IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISIPPI
EASTERN DIVISION

REAL HOSPITALITY, LLC, d/b/a EDS BURGER JOINT, *Plaintiff*, v. TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, *Defendants*.	Case No. 2:20-cv-87-KS-MTP

DEFENDANT TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA'S MOTION TO DISMISS THE COMPLAINT

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Travelers Casualty Insurance Company of America ("Travelers") hereby moves to dismiss the Complaint, with prejudice. The grounds for this motion, which are more fully stated in the accompanying memorandum of law, are as follows:

Plaintiff Real Hospitality, LLC d/b/a Eds Burger Joint ("Plaintiff" or "Real Hospitality") owns and operates a restaurant in Hattiesburg, Mississippi. Compl., ¶¶ 13, 32. Plaintiff maintains that it is entitled to insurance coverage under an insurance policy (the "Policy") issued by Travelers for its restaurant's claimed financial losses, which Plaintiff alleges were caused by the COVID-19 virus, and by city and state orders (the "Orders") issued to combat the spread of COVID-19. Compl., ¶¶ 30, 39. Plaintiff seeks coverage under the policy's Civil Authority, Business Income and Extra Expense provisions.

The Policy's Civil Authority provision provides coverage for "the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of

civil authority that prohibits access to the described premises," and further requires that "[t]he civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss." Memo. of Law, Ex. A, p. 32 of 170. Plaintiff is not entitled to coverage under this provision for several reasons:

Most significantly, Plaintiff ignores that the Policy includes a virus exclusion that is dispositive of this case. Plaintiff alleges and the Orders reflect that they were issued in an effort to slow the spread of COVID-19. Compl. ¶¶ 38, 71(a); Memo. of Law, Ex. B, pp. 1-3 of 7. The losses alleged, therefore, are caused by or result from the coronavirus, a risk of loss that falls squarely within the Policy's broad exclusion of "loss or damage *caused by or resulting from any virus*, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Memo. of Law, Ex. A, p. 148 of 170 (emphasis added). And the exclusion expressly applies to Civil Authority coverage. *Id.* ("The exclusion . . . applies to . . . forms or endorsements that cover business income, extra expense, rental value or *action of civil authority*." (emphasis added)).

In addition to the case-dispositive virus exclusion, the Complaint also fails, as a matter of law, in several additional respects. First, Plaintiff's allegations fail to establish Civil Authority coverage for the independent reason that the Orders did not "prohibit access" to the described premises, i.e., Plaintiff's restaurant. Courts nationwide have repeatedly held that to "prohibit access" requires that government authorities completely prevent access to the premises. Here, the Orders referenced in Plaintiff's Complaint make clear that access to the insured premises was not prohibited—in fact, access to the restaurant was "allowed and highly encouraged" in order for Plaintiff to provide take-out and delivery service to its customers. Memo. of Law, Ex. B, p. 4.

Second, based on the facts alleged, the Orders were not "due to direct physical loss of or damage to property at locations, other than described [i.e., the insured] premises, that are within 100 miles of the described premises," as required for Civil Authority coverage. To the contrary, Plaintiff alleges, and the Orders reflect, that they were issued for purposes of "social distancing," to slow the spread of COVID-19. Compl. ¶¶ 38, 71(a); Memo. of Law, Ex. B, pp. 1-3 of 7.

Third, to the extent that the Complaint also asserts that the Policy provides Business Income and Extra Expense coverage, Plaintiff fails to plausibly allege facts demonstrating that it suffered a "direct physical loss of or damage to [the insured] property," which Business Income and Extra Expense coverage requires. To the extent Plaintiff vaguely alleges that the "suspension of operations" at its restaurant constitutes direct physical loss of or damage to property, Compl. ¶ 30, those allegations fail as a matter of law under decisions of the Fifth Circuit and this Court. And, again, even if Plaintiff could have pleaded facts that would establish direct physical loss of or damage to property at its premises, Plaintiff's insurance claim—which results from the coronavirus—would still be *expressly excluded* by the virus exclusion.

The Complaint alleges two counts: declaratory judgment (Count I) and breach of contract (Count II). Because Plaintiff cannot demonstrate as a matter of law that it is entitled to coverage under the Policy's Civil Authority, Business Income, or Extra Expense provisions, Plaintiff is not entitled to the declaratory judgment it seeks, nor can Plaintiff establish that Travelers breached the Policy. The Complaint should be dismissed with prejudice because, as a matter of law, Plaintiff cannot plead an entitlement to coverage under his contract with Travelers. To the extent Plaintiff attempts to plead claims on behalf of a proposed class, Compl., ¶¶ 56-68, those allegations cannot survive where Plaintiff's individual claims fail to state a claim. The entire Complaint therefore should be dismissed, with prejudice.

WHEREFORE, Travelers respectfully requests that the Court enter an order dismissing the Complaint, in its entirety, with prejudice, for failure to state a claim upon which relief may be granted.

Respectfully submitted,

By: */s/ Edward J. Currie, Jr.*

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CERTIFICATE OF SERVICE

I, Edward J. Currie, Jr., certify that on June 22, 2020, I caused a true and correct copy of the foregoing to be served via ECF upon the following:

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