SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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ABRUZZO DOCG INC. d/b/a TARALLUCCI E VINO; AEMAL, LLC d/b/a YVES; ARG 570 LEX, LLC; AURIFY BRANDS, LLC; BEA'S TAVERN, INC. d/b/a BOTANICA BAR; BIG DADDY'S H LLC d/b/a DUKE'S; BLACK TAP GROUP LLC; BOBO RESTAURANT LLC d/b/a BOBO; BROADWAY SRJ, LLC; CAPTAIN HADDOCK LLC; CITY WINERY LLC; C.S.L.L. REST. CORP. d/b/a EJ'S LUNCHEONETŒ; EMPORIUM OAKLAND LLC; EMPORIUM SF LLC; ESS-A-BAGEL, INC. d/b/a ESS-A-BAGEL; ESS-A-BAGEL, 883 SIXTH AVENUE, LLC d/b/a ESS-A-BAGEL; FGNY PARENTCO, LLC; FISH BOX RESTAURANT CORPORATION d/b/a SAMMY'S FISH BOX RESTAURANT; FOOD FOR JUNIOR'S INC.; FOURTH WALL RESTAURANTS, LLC d/b/a QUALITY BRANDED; FOX SRJ, LLC; G&L RESTAURANT, LLC d/b/a LORING PLACE; GEORGE MARCEL LLC d/b/a FAIRFAX; GG CAMPBELL, LLC d/b/a THE CAMPBELL; GLOBAL DINING, INC. OF CALIFORNIA; GRAMERCY FARMER & THE FISH LLC d/b/a FARMER & THE FISH; GRAND CENTRAL OYSTER BAR INC. d/b/a GRAND CENTRAL OYSTER BAR; HAPPY COOKING LLC d/b/a JOSEPH LEONARD; HH BOWEN LLC d/b/a HARLEM HOOKAH; HRK FOODS, INC. d/b/a NAYA; IL RIFUGIO INC. d/b/a TALLUCCI E VINO; JAVELINA TEX-MEX LLC d/b/a JAVELINA; JDA GOTHAM, LLC d/b/a DELL'ANIMA; KIO RESTAURANT, LLC d/b/a KHE-YO; L'ATELIER NYC LLC; LA VECCHIA LLC d/b/a TARALLUCCI E VINO; LEONELLI RESTAURANTS LLC; LE-SE AMSTERDAM 732 RESTAURANT, INC. d/b/a DIVE BAR; LITTLE WISCO LLC d/b/a FEDORA; MANNAGGIA INC. d/b/a TARALLUCCI E VINO; MASA NY, LLC d/b/a BAR MASA & MASA; MF PEASANT, LLC d/b/a PEASANT RESTAURANT; MONOPOLIO LLC d/b/a TARALLUCCI E VINO; NAYA EXPRESS, INC. d/b/a NAYA; NAYA EXPRESS H, INC. d/b/a NAYA; NAYA HOLDINGS, LLC; NO MOORE OYSTERS, LLC d/b/a SMITH & MILLS; NORTH 43RD LLC d/b/a TONY'S DI NAPOLI 147 W 43RD STREET; PENMANSHIP LLC d/b/a JEFFREY'S GROCERY; RACINES NYC LLC; RHLP 45 LLC; RHLP 284 LLC; THE RIBBON WORLDWIDE LLC; THE RIBBON WORLDWIDE 44, LLC d/b/a THE RIBBON; SAMMY'S S.B. REST. CORP. d/b/a SAMMY'S ORIGINAL SHRIMP BOX; SEASHORE RESTAURANT CORPORATION d/b/a SEASHORE RESTAURANT; SEINFELD SQUARED LLC d/b/a DIVE BAR 106; SKDL CORP.; SRG CHURCH STREET, LLC; SRG NYP, LLC; SRG 1, LLC; ST. HELENE LLC d/b/a BAR SARDINE; STATE OF MIND HOLDINGS, LLC; STOUT, INC.; THREE HOOPLES, LTD. d/b/a BROADWAY DIVE BAR; TITO ROCKS LLC; TWO AND EIGHT GOURMET, LTD. d/b/a DALLAS BBQ 132 SECOND AVE.; UNION SQUARE HOSPITALITY GROUP LLC; W BBQ HOLDINGS, INC.; WHANY LLC d/b/a CAFE WHA?; YVES, LLC d/b/a HOLY GROUND;

1 PERRY LLC d/b/a ROEY'S; 8TH AND 42ND LLC d/b/a PATRICK'S; 18 GREENWICH AVENUE LLC d/b/a ROSEMARY'S; 24 5TH AVE LLC d/b/a CLAUDETTE; 34 8TH AVENUE LLC d/b/a ANFORA; 53RD STREET FINE DINING, LLC; 64TH & 3RD ENTERPRISES LLC d/b/a TONY'S DI NAPOLI 1081 3RD AVENUE; 68 CLINTON RESTAURANT ASSOCIATES LLC d/b/a PIG & KHAO; 77 WARREN FOODS, LLC d/b/a WARREN 77; 93 LUDLOW STREET INC. d/b/a THE DL AND DINNER ON LUDLOW; 101 WEST 75 BAR AND REST. ENTERPRISES, LTD. t/a BROADWAY DIVE BAR; 125 HOSPITALITY LLC d/b/a THE GROOVE; 135 WEST B FOOD & DRINK, LLC d/b/a TINY'S; 189 CHRYSTIE PARTNERS LP d/b/a THE BOX; 228 WEST 10TH STREET, LLC d/b/a L'ARTUSI; 239 PARK AVENUE SOUTH ASSOCIATES LLC d/b/a BIG DADDY'S; 389 BROOME LLC d/b/a GOLDBAR; 560 THIRD AVENUE GROCERY CORP. d/b/a DUKE'S ORIGINAL ROADHOUSE; 643 BROADWAY HOLDINGS LLC d/b/a SWEETWATER SOCIAL; 976 MADISON RESTAURANT, LLC d/b/a KAPPO MASA; 1395 SECOND AVENUE RESTAURANT LLC d/b/a JAVELINA; 1626 SRJ, LLC; 1650 BROADWAY ASSOCIATES, INC.,

Plaintiffs, Decision and order

- against - Index No. 514089/20

ACCEPTANCE INDEMNITY INSURANCE COMPANY; ADMIRAL INDEMNITY COMPANY; ARCH INSURANCE COMPANY; ARCH SPECIALTY INSURANCE COMPANY; ARGO MANAGING AGENCY LIMITED; ASPEN AMERICAN INSURANCE COMPANY; AXIS INSURANCE COMPANY; BRIT SYNDICATES LIMITED; CATLIN UNDERWRITING AGENCIES LIMITED; CHUBB CUSTOM INSURANCE COMPANY; CITIZENS INSURANCE COMPANY OF AMERICA; FIRST MERCURY INSURANCE COMPANY; GREATER NEW YORK MUTUAL INSURANCE COMPANY; GREENWICH INSURANCE COMPANY; HARTFORD FIRE INSURANCE COMPANY; HDI GLOBAL INSURANCE COMPANY; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA; LEXINGTON INSURANCE COMPANY; LIBERTY MANAGING AGENCY LIMITED; LIBERTY MUTUAL FIRE INSURANCE COMPANY; METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY; NATIONAL FIRE & MARINE INSURANCE COMPANY; OHIO SECURITY INSURANCE COMPANY; SCOTTSDALE INSURANCE COMPANY; SENECA INSURANCE COMPANY, INC.; SENTINEL INSURANCE COMPANY LTD.; SOMPO AMERICA INSURANCE COMPANY; STRATHMORE INSURANCE COMPANY; THE CHARTER OAK FIRE INSURANCE COMPANY; TOKIO

MARINE-KILN SYNDICATES LIMITED; TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA; TRAVELERS EXCESS AND SURPLUS LINES COMPANY; TWIN CITY FIRE INSURANCE COMPANY; UNITED NATIONAL INSURANCE COMPANY; UNITED SPECIALTY INSURANCE COMPANY; UTICA FIRST INSURANCE COMPANY; WATFORD SPECIALTY INSURANCE COMPANY; WESCO INSURANCE COMPANY; WESTERN WORLD INSURANCE COMPANY; XL INSURANCE AMERICA, INC.; ZURICH AMERICAN INSURANCE COMPANY,

Defendants, March 15, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved and cross-moved pursuant to CPLR §3211 seeking, essentially, to dismiss the claims filed against them. The plaintiff opposes all the motions. Papers were submitted by the parties and after reviewing the arguments this court now makes the following determination.

According to the amended complaint, the plaintiffs are all restaurants, cafes and bars located within New York City. The plaintiffs were forced to close due to governmental shut-down orders in the wake of the COVID-19 pandemic and even when allowed to re-open as the pandemic eased, were restricted in the space available to serve patrons. The plaintiffs all sought insurance coverage from their respective insurance companies for losses sustained by the governmental shut-down orders. All such claims were denied on the grounds the plaintiffs failed to suffer any physical loss as required under the policies. The plaintiffs have instituted the within lawsuit and have asserted sixty-four

causes of action. The first cause of action, asserted by all plaintiffs, seeks a declaratory judgement the plaintiffs suffered physical losses as a result of the shut-down orders and may recover for such losses. The last cause of action, asserted by all plaintiffs, is a claim for unjust enrichment. The remaining sixty-two causes of action are all claims for breach of contract asserted by the plaintiffs against their respective insurers alleging that each insurer breached the respective contact by denying coverage for the losses sustained. The defendants have now moved seeking to dismiss the lawsuit arguing the plaintiffs did not suffer any "direct physical loss" necessary to trigger any coverage. The plaintiffs oppose all the motions arguing that indeed, they all suffered direct physical losses and therefore should be entitled to coverage. The plaintiffs argue that in any event there are surely questions whether a direct physical loss has been presented and the case should proceed with discovery.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]).

Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

All of the insurance policies in this case contain the same trigger as a prerequisite for coverage, namely, there must be direct physical loss or damage suffered due to a business interruption. Thus, any grammatical or linguistic differences that do not change the import of the clauses are immaterial since the defendants do not base any arguments on those nuances. Rather, all the defendants base their motions to dismiss on the same principle: coverage is not available because no plaintiff has suffered a physical loss.

The plaintiffs argue they all suffered direct physical losses because governmental shut-down orders physically deprived them of their retail spaces rendering them non-functional. Moreover, upon limited reopening as the most severe restrictions eased, the plaintiffs were required to erect plexiglass barriers, rearrange the layout of the locations and reduce the size where the public could gather. According to the plaintiffs these restrictions reduced the functionality of their restaurants and bars and thereby caused direct physical losses. The amended

complaint succinctly asserts that the plaintiffs all sustained direct physical losses and damage to their properties "like those caused by the Shutdown and Partial Reopening Executive Orders, which altered, and impaired the functioning of, the tangible, material dimensions of Plaintiffs' property. This is especially true where, as here, property has been rendered partially or wholly nonfunctional for its intended purpose due to the altered appearance, shape, and other material aspects of the property" (see, Amended Complaint, ¶23). The plaintiffs thus do not allege "an intangible loss of business or loss of use without physical damage" (see, Union Square Hospitality Group's Memorandum of Law in Opposition, introduction [NYSCEF #641]). Rather, they assert they sustained direct physical loss or damage due to governmental orders that required complete shut-downs and physical alterations upon partial reopening.

The question that must be considered is whether physical changes to the establishments imposed by governmental orders constitutes direct physical loss or damage which can then trigger insurance coverage.

This question takes two forms, the first is whether the complete shut-down orders constituted physical loss or damage. In 10012 Holdings Inc., v. Sentinel Insurance Company, Ltd., 21 F.4th 216 [2d. Cir. 2021] the court held that without a

demonstration of direct physical loss or physical damage no business interruption insurance was available. There can really be no dispute that while the plaintiffs' establishments were completely shut down there was no physical loss or physical damage sustained. Indeed, although these allegations are mentioned by the plaintiffs they do not focus their arguments on the total shut-down orders.

The second and more novel form of the question is whether the physical changes imposed by the governmental orders constitutes direct physical loss or damage.

In In Re Society Insurance Company COVID-19 Business Interruption Protection Insurance Litigation, 521 F.Supp3d 721 [Northern District of Illinois 2021] the court did hold that "the pandemic-caused shutdown orders do impose a physical limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a financial limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space" (id). The court further explained that "another way to understand the physical nature of the loss inflicted by the shutdown orders is to consider how a restaurant might mitigate against the suspension of operations caused by, say, a

25%-capacity limitation on the number of guests inside the restaurant. If the restaurant could expand its physical space, then the restaurant could serve more guests and the loss would be mitigated (at least in part). The loss is physical—or at the very least, a reasonable jury can make that finding" (id). However, that decision was criticized as an 'outlier' in Menominee Indian Tribe of Wisconsin v. Lexington Insurance Company, 2021 WL 3727070 [Northern District of California 2021] and expressly not followed in Town Kitchen LLC v. Certain Underwriters at Lloyd's, London, 522 F.Supp3d 1216 [Southern District of Florida 2021]). Further, that holding is a minority opinion (Midwest Orthodontic Associates Ltd., v. Cincinnati Casualty Company Inc., 2021 WL 4489308 [Southern District of Illinois 2021]) which has generally not been followed (Till Metro Entertainment v. Covington Specialty Insurance Company, 545 F.Supp3d 1153 [Northern District of Oklahoma 2021], Ryan P. Estes D.M.D., P.S., P.S.C., v. Cincinnati Insurance Company, 452 F.Supp3d 585 [Eastern District of Kentucky 2021]). Thus, in Team 44 Restaurants LLC v. American Insurance Company, 2021 WL 4775106 [District of Arizona 2021] the court engaged in a considered analysis of the minority position that restrictions of use constitutes direct physical loss. The court rejected that view adopting the majority position not "only because of the persuasive weight that such a majority carries,

but also because of the Court's independent analysis. A layman, reading the "Building and Personal Property Coverage Form" and the insurance company's promise that it "will pay for direct physical loss of or damage to" the property, would understand this promise to mean only actual physical damage to the building and other personal property inside is covered...A layman would not read "direct physical loss" and believe that government action temporarily limiting the use of space within the building is a covered loss" (id).

Consequently, in Bourgier v. Hartford Casualty Insurance Company, 2021 WL 3603601 [Southern District of Florida 2021] the court held that rearranging furniture or installing plexiglass was not physical damage to property sufficient to enable insurance coverage similar to the coverage sought in this case. Again, in Oral Surgeons P.C. v. Cincinnati Insurance Company, 2 F.4th 1141 [8th Cir. 2021] the court held the partial loss of use of an office does not trigger insurance coverage unless there is a showing of direct physical loss or physical destruction. In G.O.A.T. Climb and Cryo LLC v. Twin City Fire Insurance Company, 548 F.Supp3d 688 Northern District of Illinois 2021] the court explained that while, of course, restricting the use of any business constitutes a physical change such restrictions are not physical losses or physical damage. The court concluded that

where "a government closure order limits access to a business's premises but does not detrimentally change the physical condition or location of property at those premises" then such insurance coverage is unavailable (see, also, Dr. Jeffrey Milton DDS Inc., v. Hartford Casualty Insurance Company, 2022 WL 603028 [District of Connecticut 2022]). In Byberry Services and Solutions LLC v. Mt. Hawlet Insurance Company, 2021 WL 3033612 [Northern District of Illinois 2021] the court held that "while the plaintiffs did physically alter their property in response to the orders —installing plexiglass among other changes— such measures do not qualify as a physical loss (id, see, also, Great River Entertainment LLC v. Zurich American Insurance Company, 2021 WL 5412276 [Southern District of Iowa 2021]).

New York courts that have considered this issue have adopted the majority view. Thus, in Sharde Harvey DDS PLLC v. Sentinel Insurance Company Ltd., 2021 WL 1034259 [S.D.N.Y. 2021] the court rejected the possibility that loss of use constitutes physical loss. Further, in Food For Thought Caterers Corp., v. Sentinel Insurance Company, 524 F.Supp3d 242 [S.D.N.Y. 2021] the court rejected the minority position that loss of use means direct physical loss (id., at Footnote 2). Again, in Broadway 104, LLC v. XL Insurance America Inc., 545 F.Supp3d 93 [S.D.N.Y. 2021] the court rejected the possibility that restrictions of use can

constitute direct physical loss and explained that "the phrase 'direct physical loss' describes tangible loss and cannot reasonably be read to encompass a regulatory restriction against certain uses. Further, the Café essentially reads the word 'property' out of the relevant language. It is true that the Policy distinguishes 'loss' from 'damage,' but both terms are applied to the word 'property,' as reflected by the prepositions 'of' and 'to.' The Policy provides for coverage when the insured suffers 'direct physical loss of ... property' or 'damage to property' on the premises. The parties did not agree to coverage in the event that the Café suspends operations due to 'loss' in a generalized sense, but due to the direct physical loss of property" (id). These cases surely stand for the principle that the mere loss of use is insufficient to trigger any coverage for physical loss or physical damage.

The plaintiffs insist the physical changes required to be implemented were the expression of the physical damages sustained, essentially equating physical alterations with physical loss or damage. The plaintiffs assert that "a reasonable businessperson would understand 'direct physical loss of or damage to' property to describe detrimental changes or alterations that impair property in some discernible, visible manner, or the deprivation of something physical, such as when

physical property can no longer function as intended" (see, Plaintiffs Memorandum of Law in Opposition, Page 14, [NYSCEF #475]). Notwithstanding the above, the plaintiffs contend that two cases which seem to conflict with this argument are distinguishable. The first, Newman, Myers Kreiness Gross Harris. P.C. v. Great Northern Insurance Company, 17 F.Supp3d 323 [S.D.N.Y. 2014] concerned Consolidated Edison preemptively shutting off power to a building in anticipation of Superstore Sandy. The plaintiff sought insurance for loss of business as a result of the loss of power. The court held no such coverage was available since the plaintiff's premises in that case did not suffer any "direct physical loss or damage" (id). The court explained that direct physical loss or damage means "actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure" (id). Indeed, the court noted there were no cases which supported the contention that "'direct physical loss or damage' should be read to include to extend to mere loss of use of a premises, where there has been no physical damage to such premises" (id). In this case, argue the plaintiffs, physical damage has been alleged. However, the plaintiffs have not satisfactorily explained the leap whereby restrictions of use

transform to physical damage. There is no basis to conclude that any restriction of use or even alterations such as installing plexiglass, an admitted inconvenience, somehow supports claims for physical damage (Mohave GC LLC v. Depositors Insurance Company, 2021 WL 5240833 [Southern District of Iowa 2021] "although Plaintiff Corral Four alleges the government-imposed restrictions rendered its restaurant 'physically nonfunctional for [its] intended purpose,' and that it was required to make 'detrimental physical alterations to their premises,' including 'physically separat[ing] tables, rearrang[ing] and remov[ing] furniture and equipment and erect[ing] new physical structures,' none of these physical alterations can be said to be caused by 'physical loss or physical damage requir[ing] restoration'").

Furthermore, the above rule requiring actual physical damage remains true whether the restriction of use of the premises is total or partial. As noted, the plaintiffs do not forcefully argue the total shut-down orders that were promulgated when COVID first began gives rise to any claims for business interruption insurance. Indeed, the plaintiffs seem to concede there can be no claims for such insurance since when totally shut down there were no alterations and thus no physical losses. The plaintiffs argue that the defendant's legal precedents in support of the motions to dismiss only "considered whether allegations of

detrimental physical changes to the insured premises constituted direct physical loss or damage. None of the cases address the allegations that physical layouts and floor plans had to be changed, physical barriers had to be erected, tables or other physical structures had to be moved, or other similar visibly physical changes had to be made to the insured properties" (Plaintiffs Memorandum of Law in Opposition, page 19 [NYSCEF #475]). Therefore, considering the primary argument of plaintiffs that physical alterations and rearranging and restricting the layout of the premises constitutes physical damage, an anomaly is presented. It really makes no sense to argue that a complete closure, such that occurred in Newman, Myers, (supra) and the total shut-down orders of March 2020, do not give rise to claims of direct physical loss or damage, however, partial restrictions do somehow cause physical damage. It is thus illogical to assert that a more permissive use of the premises creates claims for physical loss and damage but a more restrictive ability to use any of the premises creates no such loss. According to the plaintiffs there should be no reason why a total shut-down order is not likewise evidence of physical damage. If restricting seventy-five percent of a restaurant is 'physical damage' of the unused portion, then surely restricting one-hundred percent of the location is all the more so, evidence

of physical damage. The plaintiffs argue that failing to consider physical losses as a result of physical restrictions collapses the meaning of loss with that of damage (see, Plaintiffs Memorandum of Law in Opposition, Page 25, [NYSCEF #475]). However, equating mere loss of use with physical damage, without any other damages, collapses the definitions of loss of use and physical damage. These anomalous positions demonstrate that in fact there is no guiding principle that distinguishes between total and partial closures. The plaintiffs' arguments are merely an attempt to elide their equivalence. Consequently, the loss of use, standing alone, cannot be equated with physical loss or damage.

In truth, Food For Thought Caterers Corp., v. Sentinel Insurance Company, (supra) explicitly rejected the theory that partial loss is equated with physical damage and based that rejection on the conclusion there is no difference between partial or total restrictions and that neither of them trigger any coverage for physical damage. That case cited the second case presented by the plaintiffs, namely Roundabout Theatre Company v. Continental Casualty Company, 302 AD2d 1, 751 NYS2d 4 [1st Dept., 2002]. In that pre-COVID case, the City of New York denied access to a city block when a building collapsed on the street. The plaintiff, a theatre company located on the block

that did not really suffer any damage, was forced to cancel thirty-five performances since the "theatre became inaccessible to the public" (id). Although any damage the theatre sustained was quickly repaired, the city's closure nevertheless resulted in losses "in the form of ticket and production-related sales as well as additional expenses incurred in reopening the production" (id). The theatre sought to recover under its business interruption insurance policy. The court denied such coverage on the grounds that "the language in the instant policy clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage" and that "the only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property" (id). Since there was no physical damage to the theatre there could be no recovery. The plaintiffs assert that in that case "the policyholder was not seeking coverage for any changes or damages to its premises; it sought recovery of financial losses caused by only the off site damage and street closure" (see, Plaintiffs Memorandum of Law in Opposition, Page 16, [NYSCEF #475]). However, the plaintiffs maintain that loss of use is the equivalent of physical damage and if their arguments are accurate then since the theatre could not "use" its property then such loss of use amounted to a "physical loss" and

coverage should have been available. The rejection of that argument means there really are not two forms to the question presented, rather, simply, loss of use does not equal physical damage and that remains true no matter the degree of loss of use.

In a footnote, the plaintiffs maintain that the First Department decision Roundabout is not binding on the Second Department because it conflicts with Pepsico Inc., v. Winterhur International American Insurance Company, 24 AD3d 743, 806 NYS2d 709 [2d Dept., 2005] (see, Plaintiffs Memorandum of Law in Opposition, Page 16, Footnote 18 [NYSCEF #475]). The court will now address that argument.

In Pepsico the plaintiff, soft drink maker Pepsi, sought insurance for losses incurred because of faulty ingredients supplied by third parties. The faulty ingredients were not harmful, rather, they caused the beverages to have different tastes and consequently, the drinks were not merchantable and were destroyed (see, Pepsico Inc., v. Winterhur International American Insurance Company, 13 AD3d 599, 788 NYS2d 142 [2d Dept., 2004]). The court held that based upon the language of the policy, it was possible the goods were in fact physically damaged. The court disagreed with the defendant's position that to demonstrate physical damage it was necessary to "prove that 'there has been a distinct demonstrable alteration of [the]

physical structure [of the plaintiffs' products] by an external force'" (id). Rather, the court held it was "sufficient under the circumstances of this case involving the unmerchantability of beverage products that the product's function and value have been seriously impaired, such that the product cannot be sold" (id). The plaintiffs insist that decision supports the notion that "the deprivation of something physical, such as the loss of functionality of a physical space, even without structural change, should qualify as physical loss or damage" (see, Plaintiffs Memorandum of Law in Opposition, Page 24, [NYSCEF #475]). However, there is no dispute the goods in Pepsico were materially and physically affected. The only issue in that case was whether such damage could exist where the damage, affecting only the taste, was not discernable or visible and there were no alterations to the physical composition of the goods. The court explained that if the damage was real, albeit obscured by the appearance of normalcy, then damage existed nonetheless. That decision does not establish that any loss of use is automatically equated with physical damage. Thus, Pepsico applies in the unusual situation where physical damage occurs even where there is no physical change to the goods. It is difficult to imagine many scenarios where Pepsico could trigger such coverage. In Rainbow USA Inc., v. Zurich American Insurance Company, _Misc3d_,

NYS3d, 2022 WL 245412 [Supreme Court Kings County 2022] the court suggested that perhaps clothing ruined by sunlight thereby rendering them unmerchantable without any physical damage could be an instance where coverage would apply pursuant to Pepsico. Those principles have no applicability in these cases where the governmental order caused losses without any damage at all.

Therefore, since no coverage is available since as a matter of law no physical damage occurred in any of the plaintiff's establishments all the motions seeking to dismiss the complaint is granted in full.

So ordered.

ENTER:

DATED: March 15, 2022
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC