

**Westport Ins. Corp. v Auberge Resorts LLC**

2023 NY Slip Op 33521(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 651396/2022

Judge: Joel M. Cohen

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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 03M

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WESTPORT INSURANCE CORPORATION,
Plaintiff,

- v -

AUBERGE RESORTS LLC,CALISTOGA RANCH OWNER
LLC,SOLAGE OWNERS LLC,ICONIC PROPERTIES -
JEROME, L.L.C., TELLURIDE RESORT PARTNERS
LLC,VANDERBILT HOTEL, LLC,US HOTELS NEW
ENGLAND LLC,ALLIANZ GLOBAL RISKS US
INSURANCE COMPANY, EVEREST INDEMNITY
INSURANCE COMPANY, GREAT LAKES INSURANCE
SE, HOMELAND INSURANCE COMPANY OF NEW
YORK, INTERSTATE FIRE & CASUALTY COMPANY,
LANDMARK AMERICAN INSURANCE COMPANY,
NATIONAL FIRE AND MARINE INSURANCE COMPANY

Defendants.

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INDEX NO. 651396/2022
12/16/2022,
12/16/2022,
12/16/2022,
12/16/2022,
12/16/2022
MOTION DATE
MOTION SEQ. NO. 003 004 005
006 007

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 162, 175, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 282, 289, 292

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 138, 139, 140, 141, 142, 163, 176, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 246, 247, 248, 249, 250, 251, 283, 291

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 143, 144, 145, 146, 147, 148, 149, 160, 164, 177, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 284, 288

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 150, 151, 152, 153, 154, 165, 178, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 252, 253, 254, 255, 256, 285, 290

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 007) 155, 156, 157, 158, 159, 166, 179, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 267, 268, 269, 270, 271, 286, 287

were read on this motion to

DISMISS

Upon the foregoing documents, and for the reasons stated on the record following oral argument on September 11, 2023, the Insurers'<sup>1</sup> motions to dismiss Auberge Defendants'<sup>2</sup> Counterclaims, Crossclaims and Defenses with prejudice are **granted**.

This is a COVID-19 insurance coverage dispute. The policies issued by the Insurers provide or incorporate the following language:

### 1. PERILS INSURED AGAINST

This Policy insures against all risk of direct physical loss, damage or destruction to property described herein occurring during the term of insurance, except as hereinafter excluded.

(NYSCEF 129 [Westport Policy], NYSCEF 141 [ARGUS Policy], NYSCEF 142 [Interstate Policy]), NYSCEF 146 [Everest Policy], NYSCEF 147 [Landmark Policy], NYSCEF 148 [National Fire Policy], NYSCEF 158 [Homeland Policy], NYSCEF 254 [Great Lakes Policy]).

The Insurers submitted a Joint Memorandum of Law (NYSCEF 126) arguing that dismissal is required based on the Appellate Division, First Department's decision in *Consolidated Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 AD3d 76 [1st Dept 2022] *lv to appeal granted in part, dismissed in part*, 39 NY3d 943 [2022]. The Insurers also submitted

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<sup>1</sup> The "Insurers" are Plaintiff Westport Insurance Corporation ("Westport") and Defendants Allianz Global Risks US Insurance Company ("AGRUS"), Everest Indemnity Insurance Company ("Everest"), Great Lakes Insurance SE ("Great Lakes"), Homeland Insurance Company of New York ("Homeland"), Interstate Fire & Casualty Company ("Interstate"), Landmark American Insurance Company ("Landmark"), and National Fire and Marine Insurance Company ("National Fire")

<sup>2</sup> The "Auberge Defendants" are Auberge Resorts LLC, Calistoga Ranch Owner LLC, Solage Owners LLC, Iconic Properties – Jerome, L.L.C., Telluride Resort Partners LLC, Vanderbilt Hotel, LLC, and US Hotels New England LLC.

supplemental memoranda seeking dismissal based on specific exclusions in their various policies.

*Consolidated Restaurant* was a COVID-19 insurance case involving a policy that provided coverage for “direct physical loss or damage” (205 AD3d at 78-79). The First Department held that for such coverage to apply “[t]he 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. Were we to accept that an economic loss, for purposes of the all-risk policy plaintiff purchased from defendant, without any attendant physical, tangible damage to the property is sufficient, it would render the term ‘physical’ in the policy meaningless” (205 AD3d at 82). The court dismissed the policyholder’s complaint because it “fail[ed] to allege any tangible, ascertainable damage, change or alteration to the property so as to plausibly state a claim the damage was ‘physical’” (*id.* at 86-87).<sup>3</sup> The court further found that the policyholder’s proposed amendment of its complaint to allege the existence of “fomites” on the surfaces of its restaurants and the COVID-19 virus’ “infiltration” of its premises was unavailing (*id.*).

The same result obtains here, with factually indistinguishable policyholder COVID-19 claims based on a policy covering “direct physical loss, damage or destruction to property.” Additionally, as stated on the record, the Court finds that the Biological Agents Exclusion contained in the Westport policy independently warrants dismissal of the Auberge Defendants’

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<sup>3</sup> As the Second Circuit recently observed, every New York court to apply the term “direct physical loss” in the context of COVID-19 disputes has upheld denial of coverage (*147 First Realty LLC v Aspen Am. Ins. Co.*, 22-2220, 2023 WL 3014780, at \*2 [2d Cir Apr. 20, 2023] [*citing Consolidated Rest.*] [other citations omitted]).

Counterclaims and Defenses to the extent they are based on purported Cancellation of Bookings coverage under that policy.

Given the conclusion that no coverage applies as a matter of law, the Court does not reach the issue of whether any of the other exclusions raised in the Insurers' supplemental memoranda apply (*Consolidated Rest.*, 205 AD3d at 87). Accordingly, it is

**ORDERED** that Westport's motion to dismiss Auberge Defendants' Counterclaims and Defenses with prejudice (Mot. Seq. No. 3) is **GRANTED**; it is further

**ORDERED** that ARGUS and Interstate's motion to dismiss Auberge Defendants' Crossclaims and Defenses with prejudice (Mot. Seq. No. 4) is **GRANTED**; it is further

**ORDERED** that Everest and Landmark's motion to dismiss Auberge Defendants' Crossclaims and Defenses with prejudice (Mot. Seq. No. 5) is **GRANTED**; it is further

**ORDERED** that Great Lakes motion to dismiss Auberge Defendants' Counterclaims and Crossclaims with prejudice (Mot. Seq. No. 6) is **GRANTED**; it is further

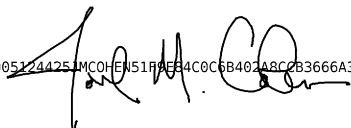
**ORDERED** that Homeland's motion to dismiss Auberge Defendants' Crossclaims and Defenses (Mot. Seq. No. 7) is **GRANTED**; it is further

**ORDERED** that counsel for movants file the September 11, 2023 transcript on NYSCEF upon receipt; and it is further

**ORDERED** that the parties file a joint letter within ten (10) days of this decision and order with respect to proposed next steps in the litigation. This constitutes the decision and order of the Court.

This constitutes the decision and order of the Court.

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**JOEL M. COHEN, J.S.C.**

10/5/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE