UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

MACE MARINE INC., d/b/a Conch Republic Divers,	)	
	)	**Case No.: 4:20-cv-10044-JEM**
Plaintiff,	)	
v.	)	
TOKIO MARINE SPECIALTY INSURANCE COMPANY,	)	
Defendant.	)	

TOKIO MARINE SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MEMORANDUM IN SUPPORT

Defendant Tokio Marine Specialty Insurance Company ("Tokio Marine") submits its Motion to Dismiss Plaintiff's Complaint pursuant to Rule 8(a) and Rule 12(b)(6) of the Federal Rules of Civil Procedure and its Memorandum in Support.

INTRODUCTION

Plaintiffs seek coverage under a commercial insurance policy issued by Tokio Marine. Specifically, the Complaint (ECF No. 1-2) (the "Complaint") alleges that that Tokio Marine improperly denied coverage for loss of business income, interruption by civil authority, and prohibited business ingress related to the COVID-10 pandemic.

Plaintiff's claims fail because the losses it alleges are not covered under Plaintiff's insurance policy. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-51 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-63 (2007). The policy only covers losses arising from "direct physical loss or damage" to covered property. To establish direct physical loss or damage, Plaintiff

must show demonstrable, physical alteration to its property. The Complaint, however, fails to allege any such alteration or damage. Nor does the Complaint allege that the governmental "stay at home" orders or mandated shutdowns were the result of "direct physical loss or damage" to Plaintiff's property. Thus, Plaintiff's Declaratory Judgment (Count I), Breach of Insurance Contract (Count II), and Statutory Bad Faith (Count III) claims fail as a matter of law because there are no facts showing the alleged loss of business income is covered by the commercial policy.

Further, Plaintiff's Statutory Bad Faith Claim (Count III) fails because Plaintiff has not alleged a final determination of Tokio Marine's liability. The claim is thus premature. For these reasons, and as more fully demonstrated below, the Complaint should be dismissed.

FACTUAL BACKGROUND

Plaintiff Mace Marine Inc. operates a dive shop and is insured under Tokio Marine "Commercial Lines Policy," No. PPK1992912 (the "Policy" attached hereto as Exhibit 1).[1] (Compl. ¶ 1).[2] The Policy provides coverage for Plaintiff's business property in the event of "direct physical loss or damage" to Plaintiff's property including, under certain circumstances, business income, extra expense, ingress/egress, and civil authority coverage. (Compl. ¶ 38; *see generally*, Ex. 1).

Plaintiff alleges that, as a result of concerns regarding COVID-19, the Governor of Florida and Monroe County Emergency Management issued orders requiring its business to close and

[1] For purposes of this Motion under Rule 12(b)(6), the Court must accept all well-pled facts in the Complaint as true. Thus, the facts set forth in this Motion are taken from the allegations in the Complaint and accepted as true solely for purposes of this Motion.

[2] This Court may consider the Policy even though it is not attached to the Complaint. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("[T]he court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed."); *Ramey v. Interstate Fire & Cas. Co.*, 32 F. Supp. 3d 1199, 1203 (S.D. Fla. 2013) (same).

causing Plaintiff economic damages. (Compl. ¶¶ 3, 12-19, 34). Plaintiff submitted a claim to Tokio Marine for business interruption coverage under the Policy. (Compl. ¶¶ 4, 35).

The Policy insures only "Covered Causes of Loss," which are defined as "direct physical loss or damage" to Plaintiff's property. (Compl. ¶ 38; Ex. 1, p. 31, § II.A.). The Policy's Time Element coverage for business interruption, in turn, likewise incorporates the physical loss or damage requirement. It covers "the actual loss sustained by the Insured during the Period of Interruption ***directly resulting from a Covered Cause of Loss to Insured Property***." (Ex. 1, p. 42, § V) (emphasis added). Period of Interruption is defined as:

> The period from the time of direct physical loss or damage insured against by this Policy to the time when, with the exercise of due diligence and dispatch, either:
>
> a. normal operation resume, or
>
> b. physically damaged buildings and equipment could be repaired or replaced and made ready for operations under the same or equivalent physical and operating conditions that existed prior to such loss or damage,
>
> whichever is less.

(Ex. 1, p. 44, § V.B.).

As relevant to Plaintiff's claims, the Time Element Coverage in the Policy also covers:

> 1. EXTRA EXPENSE: This Policy is extended to cover the loss sustained by the Insured for Extra Expense **during the Period of Interruption resulting from direct physical loss or damage from a Covered Cause of Loss** to Insured Property utilized by the Insured…
>
> 6. INTERRUPTION BY CIVIL OR MILITARY AUTHORITY: This Policy is extended to cover the actual loss sustained during the period of time when access to the Insured's real or personal property is prohibited by an order of civil or military authority, **provided that such order is a direct result of a Covered Cause of Loss to real property not insured hereunder**…
>
> 7. INGRESS & EGRESS: This policy is extended to cover the actual loss sustained during the period of time when ingress to or egress from the Insured's real or personal property is prohibited **as a direct result of a Covered Cause of Loss to real property not insured hereunder**…

(Ex. 1, p. 45-46, 48, §§ V.C.1, 6, & 7) (emphasis added). Each of these provisions therefore require a "Covered Cause of Loss" – i.e., "direct physical loss or damage." In the case of "Extra Expense," there must be "direct physical loss or damage" to the Plaintiffs' insured property. For the Civil Authority or Ingress and Egress Coverage, there must be "direct physical loss or damage" to uninsured real property that results in an order by a Civil or Military Authority prohibiting access to the insured property, or that otherwise results in prohibited access to the Plaintiffs' insured property.

On March 30, 2020, Tokio Marine denied Plaintiff's claim, and provided a detailed explanation for the denial. (Compl., Exhibit A). Among other things, Tokio Marine noted Plaintiff's confirmation that Plaintiff's property suffered no physical damage and that the business was closed to prevent the spread of the coronavirus generally, and not as a result of any direct physical loss or damage on or off the premises. (Compl. ¶¶ 4, 36, Exhibit A, pp. 1-2).[3] The letter further requested that if the insured disagreed with the coverage determination, to please notify the carrier in writing and state the basis for the disagreement so that the matter could be reconsidered. (Compl., Exhibit A, p. 4).

Plaintiff did not notify Tokio Marine of any disagreement with the coverage determination, or bring any additional facts or circumstances to Tokio Marine's attention. Instead, Plaintiff filed this lawsuit in the 16th Judicial Circuit in and for Monroe County, Florida, asserting claims for Declaratory Judgment (Count I), Breach of Insurance Contract (Count II), and Statutory Bad Faith

[3] "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c); *Solis-Ramirez v. U.S. Dep't of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985) (For purposes of a 12(b)(6) motion, all exhibits attached to the pleading are considering part of the pleadings and may properly be considered without converting the motion into one for summary judgment).

pursuant to Fla. Stat. Sec. 624.155 (Count III). Plaintiff contends that its economic losses caused by the government-mandated business shutdown are covered under the business income, extra expense, interruption by civil or military authority, and ingress/egress coverages in the Policy. (Compl. ¶ 1 & Exhibit A, p. 42-48.) Tokio Marine timely removed the Complaint to this Court on April 30, 2020. (ECF No. 1).

LEGAL STANDARDS

A complaint must be dismissed under the Federal Rules if it does not plead sufficient facts to state a claim to relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). It is a plaintiff's burden to show its "entitlement to relief" with more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. "Nor does a complaint suffice if it tenders "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678. Thus, "[t]o survive dismissal, 'the complaint's allegations must plausibly suggest that the plaintiff has a right to relief, raising the possibility above a 'speculative level'; if they do not, the plaintiff's complaint should be dismissed." *James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).

Dismissal is appropriate "when on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Glover v. Liggett Grp., Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal" and must be disregarded. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

ARGUMENT

Under Florida law,[4] "an insurance policy is treated like a contract, and therefore ordinary contract principles govern the interpretation and construction of such a policy." *Fabricant v. Kemper Indep. Ins. Co.*, 474 F. Supp. 2d 1328, 1330 (S.D. Fla. 2007) (applying Florida law). The interpretation of an insurance policy is a question of law to be determined by the court. *Id.*

The Florida Supreme Court has made clear "the language of the policy is the most important factor" in its interpretation. *James River Ins. Co.*, 540 F.3d at 1274. A court interpreting an unambiguous insurance policy must enforce the plain meaning of its terms. *Goldberg.*, 143 F. Supp. 3d at 1292. Simply because "an insurance policy could have been more clearly drafted does not necessarily mean that the provision is otherwise inconsistent, uncertain or ambiguous." *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986). Moreover, the rules of construction do not allow courts "to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties." *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003). In construing an insurance policy, the court should read each policy "as a whole, endeavoring to give each of its provisions full meaning and operative effect." *Fabricant*, 474 F. Supp. 2d at 1331.

I. The Complaint Fails To State Any Claim Because It Does Not Allege "Direct Physical Loss Or Damage" To the Property.

The Complaint fails as a matter of law because it does not allege facts showing coverage under the Policy. "Courts routinely dismiss complaints for failure to state a claim when a review of the insurance policy and the underlying claim for which coverage is sought unambiguously reveals that the underlying claim is not covered." *Goldberg v. Nat'l Union Fire Ins. Co. of*

[4] Florida substantive law applies to the Policy. *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 412 F.3d 1224, 1227 (11th Cir. 2005) ("[T]he construction of insurance contracts is governed by substantive state law.").

Pittsburgh, PA., 143 F. Supp. 3d 1283, 1291 (S.D. Fla. 2015) (collecting cases). To qualify for coverage under the Policy, Plaintiff must show that it suffered a "Covered Cause of Loss." (Ex. 1, p. 30, § II). To do so, Plaintiff's loss must arise from an insured peril, defined as "direct physical loss or damage to Insured Property." (Ex. 1, p. 31, § II.A); *see also Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-CV-23362-KMM, 2018 WL 3412974, at *10 (S.D. Fla. June 11, 2018) (to claim business interruption coverage under a commercial insurance policy, the insured must prove, among other things, that "there was direct physical loss or damage to covered property[.]").

Here, the Complaint alleges that Plaintiff's economic losses are covered under the business income, extra expense, interruption by civil or military authority, and ingress/egress coverages in the Policy. (Compl. ¶ 1). Plaintiff's loss is not covered under any of these provisions because the Complaint does not allege direct physical loss or damage.

A. Plaintiff's Claim for Lost Business Income Fails.

The Policy provision governing loss of business income reiterates the "direct physical loss or damage" requirement set forth in the definition of "Covered Cause of Loss." Specifically, the Time Element Coverage in the Policy provides that coverage "is extended to cover the actual loss sustained by the Insured during the Period of Interruption directly resulting from a Covered Cause of Loss to Insured Property." (*Id.*, p. 42, § 5). In turn, the "Period of Interruption" is defined as "[t]he period from the time of ***direct physical loss or damage*** insured against by this Policy…" (*Id.*, p. 44, § V.B. (emphasis added)).

Under Florida law, direct physical loss "contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *See Mama Jo's, Inc.*, 2018 WL 3412974, at *9 (mere fact that a business has to be

cleaned more frequently does not render it uninhabitable or unusable). "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a ***distinct, demonstrable, physical alteration of the property***." *Id*. (citing 10A Couch on Ins. § 148.46 (3d. ed. 1998) (emphasis added); *see also Colony Ins. Co. v. Montecito Renaissance, Inc.*, No. 8:09-CV-1469-T-30MAP, 2011 WL 4529948, at *3 (M.D. Fla. Sept. 30, 2011) (economic injury does not constitute "property damage" when property damage is defined as "physical injury to tangible property).

Here, however, the Complaint does not allege any "distinct, demonstrable, physical alteration of [Plaintiff's] property." *See Mama Jo's, Inc.*, 2018 WL 3412974, at *9.[5] To the contrary, Plaintiff asserts that the property "is ***capable*** of being contaminated by direct physical contact" and that "risk of contamination" should be equated to direct physical loss of the property. (Compl. ¶¶ 30, 38) (emphasis added). But speculative risk of *future* physical loss is not covered under the Policy. *See James River Ins. Co.*, 540 F.3d at 1274 (speculative allegations cannot survive motion to dismiss). Plaintiff does not allege any physical deterioration, damage or alteration as a result of the virus, nor does Plaintiff even allege any actual contamination of the insured premises. For that reason, Plaintiff is not entitled to coverage for lost business income.

B. Plaintiff's Claim for Extra Expense Fails.

Like the Policy's business income coverage, Extra Expense Coverage extends only to "loss sustained by the Insured for Extra Expense during the Period of Interruption ***resulting from direct***

[5] Defendant's denial letter notes that Plaintiff confirmed that there was no physical damage to its property. (Compl., Exhibit A, pp. 1-2).

physical loss or damage from a Covered Cause of Loss ***to Insured Property***." (*Id*., p. 45, § V.C.1) (emphasis added).

As discussed above, Plaintiff does not allege any direct physical loss or damage to its property. *See Mama Jo's, Inc.*, 2018 WL 3412974, at *9 (direct physical loss must be "distinct, demonstrable, physical alteration of [Plaintiff's] property."). Instead, Plaintiff alleges that it "***will*** incur extra expenses for cleaning and sanitizing its equipment and property." (Compl. ¶ 32) (emphasis added). That speculative allegation, however, does not constitute direct physical loss or damage. *See Mama Jo's, Inc.*, 2018 WL 3412974, at *9 (The mere fact that a business has to be cleaned more frequently does not render it uninhabitable or unusable). For that reason, Plaintiff is not entitled to coverage for extra expense.

C. Plaintiff's Claims for Interruption by Civil or Military Authority and for Loss of Ingress/Egress Fails.

Under the Policy, coverage for interruption by civil or military authority and for restricted ingress/egress extends only to those losses that are a "direct result of a Covered Cause of Loss to real property not insured hereunder…" (Ex. 1, p. 48, §§ V.C.6 & 7). As previously discussed, the Policy limits Covered Causes of Loss to "risks of ***direct physical loss or damage*** . . . ." (*Id*., p. 31, § II.A. (emphasis added)). Thus, to establish coverage, Plaintiff must show "distinct, demonstrable, physical alteration" of property other that its own, resulting in an order from Civil or Military authority prohibiting access to the insured premises, or otherwise resulting in prohibited access to the insured premises. *See Mama Jo's, Inc*., 2018 WL 3412974, at *9; *see also Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011) (interpreting an almost identical coverage provision and holding that "the action of civil authority prohibiting access to the described premises must be caused by direct physical loss of or damage to property other than at the described premises; and [] the loss or damage to property other than the described

premises must be caused by or result from a covered cause of loss as set forth in the policy."). No such direct physical loss or damage has been shown here.

In *Dickie Brennan*, the Governor of Louisiana ordered evacuations in response to a hurricane. The evacuation order forced the plaintiff to close its business, and the plaintiff therefore sought coverage under the civil authority provision of its insurance policy. The court, however, held that the policy did not cover the plaintiff's economic loss. The court reasoned that the Governor's order was not based on *prior* property damage, but instead on the threat of *future* damage. *Id*. The evacuation order was thus not the result of "physical damage to property" and was not covered under the policy. *Id*. at 686. Applying the same principles, the District Court of South Carolina held that losses arising from executive orders were not covered where those orders did not reference prior damage or destruction of property. *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, No. 4:19-CV-00693-SAL, 2020 WL 886120, at *8 (D.S.C. Feb. 24, 2020) (When the focus of the executive order is on the potential, future, or predicted impacts on life and property then the order was not issued because of direct physical loss or damage to property).

Here, Plaintiff alleges that Monroe County Emergency Directive 20-02 and the Florida Governor's Executive Orders 20-89 and 20-91 restricted access to its business and forced it to close. (Compl. ¶¶ 4, 15, 17-19; *see also* Monroe County Emergency Management Emergency Directive 20-02 dated March 20, 2020, State of Florida Office of the Governor Executive Order Number 20-89 dated March 30, 2020, and State of Florida Office of the Governor Executive Order Number 20-91 dated April 1, 2020 (collectively, the "Government Orders") and attached as Exhibit 2).[6]

[6] This Court may take judicial notice of Monroe County Emergency Directive 20-02 and the Florida Governor's Executive Orders 20-89 and 20-91 because they are public records. *Bouton v. Ocean Properties, Ltd.*, 201 F. Supp. 3d 1341, 1345 (S.D. Fla. 2016).

But, as in *Dickie Brennan* and *Kelaher*, the Government Orders do not mention prior property damage. Instead, those orders purport to have been issued "in the interests of protecting the health, safety, and welfare" of residents and visitors of Florida. (Ex. 2, p. 1). Thus, the Complaint does not allege any direct physical damage that led to the issuance of the Government Orders. Without such allegations, Plaintiff's claims under the civil or military authority and ingress/egress coverages fail.[7]

II. Plaintiff's Statutory Claim For Bad Faith (Count III) Fails And Is In Any Event Premature.

Plaintiff's claim for bad faith pursuant Fla. Stat. Ann. § 624.155 fails because, for the reasons set forth above, Plaintiff cannot establish coverage or liability under the Policy. *See Maryland Cas. Co. v. Alicia Diagnostic, Inc.*, 961 So. 2d 1091, 1092 (Fla. Dist. Ct. App. 2007) ("[I]f there is no insurance coverage, nor any loss or injury for which the insurer is contractually obligated to indemnify, the insurer cannot have acted in bad faith in refusing to settle the claim.").

Independently, Plaintiff's bad faith claim fails because it is premature. "Under Florida law, it is inappropriate to litigate a bad faith claim against an insurer until after any underlying coverage dispute is resolved." *Maryland Cas. Co.*, 961 So. 2d at 1092. "This is premised on the notion that . . . an insurer would be prejudiced by having to litigate either a bad faith claim or an unfair settlement practices claim in tandem with a coverage claim, because the evidence used to prove either bad faith or unfair settlement practices could jaundice the jury's view on the coverage issue." *Id.*

[7] The Government Orders did not prohibit Plaintiff from accessing the business property or conducting telephonic or internet business activity. *See* Exhibit 2. In fact, Executive Order 20-91 explicitly encouraged businesses like Plaintiff's to provide "delivery, carry-out or curbside services outside of the business or organization, of orders placed online or via telephone, to the greatest extent practicable." *Id.* at Executive Order 20-91. Thus, the Government Orders did not force Plaintiff's business to close.

"[T]he existence of liability and the extent of damages are elements of a statutory cause of action for bad faith that must be determined before a statutory cause of action for bad faith will lie." *Indian Harbor Ins. Co. v. Int'l Studio Apartments, Inc.*, No. 09-60671-CIV, 2009 WL 10668603, at *4 (S.D. Fla. Sept. 22, 2009) (Insured's claim for coverage under commercial property policy for loss to the property was premature and dismissed). Thus, when "the extent of coverage is the very issue yet to be determined," and the plaintiff brings a breach of contract claim to determine coverage simultaneously with its bad faith claim, then there has not yet been a determination of liability. *Id.*; *see Vanguard Fire & Cas. Co. v. Golmon*, 955 So. 2d 591, 594 (Fla. Dist. Ct. App. 2006). "Accordingly, when a plaintiff does not and cannot allege that there has been a final determination of both the insurer's liability and the amount of damages owed by the insurer, the plaintiff's bad faith claim is premature" and subject to dismissal. *Grewal v. Aetna Life Ins. Co.*, No. 17-CV-80318, 2017 WL 5640620, at *5 (S.D. Fla. May 23, 2017); *see also Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289, 1291 (Fla. 1991)* (cause of action for bad faith *cannot exist* until underlying litigation determines that coverage exists).

Here, Plaintiff "does not and cannot allege that there has been a final determination" of Defendant's liability under the Policy. *Grewal*, 2017 WL 5640620, at *5. For that independent reason, Plaintiff's statutory bad faith claim fails.

CONCLUSION

WHEREFORE, for the above stated reasons, Defendant Tokio Marine Specialty Insurance Company respectfully requests that this Court dismiss Plaintiff's Complaint in its entirety.

Dated: May 27th, 2020.

Respectfully submitted,

By: /s/ *Monica L. Irel*

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CERTIFICATE OF SERVICE

I hereby certify that on May 27th, 2020, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served by United States First Class Mail on all counsel or parties of record on the service list below:

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