

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-892-20
A.D. # _____

FAFB, LLC,)	
)	TRANSCRIPT
Plaintiff,)	
)	OF
v.)	
)	DECISION
BLACKBOARD INSURANCE)	
COMPANY,)	
)	
Defendant.)	

Place: Mercer County Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: November 4, 2020

BEFORE:

THE HON. DOUGLAS H. HURD, P.J.Cv.

TRANSCRIPT ORDERED BY:

RALPH P. FERRARA, ESQ. (Ferrara Law Group, P.C.)

Transcriber, Kelli R. Philburn
J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, NJ 08619
(609) 586-2311
FAX NO. (609) 587-3599
E-mail: jjcourt@jjcourt.com
Website: www.jjcourt.com

Audio Recorded
Audio Operator, Joy Baldwin

I N D E X

PAGE

DECISION

3

1 THE COURT: Docketed Mercer County Law
 2 Division 892-20. This matter deals with a motion to
 3 dismiss filed by the defendant. There is opposition
 4 from the plaintiff. A reply was also filed. Oral
 5 argument occurred on October 30th and today is November
 6 4th and the Court is putting its decision on the
 7 record.

8 In this matter, the plaintiff is a restaurant
 9 that operates the Salted Lime Kitchen & Bar which is a
 10 restaurant and bar in Somerdale (sic), Brunswick, New
 11 Jersey. This deals with the COVID-19 pandemic and the
 12 Governor's orders that resulted in the closure of
 13 businesses and restaurants. Specifically in March
 14 2020, the Governor entered various executive orders
 15 which prohibited restaurants from having any dining in
 16 their premises and limited the dining. Obviously, the
 17 executive orders had other matters that were part of
 18 it, but this focuses on that part of those orders. And
 19 plaintiff claims that as a result of those orders, it
 20 cannot use its restaurant space and ultimately had to
 21 close.

22 Plaintiff claims that it has suffered a
 23 substantial loss of business and income and that the
 24 closure was a result of the orders that are physically
 25 impacting plaintiff's business. That's in Plaintiff's

1 complaint at Paragraphs 20 and 21. Plaintiff has
2 business owner's insurance with the defendant
3 Blackboard for the period November 6, 2019 through
4 November 6, 2020. The policy includes business
5 interruption coverage, including coverage for business
6 income, extra expense and loss resulting from civil
7 authority. Here in Mercer County, plaintiff has filed
8 a declaratory judgment action in which they seek the
9 declaration that Blackboard has an obligation to
10 provide business interruption, extra expense and civil
11 authority coverage and that the virus exclusion policy
12 does not apply to plaintiff's loss.

13 This is a 4:6-2(e) motion which we know
14 should be granted only in the rarest of circumstances.
15 The leading case that we know deals with 4:6-2 is
16 Printing Mart v. Sharp Electronics, 116 N.J. 739. And
17 the Court in that case said at this preliminary stage
18 of the litigation, the Court is not concerned with the
19 ability of plaintiff to prove the allegations contained
20 in the complaint. For purposes of analysis, plaintiffs
21 are entitled to every reasonable inference of fact and
22 the examination of the complaint's allegations of fact
23 required by those principles should be one that is at
24 once painstaking and undertaken with a generous and
25 hospitable approach. So that is the framework by which

1 the Court will consider this motion.

2 The plaintiff, as I said, has alleged that it
3 suffered covered loss or damage as a result of the
4 closure of its business based on the Governor's orders.
5 Plaintiff points to Section I.A.4(f) of the contract
6 that provides the following business income coverage.
7 Quote, we will pay for the actual loss of business
8 income you sustained due to the necessary suspension of
9 your operations during the period of restoration. The
10 suspension must be caused by direct physical loss of or
11 damage to property at the described premises. The loss
12 or damage must be caused by or result from the covered
13 cause of loss, closed quote.

14 Also, the policy defines covered with respect
15 to extra expense and the policy provides at
16 Subparagraph (g) that we will pay necessary extra
17 expense that you incur during the period of restoration
18 that you would not have incurred if there had been no
19 direct physical loss or damage to property at the
20 described premises. The loss or damage must be caused
21 by or result from a covered cause of loss.

22 And we know from the case of President v.
23 Jenkins, 180 N.J. 550, that when reviewing an insurance
24 policy, a Court should give the policy's words their
25 plain ordinary meaning. And when the Court uses that

1 test and applies it to the language in the policy,
2 including that this is income or extra expense coverage
3 and the other coverage sections and exclusion sections
4 that are the subject of dispute here, it's clear that
5 the motion must be granted.

6 The Court should dismiss the complaint even
7 when the facts construed in its favor fail to
8 articulate a legal basis for relief and that's the case
9 here and that's the Rieder v. State Department of
10 Transportation case, 221 N.J. Super. 547. And as that
11 case said, as well, and it's applicable to this case,
12 too, there is no need for discovery to resolve these
13 issues. Even assuming discovery bears out all of
14 plaintiff's allegations, there would be no coverage.

15 So dismissal is mandated where the factual
16 allegations are palpably insufficient to support a
17 claim of relief upon which relief can be granted.
18 Specifically, even assuming that discovery could prove
19 all of plaintiff's allegations true, this would only
20 establish a loss of use of property and there's no
21 coverage under New Jersey Law for loss of use, quote,
22 unquote, standing alone without some physical impact on
23 the property and that's a quote from one of the cases
24 cited by both parties here from Wakefern at Page 540.

25 Here, the Government orders do not create any

1 distinct demonstrable physical impact on the property.
2 The Government orders to prevent COVID-19, quote, do
3 not represent an external event that changed the
4 insured property. Every physical element of the dining
5 rooms, the floors, the ceilings, the plumbing, the
6 HVAC, the tables, the chairs underwent no physical
7 damage as a result of the order, closed quote. And
8 that's a quote from the Henry's case, 2020 WL 5938755
9 in which the Court interpreted Government orders as
10 physical loss would exceed any reasonable bounds of
11 possible construction. And that same analysis clearly
12 applies to this case.

13 In addition, there's really no dispute here
14 that there is nothing to repair, rebuild or replace
15 that in the ordinary meaning of those terms, but
16 because, as we know here, the plaintiff's policy
17 provides coverage only during a period of restoration
18 which expressly assumes repair, rebuild or replacement
19 of property. So it's fair then and the convincing
20 argument is the one of the defendant that a reasonable
21 insured would understand a repair to become necessary
22 upon a tangible alteration of property and not in
23 context of a Government order imposing use
24 restrictions.

25 So because the plaintiff has asserted that

1 the loss was caused by the Governor's closure orders
2 and not the virus, it's clear that plaintiff's position
3 is contrary to New Jersey Law, as I said, that requires
4 plaintiff to establish that their structures, their
5 insured structures, were, in fact, physically damaged
6 in order to trigger coverage. The defendant has also
7 cited to 26 additional cases that nationwide have --
8 that they claim have dismissed identical claims. The
9 Court has gone through those cases and finds them,
10 obviously, not binding on this Court, but very
11 persuasive in its analysis.

12 In addition, the plaintiff is seeking its
13 rights to coverage under the policy's civil authority
14 provisions and that's from Paragraph 24 of the
15 complaint. Once again, under a plain reading of the
16 policy, it's clear that this claim fails as a matter of
17 law. The policy's civil authority coverage applies
18 only in specifically defined circumstances specifically
19 where damage to a nearby property prohibits access to
20 the immediately surrounding area, including the insured
21 restaurant. There is no civil authority coverage
22 except under those circumstances.

23 And it's clear that civil authority coverage
24 does not apply here where the neighboring properties
25 were also impacted by the same Government use

1 restrictions applying to plaintiff or face the same
2 threat. Defendant cites to many cases of other courts
3 across the country that are persuasive on this Court
4 that have dismissed claims for civil authority coverage
5 for losses from Government restrictions due to COVID-19
6 because the insureds cannot establish the requisite
7 causal nexus between damage to nearby property and the
8 Government order.

9 In addition, the civil authority orders are
10 only covered to the extent access to plaintiff's
11 physical premises is prohibited and not if plaintiffs
12 are simply prohibited from operating their business.
13 So while the civil authority orders here precluded
14 plaintiff from operating its in-person dining facility,
15 they did not prohibit access to the premises for other
16 purposes such as takeout and delivery.

17 The Court has gone through the plaintiff's
18 cases cited in support of its position and with respect
19 those cases are not persuasive on this Court. Those
20 cases involve typically they involve the prohibition on
21 access to the insured property because of damage to
22 neighboring properties which is not the case here.

23 Turning now to the virus exclusion. The
24 policy provides at Section B that we will not pay for
25 loss or damage caused directly or indirectly by any of

1 the following, such loss or damages excluded,
2 regardless of any other cause or event that contributes
3 concurrently or in any sequence to the loss. These
4 exclusions apply whether or not the loss event results
5 in widespread damage or affects a substantial area --

6 UNIDENTIFIED SPEAKER: Three more minutes.

7 THE COURT: -- at Subsection J. We have the
8 virus or bacteria exclusion. Any virus, bacterium or
9 other microorganism that induces or is capable of
10 inducing physical distress, illness or disease. Once
11 again, a plain reading of that language makes it clear
12 that the plaintiff's claim must fail as a matter of
13 law. And that's, you know, under the assumption that
14 plaintiff has pled facts sufficient to establish a
15 direct physical loss or damage which, as I already
16 said, they haven't. But, nonetheless, its claims would
17 still be precluded under the policy's exclusion for
18 loss or damage caused directly or indirectly, which is
19 a very important word there, by any virus, bacterium or
20 other microorganism that induces or is capable of
21 inducing physical distress, illness or disease.

22 There really is no differing or other
23 interpretation of the policy that would support the
24 plaintiff's position because there's no legitimate
25 dispute that the COVID-19 virus is capable of inducing

1 physical distress, illness or disease. And, once
2 again, the cases cited by the defendants here are
3 certainly persuasive on this Court and consistent with
4 the policy language that this Court is dealing with and
5 requires that the claim be dismissed due to the virus
6 exclusion.

7 Plaintiff next makes an argument in its brief
8 with respect to regulatory estoppel. However, the
9 regulatory estoppel theory is not pled in its brief and
10 is not -- should not be considered by the Court. But,
11 nonetheless, even if the Court were to consider that
12 position since it is raised in its opposing brief, it's
13 clear that this regulatory estoppel theory does not
14 defeat the motion to dismiss.

15 The defendant's position actually is
16 consistent with the position plaintiff describes to the
17 insurance services office during the regulatory
18 process and it's clear when you look at the language
19 and consistent with those representations that were
20 made. Blackboard notes in Section 1 of the motion that
21 there's no coverage for losses from Government orders
22 to prevent COVID-19 spread and that's even before the
23 virus's exclusion is considered. But what's most
24 important on this theory is that regulatory estoppel
25 does not void clear and unambiguous language provisions

1 or provide a basis for recision.

2 So, as I've said here many times, when the
3 Court looks at the plain, unambiguous language of this
4 policy coverage provisions, as well as the exclusion
5 provisions, it's clear that the declaratory judgment
6 action filed by the plaintiff herein must be dismissed
7 as a matter of law. The dismissal will be with
8 prejudice because it's clear that any further discovery
9 on these claims would not impact how the Court decides
10 these legal issues. So for those reasons, the Court
11 will grant the application.

12 * * * * *

C E R T I F I C A T I O N

I, KELLI R. PHILBURN, the assigned
transcriber, do hereby certify the foregoing transcript
of proceedings on CD, playback number 8:31:42 to
8:46:12, is prepared in full compliance with the
current Transcript Format for Judicial Proceedings and
is a true and accurate compressed transcript of the
proceedings as recorded, to the best of my ability.

/s/ Kelli R. Philburn

KELLI R. PHILBURN AOC #587

J&J COURT TRANSCRIBERS, INC. DATE: November 12, 2020