

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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JACK IRWIN, D.D.S.,

Plaintiff,

Index No. 511561/2020

v.

DECISION & ORDER

Hon. Larry D. Martin

MIDVALE INDEMNITY COMPANY,

Defendant.

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Plaintiff JACK IRWIN, D.D.S., a sole proprietor, commenced this declaratory judgment action against Defendant MIDVALE INDEMNITY COMPANY (“Midvale”) seeking a ruling that Plaintiff’s dental practice (the “Covered Property”) is insured for “business losses” related to the Covid-19 pandemic (the “Pandemic”) under its commercial property insurance policy (“the Policy”). Defendant moved to dismiss pursuant to CPLR §§ 3211(a)(7) and (a)(1). Plaintiff cross-moves for leave to amend the Complaint to cure any defects.

Analysis

The Policy’s property coverage provisions under Section I(A) provides that such coverage applies to “direct physical loss of or damage to” caused by or resulting from “Covered Cause of Loss.” Such coverage is limited by, *inter alia*, the Policy’s “Exclusions” in its Section I(B). Said exclusions include losses stemming from a “virus or bacteria” (the Virus Exclusion”).

In moving to dismiss, Defendant refers to *Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*, 515 F.Supp.3d 95 (S.D.N.Y. 2021) (“Redenburg”), where that court interpreted Midvale’s same policy. The *Redenburg* plaintiff raised essentially the same arguments as those raised by Plaintiff here, *i.e.*, that within the context of the Covid-19 Pandemic, the Policy’s

“Business Income,”¹ “Extra Expense,”² and “Civil Authority”³ provisions supersede the Policy’s explicit Virus Exclusion since (1) Covid-19 particles in the air satisfy the policy’s “direct physical damage” predicate for coverage and (2) the “proximate cause” of the plaintiff’s loss was, not just the virus, but also this State’s Governor’s “civil authority” orders mandating temporary closure of all nonessential businesses.

In rejecting the *Redenburg* plaintiff’s foregoing arguments and finding the policy’s Virus Exclusion dispositive, the court reasoned that each of the sections cited for the policy’s coverage provisions were clearly conditioned upon, rather than modifiers of, the Policy’s exclusion provisions.⁴ Other New York Courts have similarly rejected Plaintiff’s argument that Covid-19 particles in the air constitute “direct physical loss of or damage to” the covered property for purposes of an insurance agreement. *See, e.g., Buffalo Xerographix, Inc. v. Sentinel Ins. Co., Ltd.*, No. 1:20-CV-520, 2021 WL 2471315 (W.D.N.Y. June 16, 2021); *Deer Mountain Inn LLC v. Union Ins. Co.*, No. 120CV0984BKSDJS, 2021 WL 2076218 (N.D.N.Y. May 24, 2021); *Office Solution Gr., LLC v. Nat’l Fire Ins. Co. of Hartford*, No. 1:20-cv-4736-GHW, 2021 WL 2403088 (S.D.N.Y. June 11, 2021); *Elite Union Installations, LLC v. Nat’l Fire Ins. Co. of Hartford*, ___ F. Supp. ___, 2021 WL 4155016, at *10 (S.D.N.Y. Sept. 13, 2021).

¹ “We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ during the ‘period of restoration.’ The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.” (Policy at p. 5).

² “We will pay necessary Extra Expense you incur during the ‘period of restoration’ that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.” (Policy at p. 7).

³ “When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises” (Policy at p. 7).

⁴ *Cf. Benny’s Famous Pizza Plus Inc. v. Sec. Natl. Ins. Co.*, 72 Misc. 3d 1209(A), 2021 N.Y. Slip Op. 50684(U) (Sup. Ct., Kings County 2021).

This Court concurs with the forgoing precedents and finds that this Policy's Virus Exclusion supersedes its coverage inclusions. Plaintiff's additional argument that the Pandemic's "global scale," somehow, nullifies the Policy's express exclusions is without contractual, statutory, or judicial support.

Accordingly, it is hereby

ORDERED, Defendant's motion to dismiss is **granted**.

Date: ~~November 15, 2021~~

December 2, 2021

SO ORDERED,



JSC

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**