UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-61889-CIV-SMITH

THE CIGAR COLLECTION CORP,

Plaintiff,

v.

ASPEN SPECIALTY INSURANCE COMPANY,

Defendant.
_____/

ORDER GRANTING MOTION TO DISMISS

This matter is before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint [DE 9], Plaintiff's Response [DE 18], and Defendant's Reply [DE 20]. Additionally, Defendant has filed numerous Notices of Supplemental Authority [DE 19, 21-26, 30, 32-35]. Plaintiff made an insurance claim, under a policy issued by Defendant, seeking lost income occasioned by business closures during the COVID-19 pandemic. Defendant denied the claim. Plaintiff's Complaint ("Complaint") [DE 1-3] alleges a single count for breach of contract. Defendant moves to dismiss the Complaint based on the policy language and Plaintiff's failure to state a cause of action upon which relief can be granted. For the reasons set forth below, Defendant's Motion is granted.

I. FACTS ALLEGED IN THE COMPLAINT

Plaintiff owns and operates a cigar bar in Pembroke Pines, Florida. Defendant issued to Plaintiff a commercial property insurance policy, Policy Number AB8623219 (the "Policy") with

initial effective dates June 18, 2019 through June 18, 2020. The Policy identifies the insured property as located at 209 SW 145th Terrace, Pembroke Pines, Florida 33027 (the "Cigar Bar").

The Policy insures against "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (Policy [DE 1-2] at p. 32 of 120.[1]) "Covered Cause of Loss" is defined as "direct physical loss unless the loss is excluded or limited in th[e] policy." (*Id.* at p. 50 of 120.) Plaintiff sues for breach of the Business Income and Extra Expense provisions of the Policy. Plaintiff has admitted that it does not seek relief for a claim under the Policy's Civil Authority provision.[2]

The Policy's Business Income and Extra Expense Form states, in pertinent part, that:

> 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 premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

(*Id.* at p. 87 of 120 (emphasis added).) The Extra Expense provision states that it only applies if the Business Income Provision applies. (*Id.*) It defines "Extra Expense" as: "necessary expenses

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[1] The page numbers cited are to the page numbers assigned by CM/ECF, not the page numbers on the Policy.

[2] Under the Civil Authority Coverage, the Policy states, in relevant part, that:

> When the Declarations show that you have coverage for Business Income and Extra Expenses, you may extend that insurance to apply to 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 premise. The civil authority action must be due to *direct physical loss of or damage to property* at locations, other than described premise, caused by or resulting from a Covered Cause of Loss.

(DE 1-2 at 88 (*emphasis added*).)

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 caused by or resulting from a Covered Cause of Loss." (*Id.*) The Policy defines a "suspension" as the "slowdown or cessation of [Plaintiff's] business activities; or [t]hat a part or all of the described premises is rendered untenantable." (DE 1-2 at 95.) The Policy also defines "operations" as "[y]our business activities occurring at the described premises; and [t]he tenantability of the described premises, if coverage for Business Income Including 'Rented Value' or 'Rental Value' applies." (*Id.)*

Plaintiff alleges that "as a result of the spread of the SARS-CoV-2 virus and COVID-19 pandemic, certain state and local governments issued executive orders, decrees, and mandates [that] prohibited and/or limited patrons, customers, vendors, employees and others from going to business establishments, including Plaintiff's business, resulting in the suspension of operations at the insured premises." (Compl. ¶ 9). Plaintiff further alleges that it sustained losses ("Loss") which "are ongoing and will continue in the future." (*Id*. ¶ 10.) Plaintiff reported its claim to Defendant seeking coverage for the alleged loss of business income. (*See id.* ¶ 11.) Plaintiff alleges, without saying more, that the Loss is covered under the Policy. (*Id.* ¶ 12.) Defendant denied Plaintiff's claim. (*See id.* ¶ 14.)

On August 10, 2020, Plaintiff filed its Complaint against Defendant in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. Plaintiff's single count complaint alleges a cause of action for breach of contract. Defendant removed the lawsuit to federal court on September 16, 2020. Defendant now seeks to dismiss the Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

II. MOTION TO DISMISS STANDARD

A. Rule 12(b)(6)

The purpose of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the facial sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). The rule permits dismissal of a complaint that fails to state a claim upon which relief can be granted. *See id.* The rule should be read alongside Federal Rule of Civil Procedure 8(a)(2), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although a complaint challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and a "formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When a complaint is challenged under Rule 12(b)(6), a court will presume that all well-pleaded allegations are true and view the pleadings in the light most favorable to the plaintiff. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007). However, once a court "identif[ies] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," it must determine whether the well-pled facts "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). A complaint can only survive a 12(b)(6) motion to dismiss if it contains factual allegations that are "enough to raise a right to relief above the speculative level, on the assumption that all the [factual] allegations in the complaint are true." *Twombly*, 550 U.S. at 555. However, a well-pled complaint survives a motion to dismiss "even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556.

B. Florida Contract Law

This case was removed from state court based on diversity jurisdiction pursuant to 28 U.S.C. § 1332. Therefore, the Court applies the substantive law of Florida as the forum state. *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC,* 601 F.3d 1143, 1148 (11th Cir. 2010). Under Florida law, interpretation of an insurance contract is a matter of law to be decided by the court. *Mama Jo's, Inc. v. Sparta Ins. Co.,* 823 F. App'x 868, 878 (11th Cir. 2020). In determining coverage under an insurance policy, courts look at the policy in its entirety and are required to give "every provision its full meaning and operative effect." *State Farm Fire & Cas. Co. v. Steinberg,* 393 F.3d 1226, 1230 (11th Cir. 2004). Florida law requires that the plain and unambiguous language of the policy controls. *See Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003). Only if the language is susceptible to more than one reasonable interpretation, "one providing coverage and the other limiting coverage," will the court resolve the ambiguity, construing the policy to provide coverage. *Interline Brands, Inc. v. Chartis Specialty Ins., Co.* 749 F.3d 962, 965 (11th Cir. 2014) (quoting *Taurus Holdings, Inc. v. U.S. Fidelity & Guar. Co.,* 913 So. 2d 528, 532 (Fla. 2005)). However, interpreting the contract language is necessary, and the act of interpreting does not impute ambiguity to its terms. *Id.* A party claiming coverage generally bears the burden of proof to establish that coverage exists. *Mama Jo's*, 823 F. App'x at 879 (citing *U.S. Liab. Ins. Co. v. Bove,* 347 So. 2d 678, 680 (Fla. 3d DCA. 1977)). "[A]n 'all-risk' policy is not an 'all loss' policy,' and thus does not extend coverage for every conceivable loss." *Id.* (quoting *Sebo v. Am. Home Assurance Co.,* 208 So. 3d 694, 696-97 (Fla. 2016)).

III. DISCUSSION

Defendant seeks dismissal of Plaintiff's claim because Plaintiff failed to allege direct physical loss of or damage to the insured premises—the prerequisite for obtaining coverage for

business income losses. Plaintiff argues that, at the motion to dismiss stage, a court must accept as true the facts set forth in the complaint and, therefore, Plaintiff has adequately pled its claims.

A. Direct Physical Loss of or Damage to the Property

For a claim to be covered under the Business Income and Extra Expense provisions of the Policies, there must be a "direct physical loss of or damage to" the insured property. The parties dispute the meaning of this phrase, which is not defined in the Policy.

The Eleventh Circuit considered the meaning of the phrase "direct physical loss of or damage to" in *Mama Jo's Inc. v. Sparta Insurance Co.*, 823 F. App'x 868 (11th Cir. 2020), *cert. denied,* No. 20-998, 2021 WL 1163753 (U.S. Mar. 29, 2021), In *Mama Jo's,* an insured restaurant filed a claim for costs incurred to clean the restaurant and for loss of business income after debris and dust from nearby construction fell onto and into the restaurant. *Id.* at 871-72. Applying Florida law, the Eleventh Circuit concluded that:

> "A 'loss' is the diminution of value of something [ ]. Loss, *Black's Law Dictionary* (10th ed. 2014). 'Direct' and 'physical' modify loss and impose the requirement that the damage be actual." *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017); *see also Vazquez v. Citizens Prop. Ins. Corp.*, [304] So.3d [1280], [1284], 2020 WL 1950831, at *3 (Fla. 3d DCA 2020).

Id. at 879. The Eleventh Circuit concluded that "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Id.* at 879.

Numerous courts have concluded that, "under Florida law, loss of use of property for its intended purpose does not constitute 'direct physical loss.'" *Cafe La Trova LLC v. Aspen Specialty Ins. Co.*, -- F. Supp. 3d --, No. 20-22055-CIV, 2021 WL 602585, at *8 (S.D. Fla. Feb. 16, 2021); *see also Atma Beauty, Inc. v. HDI Glob. Specialty SE*, No. 1:20-CV-21745, 2020 WL 7770398, at *4 (S.D. Fla. Dec. 30, 2020) (dismissing a complaint that alleged suspension of business operations, loss of access to the business, loss of business income, incurrence of extra expenses,

and diminution of value and intended use of the business but failed to "clearly articulate the *actual* physical loss or damage" to the business); *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London*, -- F. Supp. 3d --, No. 9:20-CV-80677-UU, 2020 WL 7251643, at *5 (S.D. Fla. Dec. 9, 2020) (holding that inability to use property for its intended purpose is not a "direct physical loss of or damage to property"). Accordingly, Plaintiff must allege actual, physical damage to the Property to obtain coverage under the Policy.

In the instant case, Plaintiff has alleged that " [a]s a result of the spread of the SARS-CoV-2 virus and COVID-19 pandemic certain state and local governments issued executive orders, decrees, and mandates [that] prohibited and/or limited patrons, customers, vendors, employees and others from going to business establishments, including Plaintiff's business, resulting in the suspension of operations at the insured premises." (Compl. ¶ 9). Plaintiff also alleges that it sustained losses ("Loss") that "are ongoing and will continue in the future," and that the "Loss is covered under the Policy." (*Id*. ¶ 10, 12.) As outlined above, conclusions are not entitled to a presumption of truth at the motion to dismiss stage. Therefore, the Court need not consider Plaintiff's conclusory statements that COVID-19 caused the Loss or that the Loss is covered under the Policy.

Plaintiff does not allege in its Complaint that there was actual physical loss or damage to the Cigar Bar as mandated under Florida law. Plaintiff argues that the Business Income coverage provision is triggered by two separate things: 1) direct physical loss of covered property; or 2) damage to covered property that need not be actual. Plaintiff asserts that it appropriately states a claim because the Cigar Bar not being able to be used for its intended function amounts to a physical loss which triggers coverage under the Policy.

Plaintiff's argument is unavailing. Plaintiff cites to no controlling authority to support its interpretation of direct physical loss of covered property. Despite making these conclusory allegations, Plaintiff fails to plead any facts to support these conclusions and has not pled how such facts amount to "direct physical loss of or damage to property," as defined under Florida law. Merely calling the harm "physical" does not make it so. Consequently, Plaintiff has failed to allege a "direct physical loss of or damage to property" that would bring Plaintiff's damages within the Business Income and Extra Expense provisions of the Policy. Accordingly, it is

ORDERED that:

1. Defendant's Motion to Dismiss [DE 9] is **GRANTED**.
2. Plaintiff's Complaint is **DISMISSED**.
3. All pending motions are **DENIED as moot**.
4. The case is **CLOSED**.

DONE AND ORDERED in Fort Lauderdale, Florida on this 19th day of July 2021.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

cc: Counsel of record