

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

B & I PROPERTIES, LTD.,

Plaintiff,

v.

TOWER HILL PRIME INSURANCE CO.,

Defendant,

/

COMPLAINT

Plaintiff, B & I PROPERTIES, LTD. (the “Insured”), hereby sues Defendant, TOWER HILL PRIME INSURANCE CO. (the “Insurance Company”), and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. This is an action for damages that exceeds Thirty Thousand and 00/100 Dollars (\$30,000.00), exclusive of interest, costs and attorney’s fees and equitable relief by way of a Declaratory Judgment action.
2. Plaintiff is a Florida limited partnership with its principal place of business in Miami, Florida.
3. The Insurance Company is a Florida corporation qualified to do business in Florida and has, at all times material hereto, been conducting business in Broward County, Florida.
4. Venue is proper in Broward County, Florida because the contract, which forms the subject matter of this lawsuit, was executed in Broward County, Florida.

5. All conditions precedent to the filing of this lawsuit have occurred, have been waived or have been performed.

GENERAL ALLEGATIONS

6. COVID-19 has been a tragedy that affects all of our lives and businesses. Thus far, COVID-19 has infected more than fifteen million and killed more than 290,000 in the United States and has caused far too many people and businesses to suffer great economic harm.

7. This case is about the severe economic damage COVID-19 has caused the hospitality industry, and the insurance coverage purchased to protect that industry against the risk of catastrophic economic losses like those that Plaintiff now faces.

8. This is an action for breach of an insurance contract due to Defendant's failure to pay insurance proceeds that were due and owing to Plaintiff under a policy of insurance issued by Defendant to Plaintiff.

9. This is also an action for Declaratory Judgment pursuant to Fla. Stat. §86.011 to determine questions of insurance coverage under the policy of insurance issued by Defendant to Plaintiff.

10. Plaintiff owns the Best Western hotel located at 1900 Stirling Road, Dania Beach, FL 33004 (the "Insured Property").

11. Historically, the Insured Property has had strong occupancy rates due to its fair rates and prime location in the heart of the tourist-centric neighborhood of Dania Beach, Florida.

12. Plaintiff purchased Policy No.: ECF0006890-02 from Defendant (the "Policy"). The Insured after diligent search and expending all efforts to locate a copy of the Policy have not been able to do so. However, the Insurance Company must have a copy of said Policy in its

possession; as such the Insured will file a copy of the Policy after the same is provided by the Insurance Company.

13. The Policy provides coverage between October 1, 2019 and December 1, 2020.

14. Plaintiff faithfully paid insurance policy premiums to Defendant.

15. The Policy issued to Plaintiff is an “all risk” commercial property policy which covers loss or damage to the covered premises resulting from all risks other than those expressly excluded. The Policy includes business interruption coverage, which promises to indemnify the insured for lost income and certain expenses in the event of a business suspension.

16. The Policy includes a standard ISO policy form titled “Business Income (and Extra Expense) Coverage Form.” This form is identified by numbers “TC 00 30 10 18.”

17. Plaintiff’s Business Income (and Extra Expense) Coverage Form provides coverage as follows:

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. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises. (emphasis added)

18. “Covered Cause of Loss” is defined in Plaintiff’s Policy as any cause of loss not expressly excluded and must be construed broadly and given its most comprehensive meaning.

19. Under the “Coverage –Business Income” provision of Plaintiffs’ standard policy “Business Income” is defined as:

- a. Net income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses incurred, including payroll.

20. The Policy do not require that the business operations cease entirely, or that the insureds completely lose use of the insured premises in order to trigger coverage for business income losses and extra expense. Rather, “suspension” means:

a. The slowdown or cessation of your business activities; or

b. That a part or all of the described premises is rendered untenable, if coverage for Business Income Including “Rental Value” or “Rental Value” applies.

21. The “period of restoration” is the period of time beginning 72 hours after physical loss or damage to the property and ending on the date when the property is repaired or the business resumes at a new location, whichever comes first.

22. Defendant also promised to cover “Extended Business Income,” or the loss of business income beyond the period of restoration, under some circumstances. Specifically, Defendant promised to cover the insured's actual loss of Business Income beginning on the date when the insured property is repaired and ending either 30 consecutive days thereafter or on the date when operations are restored to the point that they generate business income at normal levels, whichever comes first.

23. In addition to lost business income, the policies cover necessary “Extra Expense,” defined as “necessary expenses ... incur[red] during the ‘period of restoration’ that [the insured] 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.”

24. Finally, form TC 00 30 10 18 includes a provision for “Additional Coverages-Civil Authority,” which can be triggered even when the standard business interruption coverage is not.

It provides:

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, provided that both of the following apply:

- 1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- 2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

25. Plaintiff has suffered a direct physical loss of or damage to its property due to the suspension of its operations from the global COVID-19 pandemic and the civil authorities' measures to reduce the number of COVID-19 cases that develop in the population. These losses are not covered by any of the exclusions included in Plaintiff's all-risk policy.

26. On March 11, 2020 World Health Organization Director General Tedros Adhanom Ghebreyesus declared the COVID-19 outbreak a worldwide pandemic: “WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic.”

27. On March 16, 2020, President Donald J. Trump, the Centers for Disease Control and Prevention, and members of the national Coronavirus Task Force issued to the American public guidance, styled as “30 Days to Slow the Spread” for stopping the spread of COVID-19.

This guidance advised individuals to adopt far-reaching social distancing measures, such as working from home, avoiding shopping trips and gatherings of more than 10 people, and staying away from bars, restaurants, and food courts.

28. Following this advice for individuals to adopt far-reaching social distancing measures, many state government administrations across the nation recognized the need to take measures to protect the health and safety of their residents from the person to person and surface to person spread of COVID-19. As a result, many governmental entities entered civil authority orders suspending, or severely curtailing business operations of non-essential businesses that interact with the public and provide gathering places for the individuals.

29. On March 10, 2020, Broward County declared a Local State of Emergency. On March 22, 2020, Broward County issued Emergency Order 20-01 preventing hotels, motels and other commercial lodging establishments from accepting new reservations.

30. On March 17, 2020, Governor Ron DeSantis issued Executive Order 20-68 further restricting restaurant operations in the State of Florida. On the same day, Miami-Dade County Mayor Carlos Gimenez issued Emergency Order 03-20 closing all restaurants in Miami-Dade County other than for delivery or takeout. These closings remained in effect until May 15, 2020, when Governor DeSantis issued Executive Order 20-123 partially lifting restrictions on restaurants but keeping in place limited occupancy and requiring personal protective measures and structural changes within the properties to safeguard employees and customers.

31. Similar orders have been issued that close or restrict all non-essential business operations or prohibit public access to the property of non-essential businesses. These civil authority orders expressly state that the closing of non-essential businesses is necessary to minimize residents' contact with COVID-19 and protect public health and safety.

32. As a direct result of these governmental orders and the COVID-19 pandemic, Plaintiff could not use its properties as intended, and was forced to suspend and curtail business operations and furlough employees. Plaintiff suffered both direct physical losses and damage to its property in the form of diminished value, lost business income, a reduction in right of full ownership, and forced physical alterations during a period of restoration.

33. Plaintiff has faithfully paid its premiums and Defendant has accepted payment, and as such is obligated to honor its contractual duty to provide coverage for the business losses and extra expense suffered.

34. Most businesses insure against such catastrophic events like the current unforeseen COVID-19 pandemic through all-risk commercial property insurance policies. These policies promise to indemnify the policyholder for actual business losses incurred when business operations are involuntarily suspended, interrupted, curtailed, when access to the premises is prohibited because of direct physical loss or damage to the property or by a civil authority order that restricts or prohibits access to the property. This coverage is commonly known as “business interruption coverage” and is standard in most all-risk commercial property insurance policies.

35. As a result of this pandemic, Plaintiff’s property sustained direct physical loss or damages and will continue to sustain direct physical loss or damages covered by the policy issued by Defendant.

36. On or about May 4, 2020, Plaintiff duly notified Defendant of the loss and allowed for all necessary inspections and evaluations to be made at the insured premises.

37. Defendant assigned Claim No. CLM0013538.

38. On September 3, 2020, Defendant notified Plaintiff it was denying coverage for the loss because there was no physical damage to the Property. A copy of the denial letter is attached hereto as Exhibit "A."

39. Plaintiff's loss of use of the insured property and insured property's inability to function as contemplated and intended by Plaintiff and Defendant is a direct physical loss. As a result of this direct physical loss, Plaintiff has suffered loss of Business Income, has incurred Extra Expenses to minimize the suspension of business and continue its operations, and has suffered other losses and damages.

**COUNT I-BREACH OF CONTRACT AGAINST
DEFENDANT**

40. Plaintiff realleges paragraphs 1-39 and incorporates the same by reference herein.

41. Plaintiff's business insurance with Defendant was in full force and effect as to Plaintiff when its property was damaged, and it is a named insured under Policy No.: ECF0006890-02.

42. During the Policy period, Plaintiff sustained a direct physical loss to its covered property from a covered cause of loss. Plaintiff also sustained a loss of Business Income, Extra Expense, Civil Authority, and Extended Business Income, in addition to other losses and damages.

43. On or about May 4, 2020, Plaintiff duly notified Defendant of the loss and allowed for all necessary inspections and evaluations to be made at the insured premises.

44. On September 3, 2020, Defendant notified Plaintiff it was denying coverage for the loss because there was no physical damage to the Property.

45. This is an action related to Defendant's failure to place the insured premises in its pre-loss condition and adequately compensate Plaintiff for loss of Business Income, Extra

Expense, Civil Authority, and Extended Business Income, and other losses and damages contemplated by the insurance contract between Plaintiff and Defendant.

46. Plaintiff has complied or substantially complied with all conditions to entitle Plaintiff to recover under the policy, the conditions have been waived, or the language of the policy created an impossibility for the conditions to be complied with.

47. Defendant has failed to provide coverages for Plaintiff's losses and has failed to pay the reasonable value of Plaintiff's losses needed to place the insured in its pre-loss condition.

48. Defendant's refusal to provide coverages to and to reimburse Plaintiff adequately for the damages that resulted, and otherwise make Plaintiff whole, is a breach of contract.

49. Plaintiff has been damaged as a result of Defendant's breach in the form of insurance proceeds that have not been paid, interest, costs, and attorney's fees.

50. As a result of Defendant's breach of contract, it has become necessary that Plaintiff retains the services of the undersigned attorney. Plaintiff is obligated to pay a reasonable fee for the undersigned attorney's services in bringing this action, plus necessary costs.

51. Plaintiff has been and remains fully prepared to comply with the obligations pursuant to the aforesaid contract of insurance.

52. Plaintiff is entitled to recover attorney's fees and costs under F.S. § 627.428, F.S. §626.9373, F.S. §57.041, and F.S. § 92.231.

WHEREFORE, Plaintiff demands judgment against Defendant for compensatory damages, consequential damages, interest, costs, and attorney's fees pursuant to F.S. § 627.428, F.S. § 626.9373, F.S. §57.041, and F.S. § 92.231.

COUNT II – DECLARATORY JUDGMENT

53. Plaintiff realleges paragraphs 1-39 and incorporates the same by reference herein.

54. This is an action for declaratory relief brought pursuant to Fla. Stat. § 86.011. Plaintiff is entitled to have any doubt regarding the existence or nonexistence of any right or duty under the insurance policy in question removed.

55. Plaintiff is unsure of its right to coverage for direct physical loss, Business Income, Extra Expense, Civil Authority, and Extended Business Income. Plaintiff believes the Policy provides coverage for all of its COVID-19 related injuries, damages, and losses. Plaintiff has therefore filed this instant action seeking a determination whether the Policy provides coverage to the Plaintiff for its injuries, damages, and losses.

56. On or about March 1, 2020, Florida Governor DeSantis issued Executive Order No.: 20-51 and declared a state of emergency in Florida as a result of COVID-19.

57. Plaintiff's business is a hotel, in Dania Beach, Florida, which was directly affected by Governor DeSantis's Order.

58. Plaintiff received insurance from Defendant which consists of coverage for Business Income, Extra Expense, Civil Authority, and Extended Business Income.

59. On or about May 4, 2020, Plaintiff submitted its claim to Defendant for Loss of Business Income, Extra Expense, Civil Authority, and Extended Business Income, due to the COVID-19 pandemic.

60. On or about September 3, 2020, Defendant denied Plaintiff's claim.

61. Plaintiff suffered a direct physical loss when it was forced to limit its services in an effort to "help stop the spread" of COVID-19 and due to Governor DeSantis' Executive Order limiting all "non-essential" businesses.

62. There is a bona fide, actual dispute between the parties. Plaintiff is unsure of its rights and obligations under the insurance policy in question and is entitled to have the doubt

removed. There is a present and ascertainable state of facts, and the Court is not being asked to merely give legal advice.

63. As a result of the dispute, it has become necessary that Plaintiff retains the service of the undersigned attorney. Plaintiff is obligated to pay a reasonable fee for the undersigned attorney's services in bringing this action, plus necessary costs.

WHEREFORE, Plaintiff requests this Court to:

- a. Take jurisdiction of the subject matter and parties thereto;
- b. Declare that Plaintiff has suffered a direct physical loss;
- c. Declare that Plaintiff's loss is a covered loss which is not excluded or limited under the Policy.
- d. Declare that Plaintiff has sustained loss of Business Income, Extra Expense, Civil Authority, and Extended Business Income due to the necessary suspension of its operation.
- e. Order full disclosure of all documents and allow full and liberal discovery of all facts that may lead to admissible evidence relevant to the determination herein, including but not limited to, production of the complete policy of insurance, and a complete copy of the written materials in the possession of the Defendant that would shed light on the issues involved herein;
- f. Determine applicable law, including the provisions of Florida Statutes that apply to the policy and to the parties;
- g. Declare each policy provision not in conformity with Florida law be amended to comply with Florida law;
- h. Declare that any ambiguities in the statute or policy be construed in favor of insurance coverage;

- i. Declare that the statutes and policy provisions be construed strictly and most strongly against the insurer, and liberally in favor of the insured, so as to affect the dominant purpose of indemnity or payout to the insured;
- j. Declare that the policy of insurance covering the insured provides coverage for the claim submitted by the insured;
- k. Declare that the Plaintiff is entitled to a claim for attorney's fees and costs against Defendant under Fla. Stat. §627.428, §92.231, §57.104, §626.9373, and §57.041 and determine amounts thereunder.
- l. Determine and declare any other material matters pertaining to the respective rights and responsibilities under the policy, as needed to do complete justice in this case.

JURY TRIAL DEMAND

Plaintiffs hereby demand a trial by jury on all issues so triable.

Dated this 3rd day of February 2021.

Respectfully submitted,

Marin, Eljaiek, Lopez & Martinez P.L.

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