

Plaintiff's complaint alleges that Defendants sold it Premier Business Owner's Policy No. BOP00000061201M (the "insurance policy"). The insurance policy was effective from April 2, 2019, until April 2, 2020, and was a renewal of a previous policy. The policy includes civil authority coverage and virus exclusion sections.

In March of 2020, COVID19 became a global pandemic. As a result, the State of Delaware declared a state of emergency due to the public health threat. Plaintiff asserts that the insurance policy premiums have been paid, but that Defendants have refused to provide coverage to which it is entitled.

The issues before the Court revolve around Defendants' October 23, 2020 motion to dismiss. Defendants' motion is fifteen pages long and attached thereto is a series of exhibits that contain portions of the insurance contract at issue and legal authority related to insurance coverage and government orders issued during the COVID19 pandemic. Defendants' motion mainly argues that an endorsement containing an exclusion for losses resulting from any virus (the "virus exclusion") bars Plaintiff's claims. (Defendants' Ex. 5, pg. 72). Secondly, Defendants argue that no physical loss occurred, and that the civil authority coverage contained in the insurance contract is not applicable.

Plaintiff filed its opposition to Defendants' motion on November 20, 2020 in a thirty-six (36) page document and attached over 200 pages in exhibits that include a plethora of legal decisions on the same subject matter. Plaintiff argues that the virus exclusion is not enforceable because it is ambiguous, there was physical damage, and coverage is required for Plaintiff's damages under the civil authority portion of the insurance contract.

After Plaintiff's opposition was filed, Defendants filed a motion to strike pages 16-36 of the filing and all of Plaintiff's exhibits. On December 14, 2020, Plaintiff filed its combined motion

for leave to exceed the page limitations of Loc.R. 12.01 *instanter*, and in opposition to Defendants' motion to strike.

II. MOTION TO STRIKE

Defendants' motion seeks to strike a portion of Plaintiff's memorandum in opposition to its motion to dismiss that exceeds the page limitations of Loc.R. 12.01, and a series of exhibits attached to Plaintiff's memorandum.

A. PAGE LIMITATIONS

Page limitations are limited by Loc.R. 12.01, which states that supporting or opposing briefs shall not exceed fifteen (15) pages, and shall not be considered without prior leave of the Court. Loc.R. 12.03 requires a motion for leave to file a memorandum in excess of fifteen (15) pages to be made no later than seven days prior to the time for filing the brief, and shall set forth unusual and extraordinary circumstances which necessitate exceeding the page limitations. "The enforcement of local court rules is well within the sound discretion of the court, including the power to strike a brief that does not comply with such rules." *Hetrick v. Ohio Dep't of Agric.*, 2017-Ohio-303, 81 N.E.3d 980, ¶ 67 (10th Dist.) (Finding no abuse of discretion where a court refused to strike a brief because it did not count the cover page towards the fifteen page limitation in Loc.R. 12.01.), *quoting Boggs v. Ohio Real Estate Comm'n*, 186 Ohio App. 3d 96, 2009-Ohio-6325, ¶ 42 (Holding that no error occurred where a court addressed only the first fifteen pages of appellant's brief and the first seven pages of her reply where leave was neither sought, nor granted to exceed the page limitation of Loc.R. 12.01.). In *State v. G.F.*, the court held that when an opposing party has filed its brief within the page limitations of Loc.R. 12.01, a party seeking leave to exceed these page limitations in its response, "face[s] a significant hurdle in setting forth any unusual or extraordinary circumstances," to justify their request. *State v. G.F.*, 10th Dist. Franklin

No. 18AP-201, 2019-Ohio-3673, ¶ 14.

Here, Plaintiff's memorandum contra Defendants' motion to dismiss exceeds the page limitations of Loc.R. 12.01 by approximately nineteen pages. No leave was sought by Plaintiff prior to filing its memorandum contra on November 20, 2020. Plaintiff filed its motion for leave to exceed the page limitations on December 14, 2020, outside the time requirements of Loc.R. 12.03. Additionally, Defendants' motion to dismiss was fifteen pages in length, elevating Plaintiff's burden in showing unusual or extraordinary circumstances to justify extending its page limit to respond. In support of leave to exceed the page limits, Plaintiff argues that Defendants' motion involves, "[N]umerous legal issues which are not only complex, but are novel." (Plaintiff Mot. for Leave, pg. 1). Plaintiff has not explained how the test for such an interpretation is different or more complex than any other insurance exclusion such that it would constitute extraordinary circumstances warranting an expansion of the page limitations of Loc.R. 12.01. Since Plaintiff did not comply with the procedural requirements of Loc.R. 12.03, and has not convinced the Court that unusual or extraordinary circumstances exist, pages 16-36 of Plaintiff's oppositional memorandum shall be struck, and will not be considered by the Court.

B. EXHIBITS

Attached to its memorandum in opposition to Defendants' motion to dismiss, Plaintiffs included a series of exhibits totaling over 200 pages, which include: (1) an affidavit from Plaintiff's counsel (Plaintiff Ex. A); (2) subpoenas and discovery requests from other cases (Plaintiff Ex. 1-2, Appendix A); (3) an unsworn declaration that was filed in another case (Plaintiff Ex. 3A); (4) a 166 page judgment entry from a court in London, England (Plaintiff Ex. B); (5) an entry denying a motion to dismiss from Cuyahoga County case CV-20-932117 (Plaintiff Ex. C); (6) an entry denying a motion to dismiss from the Western District of Missouri Southern Division in case 20-

cv-03127-SRB (Plaintiff Ex. DB); and (7) an entry denying summary judgment from a case from Louisiana number 2020-02558 (Plaintiff Ex. E). Defendants request that each of these exhibits be stricken as improperly filed.

“In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint.” *Cramer v. Javid*, 10th Dist. Franklin No. 10AP-199 (C.P.C. No. 09CVH-11-17235), 2010-Ohio-5967, ¶ 7. Documents and evidence outside the complaint are irrelevant unless they have been incorporated into the complaint. *Id.* at 8; Civ.R. 10(C); *Columbus Green Bldg. Forum v. State*, 2012-Ohio-4244, 980 N.E.2d 1, ¶ 23 (10th Dist.).

Here, Plaintiff’s Exhibits A, 1-2 (including Appendix A), and 3A all contain evidentiary materials. None of these documents is either attached to, or incorporated by Plaintiff’s complaint. Therefore, the Court may not consider them in deciding Defendants’ motion to dismiss. The remainder of Plaintiff’s Exhibits contain legal decisions from other jurisdictions. The Court will consider these decisions to the extent that they contain relevant persuasive legal authority in deciding Defendants’ motion to dismiss. The Court notes that Defendants have also provided summaries and the full text of many legal decisions, which will also receive consideration by the Court.

After considering Defendants’ motion to strike and Plaintiff’s motion for leave, the Court grants in part the motion to strike as described above, and denies Plaintiff’s motion for leave.

III. MOTION TO DISMISS

A. LEGAL STANDARD

“A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6) tests the sufficiency of the complaint.” *Brown v. Levin*, 10th Dist. Franklin No.11AP-349, 2012-Ohio-5768, ¶ 15. In reviewing whether a motion to dismiss should be

granted, the court must accept all factual allegations in the complaint as true, and it must appear beyond doubt that the plaintiff can prove no set of facts entitling him/her to relief. *Id.*

B. THE VIRUS EXCLUSION

Defendants' argument for dismissal relies on the virus exclusion, which is an endorsement that modifies the insurance provided by Defendants' in the businessowners coverage form and policy, and states:

A. The exclusion set forth in Paragraph B. applies to all coverage under Section I – Property in all forms and endorsements that comprise this Businessowners Policy, except as provided in Paragraph C. This includes but is not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

(Defendants' Ex. 5, pg. 72).

Plaintiff responds by arguing that if the Court presumes all factual allegations within its complaint true as required when analyzing a motion to dismiss pursuant to Civ.R. 12(B)(6), Defendants' motion to dismiss must fail. Plaintiff also argues that Defendants' motion cannot be granted because: (1) the virus exclusion contains ambiguous language that renders it unenforceable; (2) Defendants' motion is a summary judgment motion masquerading as a motion to dismiss; (3) the closure of Plaintiff's business was a result of a government order, not a virus; and (4) the virus exclusion is not applicable to a pandemic. Though the substance and specifics of some of these arguments is contained in the portion of Plaintiff's memorandum contra that will not be considered by the Court, the arguments are at least facially stated on page nine and earlier, warranting the Court's consideration. (Plaintiff Memo. Contra, pg. 9).

1. CIV.R. 12(B)(6) SUFFICIENCY

Plaintiff first argues that Defendants, in their motion to dismiss, ignored the bulk of Plaintiff's complaint. Plaintiff believes that if the Court considers the entirety of its complaint, it must find that Plaintiff has sufficiently alleged its claims to survive a Civ.R. 12(B)(6) motion.

The allegations that Plaintiff highlights in its memorandum contra to support this argument assert that as a result of the Delaware State Declaration of a State of Emergency (the "Delaware Order"), "Plaintiff has been forced to halt ordinary operations, resulting in substantial lost revenues and forcing the Plaintiff to shut down and/or limit operations, resulting in a loss of business income." (Complaint, ¶ 10). Plaintiff also alleges that the Delaware Order states that the pandemic is causing direct physical property damage, which includes the damages it alleges occurred to Plaintiff, requiring coverage from Defendants. (Complaint, ¶ 37-39).

Plaintiff goes to great lengths in its arguments and in the complaint to avoid using the term virus when describing the COVID19 pandemic. It also argues both that the Delaware Order, not COVID19, is the cause for its damages, and that, "[T]here is a dispute as to whether the Virus or Bacteria Exclusion even pertains to a pandemic," making the virus exclusion inapplicable. (Plaintiff Memo. Contra, pg. 9). The Court disagrees with both suppositions.

First, Plaintiff's argument that a virus does not pertain to a pandemic is immaterial because the Delaware Order does not describe COVID19 as a pandemic, but as a, "[S]erious public health threat." (Defendants' Ex. 2, pg. 2). The fact that COVID19 is a virus is inherent in the language of the Delaware order, which refers to COVID19 as the "coronavirus" or "novel coronavirus". (Defendant, Ex. 2, pg. 2); *See Draughon v. Jenkins*, 4th Dist. Ross No. 16CA3528, 2016-Ohio-5364, ¶ 26, *citing State ex rel. Everhart v. McIntosh*, 115 Ohio St. 3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 8 (Holding that a court can take judicial notice of public records from the internet

without converting a Civ.R. 12(B)(6) motion to dismiss to a motion for summary judgment.).

Second, despite Plaintiff's characterization of the Delaware Order, not COVID19, as being the cause for its interruption of business, and thereby triggering its claim for insurance coverage, the Delaware Order was issued solely because of the serious public health threat posed by COVID19. (Defendants Ex. 2, pg. 1). The Court therefore finds that the COVID19 virus is an actual cause of Plaintiff's claim for coverage, and the Court must review the virus exclusion to determine whether it bars coverage for Plaintiff's claims.

2. AMBIGUITY

Plaintiff asserts that the language contained in the virus exclusion is ambiguous, and therefore unenforceable. (Memo. Contra, pg. 9). Defendants respond by arguing that the plain meaning of the virus exclusion bars coverage. The Court agrees.

“Courts generally interpret insurance policies in accordance with the same rules as other types of contracts.” *Royal Paper Stock Co. v. Robinson*, 10th Dist. Franklin No. 12AP-455, 2013-Ohio-1206, ¶ 29. To do this, the contract is read as a whole, with any endorsements included as part of the contract policy, and the intent of the parties is presumed to lie in the language used by the parties in the policy unless the language is ambiguous. *Goodell v. Motorist Mut. Ins. Co.*, 2017-Ohio-8425, 99 N.E.3d 1158, ¶ 32 (6th Dist.).

In determining whether an ambiguity exists, the court must give words and phrases their plain and ordinary meaning unless a word or phrase is given a specific definition within the contract. *State Farm Mut. Auto. Ins. Co. v. Gourley*, 10th Dist. Franklin No. 12AP-200, 2012-Ohio-4909, ¶ 15; *Robinson* at 30. When provisions of an insurance policy are susceptible to more than one interpretation, they must be construed strictly against the insurer, and the court must adopt any reasonable construction that results in coverage for the insured. *Id.* at 12.

Here, the language contained in the virus exclusion in §B is not ambiguous. It clearly states that there will be no coverage, “[F]or loss or damage caused by or resulting from any virus * * * that induces or is capable of inducing physical distress, illness or disease.” (Defendants’ Ex. 5, pg. 72). COVID19 is capable of inducing physical distress, illness or disease, as evidenced by the language of the Delaware Order contained in Defendant’s exhibits 2-4, ordering persons within Delaware to shelter in place to avoid transmission of the virus, and acknowledging that COVID19 represents a serious public health threat.

Since the virus exclusion is not ambiguous, the Court must apply its plain meaning to determine whether it bars the coverage that Plaintiff seeks for interruption to its business as a result of COVID19. The Court has reviewed the businessowners policy, which only includes coverage for covered causes of loss. (Defendants’ Ex. 5, Part 2, pg. 2). Covered causes of loss are risks of direct physical loss not excluded or otherwise limited under Section I- Property (A)(4) or (B). Defendants’ Ex. 5, Part 2, pg. 3). Losses resulting from COVID19, a virus, are not covered because they are excluded by the virus exclusion. (Defendants’ Ex. 5, Part 2, pg. 3, Section I- Property (A)(3)). Applying the virus exclusion to Section I-Property (B)(1) excludes coverage related to COVID19. (Defendants’ Ex. 5, pg. 72). Therefore, any direct physical loss or damage to Plaintiff’s property caused by COVID19 is not a covered cause of loss as described above and provided for in Section I- Property (A)(5)(f), which covers losses for a suspension in business, “[C]aused by direct physical loss of or damage to property at the described premises,” because, “The loss or damage must be caused by or result from a Covered Cause of Loss.” (Defendants’ Ex. 5, Part 2, pg. 7, Section I- Property (A)(5)(f).

This analysis allows the Court to conclude that the virus exclusion bars coverage for the business interruption that Plaintiff alleges in its complaint was caused by COVID19. Having ruled

so, the Court declines to address Plaintiff's other arguments, most of which are laid out in the stricken portion of Plaintiff's memorandum contra.

3. EVIDENTIARY CONSIDERATIONS

Plaintiff argues that Defendants' motion to dismiss under Civ.R. 12(B)(6) is actually a Civ.R. 56 motion for summary judgment. Plaintiff submits that Defendants' motion requires the Court to decide a number of factual issues, including: (1) whether Plaintiff is an essential or non-essential business; (2) whether the government order closing businesses in the State of Delaware was issued in response to business property being damaged by COVID19; (3) the interpretation of the insurance policy. (Plaintiff Memo Contra, pg. 15).

Having decided that the virus exclusion is a bar to coverage, the Court does not believe that it is necessary to decide these issues, nor does the Court view Defendants' motion to be a disguised motion for summary judgment.

IV. CONCLUSION

After reviewing the pleadings, motions, and arguments of counsel, the Court, having considered the allegations in Plaintiff's complaint as true, finds no set of facts that Plaintiff may prove that would entitle it to relief. Consequently, Defendants' Civ.R. 12(B)(6) motion to dismiss is well-taken, and is **GRANTED**. In coming to this conclusion, the Court also finds that Defendants' motion to strike is **GRANTED IN PART**, and Plaintiff's motion for leave is **DENIED**.

IT IS SO ORDERED.

Copies to all parties.

Franklin County Court of Common Pleas

Date: 02-01-2021
Case Title: EYE SPECIALISTS OF DELAWARE -VS- HARLEYSVILLE
WORCHESTER INSURANCE COMPAN ET AL
Case Number: 20CV006386
Type: ORDER

It Is So Ordered.



/s/ Judge Jaiza Page

Court Disposition

Case Number: 20CV006386

Case Style: EYE SPECIALISTS OF DELAWARE -VS-
HARLEYSVILLE WORCHESTER INSURANCE COMPAN ET AL

Case Terminated: 18 - Other Terminations

Motion Tie Off Information:

1. Motion CMS Document Id: 20CV0063862020-12-1499980000
Document Title: 12-14-2020-MOTION FOR LEAVE TO FILE -
PLAINTIFF: EYE SPECIALISTS OF DELAWARE
Disposition: MOTION DENIED

2. Motion CMS Document Id: 20CV0063862020-10-2399980000
Document Title: 10-23-2020-MOTION TO DISMISS -
DEFENDANT: HARLEYSVILLE WORCHESTER INSURANCE
COMPAN
Disposition: MOTION GRANTED

3. Motion CMS Document Id: 20CV0063862020-12-1199970000
Document Title: 12-11-2020-MOTION TO STRIKE - DEFENDANT:
HARLEYSVILLE WORCHESTER INSURANCE COMPAN
Disposition: MOTION GRANTED IN PART