

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

Historic Court House  
Ruling on Matter Submitted

12/23/2020  
8:30 AM  
Department 7

## **RIC2003415 VSTYLES INC vs CONTINENTAL CASUALTY COMPANY**

Honorable Randall Stamen, Judge  
Courtroom Assistant: None  
Court Reporter: None

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### **APPEARANCES:**

No Appearances

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Court subsequently rules on:12/21/2020 for Hearing re: Demurrer to Complaint of VSTYLES INC by CONTINENTAL CASUALTY COMPANY.

The Demurrer of defendant Continental Casualty Company ("Continental") to the Complaint of plaintiff VStyles, Inc., ("Plaintiff") is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

Requests for Judicial Notice

Continental's moving request for judicial notice is granted as to Exhibits A-D and denied as to all other requests.

Plaintiff's request for judicial notice is granted as to Exhibit A and denied as to all other requests. (Evid. Code § 452(c); and, Aquila, Inc. v. Superior Court (2007) 148 Cal.App.5th 556, 569.)

Continental's reply to request for judicial notice is denied. (Id.)

Discussion

The elements of a claim for breach of contract are "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom." (Abdelhamid v. Fire Ins. Exchange (2010) 182 Cal.App.4th 990, 999.) Plaintiff alleges Continental breached the subject Policy when it denied Plaintiff's claim for business income loss after Plaintiff was forced to close its salons in accordance with various state and local orders issued in response to the COVID-19 pandemic.

When determining whether an insurance policy provides a potential for coverage, the court is guided by the principal that interpretation of an insurance policy is a question of law to which ordinary rules of contractual interpretation apply. (Powerine Oil Co., Inc. v. Superior Court (2005) 37 Cal.4th 377, 390.)

"The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties," which "is to be inferred, if possible, solely from the written provisions of the contract." (Ibid [internal quotation marks and citations omitted]. "If contractual language is clear and explicit, it governs." (Ibid [internal quotation marks omitted]).

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Plaintiff alleges that its loss of business income arising out the COVID-19 pandemic is potentially covered under three provisions of the Policy:

- (1) The Policy provides that Continental will pay for the actual loss of business income during the “period of restoration” due to the suspension of Plaintiff’s business if the suspension is “caused by direct physical loss of or damage to property at the [insured] premises.” (Complaint, ¶ 28; Policy, Business Income and Extra Expense endorsement, ¶ 1(b) [p. 62].) The “period of restoration” means the period of time that “begins with the date of direct physical loss or damage” and ends with “[t]he date when the property ... should be repaired, rebuilt or replaced” or “when business is resumed at a new permanent location.” (Policy, Special Property Coverage Form, ¶ 20 [p. 57].)
- (2) The Policy provides coverage for loss of business income when the suspension of business is “caused by direct physical loss of or damage at the premises of a Dependent Property,” which is defined to include property operated by a third party on whom the insured relies to deliver material or services or who accepts the insured’s products and services. (Complaint, ¶¶ 34-35; Policy, Business Loss and Extra Income – Dependent Property endorsement, ¶¶ 1-2 [p. 176].)
- (3) The Policy provides for coverage for business income loss “caused by action of civil authority that prohibits access to the [insured] premises ... [if] “[t]he civil authority ... [is] due to direct physical loss of or damage to property at locations, other than [the insured] premises.” (Complaint, ¶ 33; Policy, Civil Authority endorsement, ¶ 1 [p. 88].)

There must be a “direct physical loss of or damage to” property. Plaintiff focuses on the first alternative, “direct physical loss” and argues that it does not require tangible damage or alteration to property and that loss of the ability to continue operating its business as a result of the government orders qualifies. Plaintiff alternatively argues that the presence of the COVID-19 virus does cause tangible damage or alteration to property because the virus can remain on surfaces up to 28 days. The arguments are without merit. While no California state court has addressed these issues, federal district courts applying California law have overwhelmingly rejected similar claims. (See, e.g., Pappy's Barber Shops, Inc. v. Farmers Group, Inc. (S.D. Cal. 2020) \_\_ F.3d \_\_, 2020 WL 5847570; Mudpie, Inc. v. Travelers Casualty Insurance Company of America (N.D. Cal. 2020) \_\_ F.3d \_\_, 2020 WL 5525171; 10E, LLC v. Travelers Indemnity Co. of Connecticut (C.D. Cal. 2020) \_\_ F.3d \_\_, 2020 WL 5359653; Mark's Engine Company No. 28 Restaurant, LLC v. Travelers Indemnity Company of Connecticut (C.D. Cal. 2020) \_\_ F.3d \_\_, 2020 WL 5938689; Travelers Casualty Insurance Company of America v. Geragos and Geragos (C.D. Cal., Oct. 19, 2020) No. CV 20-3619 PSG (EX), 2020 WL 6156584; Robert W. Fountain, Inc. v. Citizens Insurance Company of America. (N.D. Cal., Dec. 9, 2020) No.

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20-CV-05441-CRB, 2020 WL 7247207; Selane Products, Inc. v. Continental Casualty Co. (C.D. Cal., Nov. 24, 2020) No. 2:20-CV-07834-MCS-AFM, 2020 WL 7253378; West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Insurance Companies (C.D. Cal., Oct. 27, 2020) No. 2:20-CV-05663-VAP-DFMX, 2020 WL 6440037; Plan Check Downtown III, LLC v. AmGuard Insurance Company (C.D. Cal., Sept. 10, 2020) No. CV 20-6954-GW-SKX, 2020 WL 5742712; Long Affair Carpet and Rug, Inc. v. Liberty Mutual Insurance Company (C.D. Cal., Nov. 12, 2020) No. SA-CV-2001713-CJC-JDEX, 2020 WL 6865774.)

Under California law, losses from inability to use property do not amount to “direct physical loss of or damage to property” within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a “distinct, demonstrable, physical alteration.” (MRI Healthcare Center of Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal. App. 4th 766, 779 [citation and internal quotation marks omitted].) “Detrimental economic impact” does not suffice. (Ibid. [citation and internal quotation marks omitted].) An insured cannot recover by artfully pleading temporary impairment to economically valuable use of property as physical loss or damage. (Id. at 780.)

Plaintiff cites no persuasive authority to support its argument that the provisions do not require actual tangible injury to the property. Its reliance on Hughes v. Potomac Ins. Co. of District of Columbia (1962) 199 Cal.App.2d 239 and Strickland v. Federal Ins. Co. (1988) 200 Cal.App.3d 792 is misplaced. Hughes and Strickland simply determined that a policy covering a dwelling also covers the loss which occurs when the soil beneath it slides away. (Hughes, 199 Cal.App.2d at 248-49; Strickland, 200 Cal.App.3d at 800.) Moreover, the Policy’s definition of “period of restoration” further supports the position that a loss contemplated by the Policy be physical in nature. (See, Mudpie, Inc., supra, 2020 WL 5525171, at \*4 [the words “rebuild,” “repair” and “replace” “strongly suggest that the damage contemplated by the Policy is physical in nature”].) Plaintiff need not repair, rebuild or replace anything (or even disinfect) in order to reoccupy the insured properties, as it is clear from the Complaint’s allegations that Plaintiff’s properties were closed under state and local closure orders. Plaintiff further argues that coverage does not require structural alteration, as evidenced by the Policy’s exclusions for fungi and microbes. (Opposition, p. 8:19-9:15.) However, Plaintiff’s businesses and any alleged Dependent Property were not closed because of an infestation of the COVID-19 virus. Rather, they were closed as part of a state-wide effort to slow the spread of the virus by imposing social-distancing. Plaintiff argues the presence of the virus causes physical damage/alteration because it may potentially remain on surfaces for up to 28 days. (Complaint, ¶ 37.) However, Plaintiff notably cites no authority to support its interpretation. Again, Plaintiff’s business was

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not suspended because of the presence of the virus at the insured locations (or at any Dependent Property).

Plaintiff further argues that because the various state and local closure orders prevented its access to the insured locations, its business income loss is covered under the Civil Authority endorsement. However, under the Policy, “[t]he civil authority must be due to direct physical loss of or damage to property at locations, other than [the insured] premises.” In this case, the civil authority arose not out of any physical loss or damage of property but out of a state-wide effort to slow the spread of the COVID-19 virus. Moreover, the civil authority was directed to and affected all non-essential businesses, including Plaintiff’s salons.

Demurrer by CONTINENTAL CASUALTY COMPANY on Complaint of VSTYLES INC (from RIC2003415) sustained.

Leave to amend Complaint of VSTYLES INC granted, with 20 days to leave to amend.

Notice to be given by Clerk to THE AMMONS LAW FIRM LLP , GLASER WEIL , JOHNSTON & HUTCHINSON , SQUIRE PATTON BOGGS (US) , Amanda Leigh Groves .