

UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF NEW YORK

SALVATORE'S ITALIAN GARDENS INC.,
GARDEN PLACE, INC., and THE
DELANAN HOTEL, LLC

Plaintiffs,

vs.

HARTFORD FIRE INSURANCE
COMPANY

Defendant.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs Salvatore's Italian Gardens Inc., doing business as Italian Prime Restaurant at Salvatore's, The Delavan Hotel, LLC, doing business as The Delavan, and Garden Place, Inc., doing business as Salvatore's Garden Place Hotel (collectively, "Plaintiffs") bring this Complaint, alleging against Defendant Hartford Fire Insurance Company as follows:

I. NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiffs' contract of insurance with the Defendant.
2. In light of the Coronavirus global pandemic ("COVID-19") and state and local orders ("Civil Authority Orders") mandating that all non-essential businesses such as Plaintiffs' cease or restrict operations, Plaintiffs have sustained significant business losses.
3. Plaintiffs' insurance policy provides coverage for all non-excluded business losses, and thus provides coverage here.
4. As a result, Plaintiffs are entitled to declaratory relief that it is covered for all business losses that have been incurred in an amount greater than \$150,000.00.

II. JURISDICTION

5. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiffs and the Defendant. Further, Plaintiffs have suffered business losses in an amount greater than \$150,000.00. The amount in controversy necessary for diversity jurisdiction over a declaratory judgment action is measured by the value of those business losses. *Id.* at § 1332(a).

6. The Court has personal jurisdiction over Defendant because at all relevant times it has engaged in substantial business activities in the State of New York. At all relevant times Defendant transacted, solicited, and conducted business in New York through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in New York. Defendant purposefully availed itself of personal jurisdiction in New York because it contracted to provide insurance to Plaintiff in New York which is the subject of this case.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) because a substantial portion of the wrongful acts upon which this lawsuit is based occurred in this District. Venue is also proper pursuant to 28 U.S.C. § 1391(c) because Plaintiff is a New York corporation and Defendant is a corporation that has substantial, systematic, and continuous contacts in the State of New York, and the acts and/or omissions complained of took place, in whole or in part, within the venue of this Court.

III. PARTIES

8. At all relevant times, Plaintiff Salvatore's Italian Gardens Inc., doing business as Italian Prime Restaurant at Salvatore's ("Salvatore's"), is a corporation authorized to do business and doing business in the State of New York, County of Erie. Salvatore's Italian Gardens Inc.

owns, operates, manages, and/or controls Salvatore's, a restaurant at 6461 Transit Road in Depew, New York 14043.

9. At all relevant times, Plaintiff The Delavan Hotel LLC, doing business as The Delavan ("The Delavan"), is a limited liability company authorized to do business and doing business in the State of New York, County of Erie. The LLC has one member who owns 100% of the stock and resides in the State of New York. The Delavan Hotel LLC owns, operates, manages, and/or controls The Delavan, a hotel at 6461 Transit Road in Depew, New York 14043.

10. At all relevant times, Plaintiff Garden Place, Inc., doing business as Salvatore's Garden Place Hotel ("The Garden Place Hotel"), is a corporation authorized to do business and doing business in the State of New York, County of Erie. Garden Place, Inc. owns, operates, manages, and/or controls The Garden Place Hotel, a hotel at 6615 Transit Road in Depew, New York 14043

11. At all relevant times, Defendant Hartford Fire Insurance Company ("Hartford" or "Defendant") is a corporation doing business in the County of Hartford, State of Connecticut, and provides business interruption coverage to its insureds, including the Plaintiffs.

12. Defendant issued a Special Multi-Flex Business Insurance Policy to the Plaintiff (Policy Number 01 UUN ZL1216) for the period of August 1, 2019 to August 1, 2020. *See* Policy Declarations page, attached hereto as **Exhibit A**.

13. The policy, currently in full effect, includes "Property Choice" coverage which incorporates business interruption coverage for, among other things, business personal property and income protection & extra expense.

14. Plaintiffs submitted an insurance claim arising out of business losses sustained due to the New York Civil Authority Orders issued as a result of the risk human and property loss from

COVID-19. On March 24, 2020, Defendant denied Plaintiffs' claim and asserted that Plaintiffs were not entitled to coverage for loss of income. *See* Denial Letter, attached hereto as **Exhibit B**.

IV. FACTUAL BACKGROUND

A. Insurance Coverage

15. On or about August 1, 2019, Defendant entered into a contract of insurance with the Plaintiffs specifically to provide, among other things, business income coverage in the event of business interruption or closures by order of Civil Authority, and for business losses as a result of property damage at its various locations in Erie County, State of New York (the "Covered Properties").

16. The Covered Properties consist of, among other locations:

- a. The Delavan Hotel at 6461 Transit Road in Depew, New York 14043 (*see* <https://thedelavanbuffalo.com/>, last visited 5/30/2020);
- b. Salvatore's, at 6461 Transit Road in Depew, New York 14043 (*see* <http://salvatoresitalianprime.com/>, last visited 5/30/2020), and;
- c. The Garden Place Hotel at 6615 Transit Road in Depew, New York 14043 (*see* <http://gardenplacehotelbuffalo.com/>, last visited 5/30/2020).

17. The Covered Properties are covered under a Special Multi-Flex Business Insurance Policy to the Plaintiffs issued by the Defendant with Policy Number 01 UUN ZL1216 (hereinafter "Policy").

18. The Policy is currently in full effect, providing, among other things coverage for property, business personal property, income protection & extra expense, and additional coverages between the period of August 1, 2019 to August 1, 2020.

19. Plaintiffs faithfully paid policy premiums to Defendant, specifically to provide, among other things, coverage for the loss of business income and extra expense sustained in the event of business interruption or closures by order of Civil Authority.

20. Under the Policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the Covered Properties is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiffs' Covered Properties. This additional coverage is identified as coverage under "Civil Authority."

21. The Policy is an all-risk policy, insofar as it provides that covered causes of loss under the policy means direct physical loss or direct physical damage unless the loss is specifically excluded or limited in the Policy.

22. Based on information and belief, the Defendant has accepted the policy premiums with no intention of providing coverage for business income losses resulting from orders of a Civil Authority that the Covered Properties be shut down or restricted, or any related losses and/or damages.

23. Defendant's denial of coverage is based on its claim that the Covered Properties did not sustain direct physical loss or damage. *See* Denial Letter, attached hereto as **Exhibit B**.

24. However, Defendant's narrow reading of "loss" renders the Civil Authority coverage ineffectual and demonstrates Defendant had no intention of providing coverage for losses Plaintiffs faithfully paid premiums to insure against.

B. The Coronavirus Pandemic

25. The scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage. It is clear that contamination of the Covered Property would be a direct physical loss requiring remediation to clean the surfaces of the salon.

26. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. *See* <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 29, 2020).

27. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

28. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight (28) days.

29. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

C. Civil Authority

30. On March 7, 2020, New York Governor Andrew Cuomo declared a Disaster Emergency for the entire state of New York as a result of COVID-19.

31. On March 12, 2020, Governor Cuomo set restrictions on large gatherings.

32. On March 20, 2020, the State of New York issued a stay-at-home order that all non-essential workers must stay at home as a result of the COVID-19 pandemic. To date, this order has been extended to at least May 15, 2020.

33. As of March 22, 2020, Governor Cuomo ordered all “non-essential businesses” statewide to be closed. This Order remains in effect as of this filing. *See* State's Executive Order 202.6. The Governor ordered that essential businesses can remain open subject to restriction. Essential businesses include hotels (infrastructure) and restaurants/bars (but only for take-

out/delivery) (retail). Any dine-in or on-premise restaurant or bar service, is specifically deemed non-essential.

34. Further, on April 10, 2020 President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff:

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it's something that we've already suggested, we're talking to them. ***Business interruption insurance***, I'd like to see these insurance companies—you know you have people that have paid. When I was in private I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I'd have business where I had it, I didn't always have it, sometimes I had it, sometimes, I had a lot of different companies. ***But if I had it I'd expect to be paid***. You have people. ***I speak mostly to the restaurateurs***, where they have a restaurant, they've been paying for 25, 30, 35 years, business interruption. They've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects, OK. And I don't see the word pandemic mentioned. Now in some cases it is, it's an exclusion. But in a lot of cases I don't see it. I don't see it referenced. And they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair, and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot of money to a lot of people. And they've been paying for years, sometimes they just started paying, but you have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen.

https://youtu.be/_cMeG5C9TjU (last visited on April 29, 2020) (emphasis added).

35. The President is articulating a few core points:
- a. Business interruption is a common type of insurance.

- b. Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.
- c. This pandemic should be covered unless there is a specific exclusion for pandemics.
- d. If insurers deny coverage, they would be acting in bad faith.

36. These Orders and proclamations, as they relate to the closure of all “non-essential businesses” and restrictions on essential businesses evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiffs’, as the requisite contact and interaction causes a heightened risk of the property becoming unsuitable for business.

37. Plaintiffs suffered losses as a direct consequence of the Civil Authority stay-at-home orders for public safety issued by the Governor of New York and the State of New York generally. Accordingly, Plaintiffs have submitted a claim to Defendant related to such losses.

38. However, Defendant has denied Plaintiffs’ claim in contravention of the clear policy language entitling Plaintiffs to coverage for business losses arising out of the Civil Authority Orders.

D. Impact on Plaintiffs

39. Each of Plaintiff’s businesses were significantly interrupted.

40. Plaintiffs’ businesses are not closed environments, and because people – staff, customers, community members, and others – constantly cycle in and out, there is an ever-present risk that the Covered Properties are contaminated and would continue to be contaminated.

41. Businesses like the Plaintiffs’ are more susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on the Covered Properties and remain viable for far longer as compared to a facility with open-air ventilation.

42. Plaintiffs' businesses are also highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the service nature of the businesses place staff and customers in close proximity to the property and to one another.

43. The Delavan Hotel did not close but its business operations have been significantly restricted pursuant to New York's Civil Authority Orders referenced herein.

44. Salvatore's shut its doors to customers at the close of business on March 13, 2020 and continues to be shut down pursuant to New York's Civil Authority Orders referenced herein. Prior to the shutdown, Salvatore's was open 7 days a week in the dining room, opening at 5 p.m. Banquets took place at all hours of the day and evening as scheduled. Salvatore's furloughed 222 people that were on the payroll at the time of the shutdown and only one employee remains on the payroll now. Pursuant to New York Phase 3 reopening protocols, Salvatore's is beginning to prepare for a June 15th re-opening at 25% capacity in the restaurant and no banquets or groups of more than 10 people at any one time

45. Salvatore's Garden Place Hotel shut its doors to customers at the close of business on March 16, 2020 and continues to be shut down pursuant to New York's Civil Authority Orders referenced herein. All reservations and contracts for the Garden Place Hotel were moved to The Delavan. Pursuant to New York reopening protocols, the Garden Place Hotel is beginning to prepare for a June 8th re-opening. The Garden Place Hotel furloughed 78 people that were on the payroll at the time of the shutdown and intend on bringing back approximately 30 individuals to staff the hotel depending on the amount of business after the re-opening.

46. The government-mandated closure is physically impacting all three of Plaintiffs' businesses. Any effort by the Defendant to deny the reality that the above-referenced Civil

Authority Orders have caused physical loss and damage would constitute a false and potentially fraudulent misrepresentation.

47. A declaratory judgment determining that the coverage provided under the Policy will prevent the Plaintiffs from being left without vital coverage acquired to ensure the survival of the businesses due to the shutdown caused by the Civil Authority Orders is necessary. As a result of these Orders, Plaintiffs have incurred, and continue to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

CAUSE OF ACTION

DECLARATORY RELIEF

48. Plaintiffs re-allege and incorporate by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

49. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in “a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a); *see also Columbus McKinnon Corp. v. SST Casting, Inc.*, No. 08-CV-1672, 2009 WL 1563922, at *3 (W.D.N.Y. June 3, 2009); *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003).

50. An actual controversy has arisen between Plaintiffs and the Defendant as to the rights, duties, responsibilities and obligations of the parties under the Policy in that Plaintiffs contend and, on information and belief, the Defendant disputes and denies that:

- a. The Civil Authority Orders constitute a complete or partial prohibition of access to Plaintiffs’ Covered Properties;
- b. The prohibition of access by the Civil Authority Orders has specifically “prohibit[ed] access to the premises” in whole or in part as set forth in the Policy’s Civil Authority provision’

- c. The Policy's virus an exclusion does not apply here;
- d. The Civil Authority Orders trigger coverage;
- e. The Policy includes coverage for losses caused by the Civil Authority Orders;
- f. The Policy includes coverage for losses caused by the Coronavirus;
- g. The Policy provides coverage to Plaintiffs for any current and future civil authority closures of businesses in Erie County and New York State due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters;
- h. The Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Covered Properties; and
- i. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

51. Plaintiffs seek a Declaratory Judgement to determine whether the Civil Authority Orders "prohibit[] access to the premises" in whole or in part of Plaintiffs' Covered Properties as set forth in the Policy's Civil Authority provision.

52. Plaintiffs further seek a Declaratory Judgement to affirm that the Civil Authority Orders trigger coverage.

53. Plaintiffs further seek a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiffs for any current and future Civil Authority closures of businesses in Erie County and New York State due to physical loss or damage from the Coronavirus and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Covered Properties.

54. Plaintiffs do not seek any determination of whether the Coronavirus is physically in or at any of the Covered Properties specifically, the amount of damages, or any other remedy other than declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs herein pray as follows:

- 1) For a declaration that the Civil Authority Orders constitute a prohibition of access in whole or in part to Plaintiffs' Covered Properties.
- 2) For a declaration that the prohibition of access by the Civil Authority Orders "prohibits access to the premises" in whole or in part as stated in the Policy.
- 3) For a declaration that the Civil Authority Orders trigger coverage under the Policy.
- 4) For a declaration that the Policy provides coverage to Plaintiffs for any current, future and continued civil authority closures of businesses in Erie County and New York State due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters.
- 5) For a declaration that the virus exclusion does not preclude coverage of Plaintiffs' loss of business income or the physical loss or damage suffered at the Insured Properties;
- 6) For a declaration that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiffs' Covered Properties or the immediate area of the Plaintiffs' Covered Properties.
- 6) For such other relief as the Court may deem proper.

TRIAL BY JURY IS DEMANDED

Dated: June 2, 2020

Respectfully submitted,

/s/ John E. Richmond

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