UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TANQ'S INC.,

Plaintiff,

v. **Case No. 6:20-cv-2356-ACC-GJK**

SCOTTSDALE INSURANCE COMPANY,

Defendant.

ORDER

This cause comes before the Court on the Motion to Dismiss Plaintiff's Complaint with Prejudice filed by Defendant Scottsdale Insurance Company. (Doc. 15). Plaintiff Tanq's Inc. has filed a Response in Opposition (Doc. 22) and Defendant has filed a Reply (Doc. 26); thus, the Motion is ripe for review. For the reasons set forth below, the Motion will be granted.

I. BACKGROUND

The dispute in this case arises from Defendant's denial of Plaintiff's insurance claim for loss of business income during the COVID-19 pandemic. In its Complaint,[1] Plaintiff states:

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[1] On October 28, 2020, Plaintiff filed its Complaint in state court. (Doc. 1-1). Defendant was served with a Summons and copy of the Complaint on November 25, 2020. (Doc. 1, ¶ 2; Doc. 1-3 at 1). On December 23, 2020, Defendant removed the action to this Court on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. (Doc. 1).

> On March 17, 2020, Plaintiff was denied use of [its] premises by a state government Order requiring all bars in Orange County[, Florida] to close due to concerns about the spread of the corona virus. On June 15, 2020, Plaintiff was allowed to re-open its business, but then was shut down [again] on June 26, 2020 due to a subsequent Order of the Governor through no fault of its own until September 16, 2020.

(Doc. 1-1, ¶ 5).

Plaintiff alleges that it "sustained significant loss of business income and has had to continue to pay rent and other expenses during these periods and [that] Defendant has wrongfully and in breach of the parties' agreement refused to pay for these losses despite the losses being covered under the parties' insurance contract." (*Id.* ¶ 6). In Count I, Plaintiff requests a declaratory judgment regarding its rights under the parties' insurance policy. (*Id.* ¶¶ 8-16; *see id.* at 5-80). In Count II, Plaintiff sues Defendant for breach of contract. (*Id.* ¶¶ 17-19).

In its Motion to Dismiss (Doc. 15), Defendant argues that Plaintiff's Complaint is due to be dismissed with prejudice because: (1) Plaintiff has failed to allege "direct physical loss of or damage to Covered Property . . . caused by or resulting from a Covered Cause[ ] of Loss" and (2) the parties' insurance policy excludes coverage for "loss or damage caused by or resulting from any virus[.]" (*Id.* at 2-3). In its Response (Doc. 22), Plaintiff asserts it is entitled to coverage because the policy is ambiguous and the exclusion cited by Defendant is "irrelevant and inapplicable." (*Id.* at 6-7, 10).

II. LEGAL STANDARD

For purposes of deciding a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court accepts as true the factual allegations in the complaint and draws all reasonable inferences in the light most favorable to the plaintiff. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010). When analyzing a motion to dismiss, the court is "limited primarily to the face of the complaint and attachments thereto." *Brooks v. Blue Cross & Blue Shield of Fla., Inc*., 116 F.3d 1364, 1368–69 (11th Cir. 1997).

"Generally, under the Federal Rules of Civil Procedure, a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Randall*, 610 F.3d at 705 (quoting Fed. R. Civ. P. 8(a)(2)). However, the plaintiff's complaint must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Thus, the Court is not required to accept as true a legal conclusion merely because it is labeled a "factual allegation" in the complaint; it must also meet the threshold inquiry of facial plausibility. *Id.*

III. ANALYSIS

In its Motion to Dismiss, Defendant first argues that Plaintiff's Complaint fails to state a claim for business income coverage because, under Florida law, Plaintiff must allege "some tangible, actual and physical damage to property and not mere economic losses or loss of use." (Doc. 15 at 2). However, the Court need not determine whether business income coverage is available under Florida law because the insurance policy's virus exclusion precludes coverage in this case. Specifically, the parties' insurance policy states, in relevant part:

> **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**
>
> . . .
>
> **A.** The exclusion set forth [below] applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but 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 microorganism that induces or is capable of inducing physical distress, illness or disease.
>
> However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

(Doc. 1-1 at 53).

Citing to recent cases involving the same virus exclusion, Defendant asserts that any "loss or damage caused directly or indirectly by the coronavirus is explicitly excluded under the express terms of the Policy." (Doc. 15 at 20-22 (citing *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, No. 8:20-cv-1417-WFJ-AAS, 2021 WL 22314,

at *7–8 (M.D. Fla. Jan. 4, 2021) (Jung, J.); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, No. 1:20-cv-23661-BLOOM/Louis, 2021 WL 86777, at *9 (S.D. Fla. Jan. 11, 2021) (Bloom, J.)). Alternatively, arguing that the virus exclusion does not apply, Plaintiff states:

> The inapplicability of the exclusion for loss due to virus or bacteria is based on the fact the loss claimed is not claimed on an allegation that the closure occurred as a result of the presence of a virus or bacteria in or on the premise[s] at issue. The claim is based on the loss to Plaintiff as a result of the governmental order that disallowed Plaintiff from exercising its right under the policy to generate monetary revenue[.]

(Doc. 22 at 11).

Plaintiff's argument is flawed for two reasons. First, the virus exclusion in the parties' insurance policy broadly applies to preclude coverage for "loss or damage caused by or resulting from any virus"; thus, the virus need not be present in or on the premises at issue for the exclusion to apply. Second, Plaintiff's argument turns a blind eye to the underlying reason for its closure and resulting loss—COVID-19. Even Plaintiff's Complaint recognizes that COVID-19 caused Plaintiff's loss, as the Complaint states: "Plaintiff was denied use of [its] premises by a state government Order requiring all bars in Orange County to close *due to concerns about the spread of the corona virus*." (Doc. 1-1, ¶ 5 (emphasis added)).

As Defendant notes, this Court is not the first to interpret this specific virus exclusion or consider these arguments in the context of the COVID-19 pandemic. In

responding to a similar argument regarding the cause of the plaintiff's losses and considering the same virus exclusion, Judge Jung stated:

> The role of the pandemic in the economic losses cannot be ignored. Because the pandemic was, at the very least, a contributing cause to the loss and because the virus exclusion by its terms applies to all elements of coverage, including the additional coverage under civil authority, the exclusion applies to the claims for loss in this case.

Edison Kennedy, 2021 WL 22314, at *7–8.

In another case involving the same virus exclusion, Judge Bloom dismissed the plaintiff's complaint with prejudice and noted that "courts across the country have dismissed with prejudice claims based on substantially similar or identical virus exclusions contained within the policies." *Mena Catering*, 2021 WL 86777, at *9 (collecting cases). The Court agrees that, based on the insurance policy's virus exclusion, Plaintiff's Complaint (Doc. 1-1) is due to be dismissed.[2]

The only remaining question is whether Plaintiff's Complaint is due to be dismissed with prejudice. "Ordinarily, a party must be given at least one opportunity to amend before the district court dismisses the complaint." *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1014 (11th Cir. 2005) (citing *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001)). However, a district court does not have to allow amendment if

[2] The Court notes that in *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, 489 F. Supp. 3d 1297 (M.D. Fla. 2020) (Conway, J.), the Court denied the defendant's motion to dismiss the plaintiff's complaint, which alleged similar claims for business income coverage. *See id.* However, in *Urogynecology Specialist*, the insurance policy's virus exclusion contained substantially different language and the parties did not provide the Court with all the relevant coverage forms that were modified by the virus exclusion. *See id.*

amendment would be futile. *Id.* (quoting *Bryant*, 252 F.3d at 1163) (internal quotation marks omitted). Moreover, a "district court is not required to grant a plaintiff leave to amend [its] complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc).

In this case, Plaintiff did not request leave to amend in its Response or move to amend, and the Court finds that amendment would be futile considering the broad virus exclusion included in the parties' insurance policy. (*See* Doc. 22 at 19); *see Mena Catering*, 2021 WL 86777, at *9 (collecting cases). Accordingly, Plaintiff's Complaint will be dismissed with prejudice.

IV. CONCLUSION

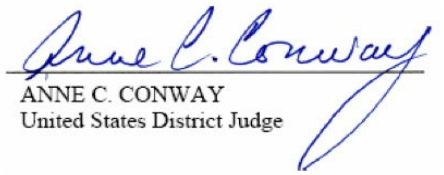
Based on the foregoing, it is ordered as follows:

1. Defendant Scottsdale Insurance Company's Motion to Dismiss Plaintiff's Complaint with Prejudice (Doc. 15) is **GRANTED**.

2. This case is DISMISSED with prejudice.

3. The Clerk is directed to close the file.

DONE and **ORDERED** in Chambers, in Orlando, Florida on April 15, 2021.



Copies furnished to:

Counsel of Record