IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

JAEWOOK LEE, D/B/A/ EVANSTON GRILL, INDIVIDUALLY AND ON BEHALF OF THE CLASSES DESCRIBED BELOW, Plaintiffs, v. STATE FARM FIRE & CASUALTY COMPANY, Defendant.	Case No. 20 CH 4589 Calendar 03 Honorable Allen Walker **JURY DEMAND**

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Defendant, State Farm Fire and Casualty Company's, Motion to Dismiss Class Action Complaint Pursuant to 735 ILCS 5/2-615. The Court has reviewed the briefs submitted by the parties, heard their arguments in the matter, and is fully advised in the premises. It is ordered that Defendant's motion is granted with prejudice.

BACKGROUND

Plaintiff, Evanston Grill, is an Illinois restaurant, owned and operated by Cook County residents, Hyun Lee, and his father, Jaewook Lee.[1] Defendant, State Farm, is an insurance company licensed in Illinois and engaged in the business of insuring properties throughout the United States, with its principal place of business in Bloomington, Illinois. State Farm issued Policy No. 93-KH-H688-5 to Evanston Grill for the period of August 15, 2019 to August 15, 2020 (the "Policy").

On March 15, 2020, Illinois Governor J.B. Pritzker ("Governor Pritzker") issued Executive Order 2020-07, requiring that all bars, restaurants, and movie theaters close to the public beginning March 16, 2020. Executive Order 2020-07 specifically stated, "the Illinois Department of Public Health recommends Illinois residents avoid group dining in public settings, such as in bars and restaurants, which usually involves prolonged close social contact contrary to recommended practice for social distancing."

[1] The facts recited herein are derived from Plaintiffs' Complaint and the exhibits attached thereto, and are accepted as true for purposes of Defendant's Motion to Dismiss. *Kedzie & 103rd Currency Exchange v. Hodge*, 156 Ill. 2d. 112, 115 (1993).

On March 20, 2020, Governor Pritzker issued Executive Order 2020-10, which ordered the immediate closure of all "non-essential" businesses in Illinois (Executive Order 2020-07 and 2020-10 are collectively referred to as the "Closure Orders"). The Closure Orders prohibited the public from accessing restaurants, thereby causing Evanston Grill to suspend its operations. Evanston Grill has not been operating since March 16, 2020.

Following the Closure Orders, Evanston Grill submitted a claim to State Farm requesting coverage for its business interruption losses under the "Loss of Income and Extra Expense" Provision of the Policy, identified as CMP-4705.

Section CMP-4705 provided:

1. Loss of Income

> a. We will pay for the actual "Loss of Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by accidental direct physical loss to the property at the described premises. The loss must be caused by a Covered Cause of Loss …

Section CMP-4705 also included coverage for losses resulting from an action of Civil Authority, and provided:

4. **Civil Authority**

> a. 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 Income" you sustain, and necessary "Extra Expense" caused by action of civil authority that prohibits access to the described premises …

State Farm denied the claim, citing the "Fungi, Virus or Bacteria" Exclusion, which excluded from coverage losses due to "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease." State Farm similarly denied coverage statewide for lost income as a result of the Closure Orders.

On June 17, 2020, Evanston Grill filed a three-count complaint (the "Complaint") on its behalf and on behalf of a class of similarly situated insureds (hereinafter collectively "Plaintiffs") for: (1) a declaratory judgment, Count I; (2) breach of contract, Count II; and (3) bad faith denial of insurance under 215 ILCS 5/155.

On August 12, 2020, State Farm (hereinafter "Defendant") filed a motion to dismiss the Complaint pursuant to 735 ILCS 5/2-615, which is presently before the Court.

2-615 MOTION TO DISMISS STANDARD

"The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). In reviewing the sufficiency of a complaint, a court must "accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "Moreover, Illinois is a fact-pleading jurisdiction." *Beahringer*, 204 Ill. 2d at 369. As such, a plaintiff "must allege facts that set forth the essential elements of the cause of action" and may not rely on "conclusions of law [or] conclusory allegations not supported by specific facts." *Visvardis v. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (1st Dist. 2007). However, "the plaintiff is not required to set out evidence." *Chandler v. Illinois Cent. R.R.*, 207 Ill. 2d 331, 348 (2003). Instead, the plaintiff need only allege the ultimate facts to be proved, "not the evidentiary facts tending to prove such ultimate facts." *Id.* Therefore, "[t]o survive a [section 2-615] motion to dismiss, a complaint must present a legally recognized claim as its basis for recovery, and it must plead sufficient facts which, if proved, would demonstrate a right to relief." *Derby Meadows Util. Co. v. Inter-Cont'l Real Estate*, 202 Ill. App. 3d 345, 358 (1st Dist. 1990). Further, a court should dismiss a cause of action on the pleadings "only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery." *Chanel v. Topinka*, 212 Ill. 2d 311, 318 (2004). It is within this framework that the Court analyzes Defendant's motion to dismiss.

DISCUSSION

Count I: Declaratory Judgment

Count I of Plaintiffs' Complaint seeks a declaration that: (1) the losses incurred by Plaintiffs as the result of the Closure Orders are covered losses under the Policies; (2) Defendant has not and cannot prove the application of any exclusion or limitation to the coverage for Plaintiffs' losses alleged herein; (3) Plaintiffs are entitled to coverage for their past and future Business Income loss(es) and Extra Expense resulting from the Closure Orders for the time period set forth in the Policies; (4) Plaintiffs have coverage for any substantially similar Closure Orders in the future that limits or restricts the access to Plaintiffs' places of business; and (5) any other issue that may arise during the course of litigation that is a proper issue on which to grant declaratory relief. Count II alleges Defendant breached the Policy by failing to pay Plaintiffs' losses for claims covered by the Policy. Count III alleges that Defendant's denied coverage in bad faith.

i. Whether Plaintiffs have adequately alleged coverage under the Policy

Defendant argues that Plaintiffs' claims are barred by the clear language of the Policy and its Endorsement. To trigger coverage, Defendant asserts that the Policy requires "accidental direct physical loss to" Covered Property. According to Defendant, the Illinois Supreme Court has interpreted "physical" loss to require an alteration in "appearance, shape, color or in other material dimension," citing *Travelers Ins. Co. v. Eljer Mfg., Inc*., 197 Ill. 2d 278, 301 (2001). Defendant claims that Plaintiffs' alleged "suspension of [its] business operations," "exclusion of customers"

from its restaurant, and "loss of revenue" due to the Closure Orders is an economic loss, not a physical injury to covered property.

Plaintiffs respond that the Policy is an "all-risk" policy, which means that the insurer agrees to cover all risks of loss not specifically excluded by the policy**,** citing *Board of Educ. v. International Ins. Co.*, 292 Ill. App. 3d 14, 17 (1st Dist. 1997). Because of this, Plaintiffs argue they need only allege a covered loss, rather than prove the exact cause of the loss or disprove any excluded perils in order to establish a prima facie case, citing *Wallis v. Country Mut. Ins. Co*., 309 Ill. App. 3d 566, 570 (2d Dist. 2000). Plaintiffs contend that they have adequately pled a "direct physical loss" under the Policy, and now the burden shifts to Defendant to prove Plaintiffs' loss was the result of an excluded risk, citing *Gulino v. Econ. Fire & Cas. Co*., 971 N.E.2d 522, 527 (1st Dist. 2012).

According to Plaintiffs, "accidental direct physical loss" is not defined in the Policy. When a phrase in an insurance policy is undefined, assert Plaintiffs, courts afford that phrase "its plain and ordinary meaning which can be derived from a dictionary. *Gulino*, 971 N.E.2d at 527. Plaintiffs contend that an average, ordinary, and reasonable person would interpret the meaning of "direct physical loss of … covered property" to include the sudden inability to use property that was previously usable. Plaintiffs allege that they suffered "physical" loss to their property due to the suspension of their business operations from the Closure Orders. According to Plaintiffs, the "loss" of Plaintiff's in-restaurant dining areas was undoubtedly "physical" as the dining rooms are composed of square footage and material, physical, tangible objects (like chairs, tables, dispensers, and utensils) that are perceptible to the senses and interactive.

Plaintiffs argue that *Mehl v. The Travelers Home & Marine Ins. Co.*, 2018 U.S. Dist. LEXIS 74552, *1 (E.D. Mo. 2018) is analogous and persuasive here. Plaintiffs note that in *Mehl*, the court rejected the defendant insurance company's argument that "actual physical damage" was required to allege "direct physical loss." Plaintiffs argue that like the court in *Mehl,* this Court should reject Defendant's argument that the Closure Orders did not actually cause damage to the property because Defendants' did not define "physical loss" and "point to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage." *Id*.

Last, Plaintiffs argue that Defendant's complete dependence upon *Travelers Ins. Co. v. Eljer Mfg., Inc*., 197 Ill. 2d 278 (2001) is erroneous because that case interpreted the term "property damage" rather than a "physical loss." Plaintiffs note that "damage" is a far narrower term than "loss", arguing that loss is defined as "[a]n undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way [;] … [and] [t]he failure to maintain possession of a thing." Conversely, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation," citing Merriam-Webster's Online Dictionary.

In construing an insurance contract, regular contract interpretation principles apply. The objective of the court is to ascertain the intent of the parties, construing the policy as a whole, with due regard to the risk undertaken, the subject matter of the policy and the purposes of the entire contract. *Outboard Marine Corp. v. Liberty Mutual Ins. Co*., 154 Ill. 2d 90 (1992). If words in the

policy are unambiguous, the court must afford them their ordinary meaning. *Id.* But if words are susceptible to more than one reasonable interpretation, they are ambiguous, and the insurance policy should be construed in favor of the insured and against the insurer who drafted the policy. *Id.* The determination of whether a term is ambiguous depends on how an ordinary person would understand it, not how a legally trained mind understands it. *USF&G v. Specialty Coatings*, 180 Ill. App. 3d 378 (1989).

At the outset, the Court notes that Plaintiffs cite numerous cases from other jurisdictions in their Response brief, including the *Mehl* case cited above, that address similar issues asserted in the instant case. These cases, while not binding, "are persuasive authority and entitled to respect." *Kostal v. Pinkus Dermatopathology Laboratory, P.C.*, 357 Ill. App. 3d 381(2005). However, "Illinois courts do not look to the law of other states when there is relevant Illinois case law available." *In re Estate of Walsh*, 2012 IL App (2d) 110938, ¶ 45. Moreover, the Court finds that Plaintiffs misstate the holding in *Mehl*. The *Mehl* court concluded that since "direct physical loss" was not defined in the policy, there was nothing in the policy "that would lead a reasonable insured to believe that actual physical damage was required for coverage." *Mehl*, 2018 U.S. Dist. LEXIS 74552 at * 2. The court noted, however, that the policy did define "property damage" as "physical injury to, damage of, *or loss of use* of tangible property," and therefore determined that the policy explicitly provided coverage for "loss of use." *Id*. Unlike *Mehl*, the Policy at issue in this case does not explicitly provide for "loss of use" coverage.

Notably, Plaintiffs concede in their Response brief that coverage under the Policy requires direct physical loss "to" Covered Property, but then proceed to argue that a reasonable person would interpret direct physical loss "of" covered property to include the inability to use property that was previously usable. In fact, the cases that Plaintiffs cite in support of this assertion interpret direct physical loss "of," not "to" property. The Court notes that there is a difference between direct physical loss *of* property and physical loss *to* property, which, as Defendant notes above, Illinois courts have defined as alteration in the physical condition of the property.

While Plaintiffs argue that Defendant's reliance on *Travelers* is misguided because the Illinois Supreme Court interpreted "property damage" rather than "physical loss," the Court finds that is simply not the case. The insurance policy in *Travelers* defined the term "property damage" as "*physical injury to* tangible property which occurs during the policy period." 197 Ill. 2d 278 at 289 (Emphasis added). At issue was whether the installation of a faulty plumbing system in a residential building constituted "physical injury to tangible property," given that system allegedly reduced the value of the building once it was installed. *Id*. at 299. The insurance company argued that the claimed reduction in value was an intangible economic loss, not covered under the Policy. *Id*. The Illinois Supreme Court concluded that "to the average, ordinary person, tangible property suffers a 'physical injury' when the property is altered in appearance, shape, color or in other material dimension. Conversely, to the average mind, tangible property does not experience 'physical injury' if that property suffers intangible damage, such as diminution in value…" *Id*. at 301-302.

Likewise, in this instance, the Court finds that Plaintiffs' alleged economic losses do not constitute "accidental direct physical loss to" Covered Property. Plaintiffs allege that due to the Closure Orders, they suffered "a substantial a loss of revenue in excess of $100,000 in the month

of April 2020" alone. Compl. at 18. The lost revenue, however, is an economic loss. Plaintiffs fail to allege that their restaurant suffered an "alteration in appearance, shape, color or other material dimension" as a result of the Closure Orders. Even if the Court granted Plaintiffs leave to amend the Complaint, Plaintiffs would not be able to establish that the Closure Orders resulted in "physical" loss to their property.

ii. *Whether Plaintiffs' claims are barred by an exclusion under the Policy*

Having determined that Plaintiffs failed to satisfy their burden of establishing coverage under the Policy, the Court's inquiry need not proceed any further. However, as outlined below, the Court finds that even if Plaintiffs had met their initial burden, their claims would not succeed under the Virus Exclusion of the Policy.

a. Virus Exclusion

Defendant contends that Plaintiffs' claims are barred by the Policy's Virus Exclusion, which bars coverage for "any loss which would not have occurred in the absence of ... [a] virus." Policy at 5-6 ¶ 1, j (2). Defendant asserts that under Illinois law, "[a]n insurer has the right to limit coverage on a policy, and where an insurer has done so, a court must give effect to the plain language of the limitation, absent a conflict with the law." *Phusion Projects, Inc. v. Selective Ins. Co*., 2015 IL App (1st) 150172, ¶ 38. Here, Defendant insists that the presence or suspected presence of a virus does not constitute "accidental direct physical loss to" Covered Property under the terms of the Policy.

Defendant argues that the Virus Exclusion is unambiguous, and that Illinois courts evaluating comparable policy exclusions have found the provisions unambiguous and applied their plain meaning, citing *DeVore v. Am. Family Mut. Ins. Co*., 383 Ill. App. 3d 266, 269 (2d Dist. 2008). Further, Defendant contends that Plaintiffs attempt to avoid the unambiguous language of the contract by alleging its loss "was not caused by the presence of COVID-19 on its premises," but rather "from the Closure Orders." Compl. ¶ 38. However, Defendant notes that the COVID-19 virus is plainly at the root of these orders, especially since each of the Closure Orders cited by Plaintiffs state they were issued in response to COVID-19. Put simply, asserts Defendant, if there were no COVID-19 virus, there would be no government orders to prevent its spread.

Plaintiffs respond that for the purposes of reviewing the instant 2-615 motion, the Court must accept as true that its losses were not caused by a Virus "on the insured premises." Plaintiffs contend that its losses arise from the *Closure Orders,* not a virus, and that a virus would not have caused the suspension of Plaintiffs' operations unless that virus spread throughout the property and/or required decontamination, which Plaintiffs' claim was contemplated under the Virus Exclusion. Plaintiffs contend that the Virus Exclusion clearly does not apply here, since Plaintiffs do not allege that any virus is present on its property.

Defendant replies that Plaintiffs do not dispute that under Illinois law "[a]n insurer has the right to limit coverage on a policy, and where an insurer has done so, a court must give effect to the plain language of the limitation, absent a conflict with the law." *Phusion Projects, Inc. v.*

Selective Ins. Co., 2015 IL App (1st) 150172, ¶ 47.[2] Defendant notes that the Policy unambiguously excludes loss caused by virus, and specifically states that this includes *all losses* that "would not have occurred in the absence of the excluded event" (virus). "Defendant maintains that Plaintiffs' alleged loss "would not have occurred in the absence of" a "virus" and is thus barred by the Virus Exclusion.

The Illinois Supreme Court has long held that the burden rests with an insured to establish that their claim is covered under its policy. *Wells v. State Farm Fire & Cas. Co.,* 2021 IL App (5th) 190460, ¶ 25. Once the insured has demonstrated coverage, the burden shifts to the insurer to prove that a limitation or exclusion applies. *Id*.

The plain language of the Policy states:

> **SECTION I – EXCLUSIONS**
>
> 1. We do not insure under any coverage for *any loss which would not have occurred in the absence of one or more of the following excluded events*. We do not insure for such loss *regardless of*: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: …
>
> **J. Fungi, Virus or Bacteria**
>
> … (2) *Virus*, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease; ….

While Plaintiffs argue that their losses were a result of the Closure Orders, and not a virus, the Court finds this argument unpersuasive. As Defendant argues above, each of the Closure Orders were entered in response to the COVID-19 virus. If not for COVID-19, the Governor would not have issued the Closure Orders, and Plaintiffs would not have incurred the claimed losses. As such, the Court finds that Defendant has met its burden of establishing an exclusion applies under the Policy. Accordingly, the Court grants Defendant's motion to dismiss Count I.

[2] Plaintiffs filed a motion to strike certain portions of Defendant's Reply. Accordingly, the Court did not consider the following additional cases cited by Defendant in the Reply: *It's Nice, Inc. v. State Farm Fire and Casualty Co*., No. 20-L-547 (Ill. Cir. Ct. DuPage County Sept. 29, 2020); *Malaube, LLC v. Greenwich Ins. Co*., 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434 (N.D. Cal. Sept. 22, 2020); *Turek Enterprises Inc. v. State Farm Mutual Automobile Insurance Co*., 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020).

Count II: Breach of Contract

Count II of Plaintiffs' Complaint alleges Defendant breached the Policy by denying coverage for Plaintiffs' alleged losses. However, having determined that Plaintiffs' claims are not covered under the Policy, the Court finds that Plaintiffs have not and cannot adequately plead a breach of the insurance contract for failing to provide coverage. Thus, the Court grants Defendant's motion to dismiss Count II.

Count III: Bad Faith

Defendant argues that in the absence of a breach of the Policy, Plaintiffs' bad faith claim should also be dismissed, citing *Woodard v. Am. Family Mut. Ins. Co*., 950 F. Supp. 1382, 1394 (N.D. Ill. 1997) (dismissing a claim under section 155 because such a claim "is dependent upon a valid claim for breach of contract"). The Court agrees. As such, the Court grants Defendant's motion to dismiss Count III.

CONCLUSION

Defendant, State Farm's, Motion to Dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-615 is granted with prejudice.

DATE: January 13, 2021

ENTERED:

Allen Price Walker
Associate Judge

Jan. 13, 2021

Allen P. Walker Circuit Court - 2071