mutual Insurance Company, 2022 WL 1700139 [7th Cir. 2022]). Indeed, if the shut-down orders would have been issued in any event, then there is no causal connection between the shut-down order and the presence of COVID-19 sufficient to seek the insurance coverage (Treo Salon Inc., v. West Bend Mutual Insurance Company, 2022 WL 16848203 [Southern District of Illinois 2022]). Although the insurance policy in this case does not contain the language such as "due to" or "resulting from" it is clear the shut-down orders must be directed to the specific locations in question and not to the general public that were promulgated as a result of COVID-19. The specific language of the policy provision states that the coverage is available where "an order of an authorized governmental agency regulating the actual not suspected presence of" COVID-19 prevents access. However, no such order was ever

issued. The complaint (see, Complaint ¶¶105-118 [NYSCEF Doc. No. 1]) describes the governmental orders issued in the various states where the plaintiff maintained businesses and those governmental orders were not issued regulating the actual existence of any COVID-19 at all. Rather, such governmental shut-down orders were general orders issued to the general public. Indeed, even if it is true that COVID-19 existed at the plaintiff's locations, an inference that does not satisfy the actual presence requirement, in any event that is not why the government issued shut-down orders. Those orders would undoubtedly have been issued regardless of the COVID-19 status of any of plaintiff's locations. Consequently, no such communicable disease coverage is available and the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: February 15, 2023
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC