

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.:
SUMMONS

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JACK IRWIN, D.D.S.

Plaintiff,

Plaintiff designates Kings
County as the place of trial.

-against-

MIDVALE INDEMNITY COMPANY

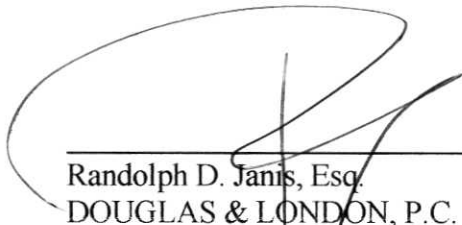
Defendant.
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The basis of venue is:
CPLR 503(a) and 503(d):
Plaintiff's residence and
substantial part of events or
omissions occurring in County

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the Plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, where service is made by delivery upon you personally within the state, or, within 30 days after completion of service where service is made in any other manner. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
July 3, 2020



Randolph D. Janis, Esq.
DOUGLAS & LONDON, P.C.
Attorneys for Plaintiff
59 Maiden Lane, 6th Floor
New York, New York 10038
(212) 566-7500

TO:
Midvale Indemnity Company
6000 American Parkway,
Madison WI 53783

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
JACK IRWIN, D.D.S.

Plaintiff,

-against-

**VERIFIED
COMPLAINT FOR
DECLARATORY RELIEF**

MIDVALE INDEMNITY COMPANY

Defendant.

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Plaintiff JACK IRWIN, DDS, a sole proprietorship, (hereinafter, "Plaintiff"), brings this Complaint alleging relief against Defendants, MIDVALE INDEMNITY COMPANY, and avers as follows:

I. NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiff JACK IRWIN DDS's contract of insurance with the Defendant.

2. In light of the Coronavirus global pandemic ("COVID-19") and state and local orders ("Civil Authority Orders") mandating that all non-essential in store businesses such as Plaintiff's cease or restrict operations, Plaintiff has sustained significant business losses.

3. Plaintiff's insurance policy is an All Risk Policy and provides coverage for all non-excluded business losses, and thus provides coverage here.

4. As a result, Plaintiff is entitled to declaratory relief that Plaintiff is covered for all business losses that have been incurred in a sum which exceeds the jurisdictional limitations of all lower Courts which would otherwise have jurisdiction over this action.

II. JURISDICTION & VENUE

5. This action for a declaratory judgment is within this Court's general original jurisdiction and not within the jurisdiction of any court of limited jurisdiction of this state.

6. This Court has personal jurisdiction over the Defendant because the Defendant has transacted, solicited and conducted business in New York through its employees, agents, affiliates and/or sales representatives and has derived substantial revenue from such business in New York. Defendant is licensed to do business in New York State and has purposely availed itself of personal jurisdiction in New York because it contracted to provide insurance to Plaintiff in New York which is the subject of this case.

7. This Court has personal jurisdiction of over defendant pursuant to CPLR §302.

8. This Court has personal jurisdiction of over defendant pursuant to CPLR §302(a)(1) in that defendant transacted business within the state and supplied good and services within New York State.

9. Venue is proper in Kings County pursuant to CPLR §503 because Plaintiff's office is located in this county and because a substantial part of the events or omissions giving rise to this claim occurred in Kings County.

PARTIES

10. At all relevant times, Plaintiff JACK IRWIN DDS is a sole proprietorship authorized to do business and doing business in the State of New York, County of Kings.

11. Plaintiff JACK IRWIN DDS operates a dental practice whose revenue depends substantially upon the ability of patients to visit that facility.

12. Defendant MIDVALE INDEMNITY COMPANY ("MIDVALE") is an insurance carrier with its principal place of business in Madison, Wisconsin located at 6000 American Parkway, Madison WI 53783. MIDVALE operated in this State and County at all relevant times.

13. At all relevant times, Defendant MIDVALE provides business interruption coverage to its insureds, including the Plaintiff.

14. Defendant MIDVALE issued an All Risk Insurance Policy to the JACK IRWIN DDS (Policy Number BPP1039186) for the period of February 15, 2020 to February 15, 2021. See, Policy, attached as **Exhibit A**.

15. The policy, currently in full effect, includes All Risk coverage which incorporates business interruption coverage for, among other things, business personal property and income protection and extra expense.

16. Plaintiff has paid the policy premiums to MIDVALE specifically to provide coverages of lost business income and extra expenses in the event of an involuntary business interruption.

17. In light of the Coronavirus global pandemic (“COVID-19”) and state and local orders (“Civil Authority Orders”) mandating that all non-essential in store businesses such as Plaintiff’s cease or restrict operations, Plaintiff sustained significant business losses. Consequently, Plaintiff properly and promptly submitted an insurance claim to defendant for losses and damages. On or about May 7, 2020, Defendant denied Plaintiff’s claim and asserted that Plaintiff was not entitled to any coverage. See, Denial Letter, attached hereto as **Exhibit B**.

III. FACTUAL BACKGROUND

A. Insurance Coverage

18. On or about February 15, 2020, Defendant entered into a contract of insurance with the Plaintiff JACK IRWIN DDS specifically to provide, among other things, business income coverage in the event of business interruption or closures by order of Civil Authority, and for business losses as a result of property damage at its location in Kings County, State of New York (the “Covered Properties”).

19. The Covered Property consist of the following location:

- JACK IRWIN DDS a dental practice located at 414 7th Avenue, Brooklyn, New York.

20. The Covered Property is covered under a Special All Risk Business Insurance Policy to the Plaintiff issued by the Defendant to Plaintiff JACK IRWIN DDS with Policy Number BPP1039186.

21. The Plaintiff's Policy is currently in full effect, providing, among other things coverage for property, business personal property, income protection & extra expense, and additional coverages between the period of February 15, 2020 to February 15, 2021.

22. Plaintiff JACK IRWIN DDS faithfully paid policy premiums to Defendant, specifically to provide, among other things, coverage for the loss of business income and extra expense sustained in the event of business interruption or closures by order of Civil Authority.

23. Under the Policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the Covered Property is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiff's Covered Property. This additional coverage is identified as coverage under "Civil Authority."

24. Based on information and belief, the Defendant accepted the policy premiums with no intention of providing coverage for business income losses resulting from orders of a Civil Authority that the Covered Property be shut down or restricted, or any related losses and/or damages.

25. Defendant's denial of coverage is based on its claim that the Covered Properties did not sustain direct physical loss or damage. *See Denial Letter*, attached hereto as Exhibit B.

26. However, Defendant's narrow reading of "loss" renders the Civil Authority

coverage ineffectual and demonstrates Defendant had no intention of providing coverage for losses Plaintiff faithfully paid premiums to insure against.

B. The Coronavirus Pandemic

27. The scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage. It is clear that contamination of the Covered Property would be a direct physical loss requiring remediation to clean the surfaces of the salon.

28. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. See, <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces>.

29. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

30. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight (28) days.

31. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

32. COVID-19 is a virus.

33. COVID-19 is a physical substance.

34. COVID-19 is a human pathogen,

35. COVID-19 can be present outside the human body in viral fluid particles.

36. COVID-19 can and does live on and/or remains capable of being transmitted and active on inert physical surfaces.

37. COVID-19 can and does live on and/or remains capable of being transmitted and active on floors, walls, furniture, desks, tables, chairs, equipment and other items of property for a period of time.

38. COVID-19 can be transmitted by way of human contact with surfaces and items of physical property on which COVID-19 particles are physically present.

39. COVID-19 has been transmitted by way of human contact with surfaces and items of physical property located at premises in Bronx County.

40. COVID-19 can be transmitted by human to human contact and interaction at premises in Bronx County, include places such as the business entities herein.

41. COVID-19 has been transmitted by human to human contact and interaction at premises in Bronx County.

42. COVID-19 can be transmitted through airborne viral particles emitted into the air at premises.

43. COVID-19 has been transmitted by way of human contact with airborne COVID-19 particles emitted into the air at premises in Kings County.

44. The presence of any COVID-19 particles renders items of physical property unsafe.

45. The presence of any COVID-19 particles on physical property impairs its value, usefulness and/or normal function.

46. The presence of any COVID-19 particles causes direct physical harm to property,

47. The presence of COVID-19 particles causes direct physical loss to property.

48. The presence of COVID-19 particles causes direct physical damage to property.

49. The presence of any COVID-19 particles at premises renders the premises unsafe, thereby impairing the premises' value, usefulness and/or normal function.

50. The presence of people infected with or carrying COVID-19 particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to that property.

51. The presence of people infected with or carrying COVID-19 particles at premises renders the premises, including property located at that premises, unsafe, resulting in direct physical loss to the premises and the property.

52. State and local governmental authorities, and public health officials around the Country acknowledge that COVID-19 and the Pandemic cause direct physical loss and damage to property. For example,

- The City of New York issued an Emergency Executive Order in response to COVID-19 and the Pandemic, in part, "because the virus **physically is causing property loss and damage.**" (Emphasis added).
- The State of Colorado issued a Public Health Order that "COVID-19....**physically contribute to property loss, contamination and damage.**" (Emphasis added).
- Broward County, Florida issued an Emergency Order acknowledging COVID-19 "**is physically causing property damage.**" (Emphasis).
- The State of Washington issued a stay at home Proclamation stating that the "COVID-19 pandemic and its progression...remains a public disaster affecting life, health, [and] **property...**" (Emphasis added).
- The State of Indiana issued an Executive Order recognizing that COVID-19 has the propensity to **physically** impact surfaces and personal **property.**" (Emphasis added).
- The City of New Orleans issued an order stating that "there is reason to believe that COVID-19 may spread amongst the population by various means of exposure, including the propensity to attach to surfaces for prolonged period of time, thereby spreading from surface to person and **causing property loss and damage** in certain circumstances."

(Emphasis added).

- The State of Illinois issued an Executive Order describing COVID-19's "propensity to **physically** impact surfaces and personal property." (Emphasis added).
- The State of New Mexico issued a Public Health Order acknowledging the "threat" COVID-19 "poses" to "**property**." (Emphasis added).
- North Carolina issued a statewide Executive Order in response to the Pandemic not only "to assure adequate protection for lives," but also to "assure adequate protection of...**property**." (Emphasis added).
- The City of Los Angeles issued an Order in response to COVID-19 "because among other reasons, the COVID-19 virus can spread easily from person to person and it is **physically causing property loss or damage** due to its tendency to attach to surfaces for prolonged periods of time." (Emphasis added).

C. Civil Authority

53. In response to COVID-19 and the Pandemic the Governor of New York has issued multiple executive orders pursuant to the authority vested by laws of New York.

54. In response to COVID-19 and the pandemic, the New York State of Health pursuant to its authority under New York State Law has issued multiple orders including a Stay at Home Order.

55. The State of New York is a civil authority as contemplated by the Policy.

56. The New York State Department of Health is a civil authority as contemplated by the Policy.

57. The Governor of the State of New York is a civil authority as contemplated by the Policy.

58. On March 7, 2020, New York Governor Andrew Cuomo declared a Disaster Emergency for the entire state of New York as a result of COVID-19.

59. On March 12, 2020, Governor Cuomo set restrictions on large gatherings.

60. On March 20, 2020, the State of New York issued a stay-at-home order that all non-essential workers must stay at home as a result of the COVID-19 pandemic. To date, this order has been extended to at least June 13, 2020.

61. As of March 22, 2020, Governor Cuomo ordered all “non-essential businesses” statewide to be closed. See, State's Executive Order 202.6. This Order remained in effect up to on or about June 8, 2020 when Phase 1 re-opening in New York State commenced. The Governor ordered that essential businesses could remain open subject to restriction. Essential businesses include hotels (infrastructure) and restaurants/bars (but only for take-out/delivery) (retail). Any dine-in or on-premise restaurant or bar service, is specifically deemed non-essential.

62. Further, on April 10, 2020 President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff:

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it's something that we've already suggested, we're talking to them. **Business interruption insurance**, I'd like to see these insurance companies—you know you have people that have paid. When I was in private I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I'd have business where I had it, I didn't always have it, sometimes I had it, sometimes, I had a lot of different companies. **But if I had it I'd expect to be paid**. You have people. **I speak mostly to the restaurateurs**, where they have a restaurant, they've been paying for 25, 30, 35 years, business interruption. They've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects, OK. And I don't see the word pandemic mentioned. Now in some cases it is, it's an exclusion. But in a lot of cases I don't see it. I don't see it referenced. And they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair, and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot money to a lot of people. And they've been paying for years, sometimes they just

started paying, but you have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen.

See, <https://youtu.be/cMeG5C9TjU> (emphasis added).

63. The President is articulating a few core points:

- Business interruption is a common type of insurance.
- Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.
- This pandemic should be covered unless there is a specific exclusion for pandemics.
- If insurers deny coverage, they would be acting in bad faith.

64. These Orders and proclamations, as they relate to the closure of all “non-essential businesses” and restrictions on essential businesses evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiff’s, as the requisite contact and interaction causes a heightened risk of the property becoming unsuitable for business.

65. Plaintiff JACK IRWIN DDS suffered losses as a direct consequence of the Civil Authority stay-at-home orders for public safety issued by the Governor of New York and the State of New York generally. Accordingly, Plaintiff has submitted a claim to Defendant related to such losses.

66. However, Defendant has denied Plaintiff’s claims in contravention of the clear policy language entitling Plaintiffs to coverage for business losses arising out of the Civil Authority Orders.

D. Impact on Plaintiff

67. As a result of the Orders referenced, herein, Plaintiff JACK IRWIN DDS shut its doors to dental patients not receiving emergency care.

68. Plaintiff's business loss occurred when the State of New York declared a State of Emergency on March 7, 2020. It suffered further when the State of New York required all non essential businesses to shut down on March 20, 2020.

69. Prior to March 7, 2020 Plaintiff was opened to patients for all dental needs. Plaintiffs' dental practice is not a closed environment, and because people – staff, patients, community members, and others – constantly cycle in and out of the dental practice office/suite, there is an ever-present risk that the Covered Property is contaminated and would continue to be contaminated. In fact, it's probable that Plaintiffs dental practices suffered contamination based upon patients later being diagnosed as suffering from Coronavirus (COVID-19).

70. Businesses like the Plaintiff's dental practice are more susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on the Covered Property and remain viable for far longer as compared to a facility with open-air ventilation.

71. Plaintiff's business is also highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the service nature of the businesses place staff and patients in close proximity to the property and to one another and because the nature of a dental practice involves a high level of respiratory droplets and fomites being released into the air of the property during dental procedures and contacting dental equipment.

72. The virus is physically impacting Plaintiff. Any effort by defendant to deny the reality that the virus causes physical loss and damage would constitute a false and potentially

fraudulent misrepresentation that could endanger the Plaintiff and the public. Dental equipment in the practice as well as other property in the practice has been impacted by exposure to the Covid-19 Virus.

73. It is probable that COVID-19 particles have been physically present at Plaintiff's premises described in the Policy during the Policy period.

74. It is probable that COVID-19 particles have been physically present on surfaces and items of property located at Plaintiff's premises described in the Policy during the Policy period.

75. It is probable that airborne COVID-19 particles have been physically present at Plaintiff's premises described in the Complaint during the Policy period.

76. It is probable that airborne COVID-19 particles have been physically present at Plaintiff's premises described in the Policy during the Policy period.

77. Plaintiff has sustained direct physical loss and damage to items of property located at its premises and direct physical loss and damage to its premises described in the Policy as a result of the presence of COVID-19 particles and/or the Pandemic.

78. Plaintiff submitted timely insurance claims to defendant.

79. Any purported viral exclusion does not apply here because a legal proximate cause of the Plaintiff's losses was the civil authority orders issued by the State of New York and similar civil authority orders.

80. Also, while the policy contains a virus exclusion – the policy does not exclude coverage for a national state of disaster like the current pandemic. The insurance industry knows how to exclude “pandemics and epidemics” and has done so in other contexts. See, https://www.travelinsurance.com/brochure/Allianz/Allianz_Basic_FL_0216.pdf (“You aren't

covered for any loss that results directly or indirectly from any of the following general exclusions.

The following Events: an epidemic or pandemic[.]”). Here it did not.

81. As drafter of the Policy of insurance, if MIDVALE had wished to exclude from coverage as “physical loss or damage” loss of use of property that has not been physically altered, it could have used explicit language stating such a definition of physical loss of damage.” It did not do so.

82. The simple truth is that Defendant pre-determined its intent to deny coverage for any business interruption claim related to COVID-19 pandemic and civil authority orders connected to the COVID-19 pandemic; which explains the quick and cursory denial of the claims timely submitted to defendant herein.

83. A declaratory judgment determining that the coverage is provided under the Policy will prevent the Plaintiff from being left without vital coverage acquired to ensure the survival of the business due to the shutdown caused by the Civil Authority Orders is necessary. As a result of these Orders, Plaintiff has incurred, and continue to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

CAUSE OF ACTION
DECLARATORY RELIEF

84. Plaintiff re-alleges and incorporate by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

85. Pursuant to NY CPLR §3001, the Supreme Court may render a Declaratory Judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the Court declines to render a judgment is shall state its grounds.

86. An actual controversy has arisen between Plaintiff and the Defendant as to the

rights, duties, responsibilities and obligations of the parties under the Policy in that Plaintiff contends and, on information and belief, the Defendant disputes and denies that:

- a. The Civil Authority Orders constitute a complete or partial prohibition of access to Plaintiffs' Covered Properties;
- b. The prohibition of access by the Civil Authority Orders has specifically "prohibit[ed] access to the premises" in whole or in part as set forth in the Policy's Civil Authority provision;
- c. The Policy virus exclusion does not apply here;
- d. The Civil Authority Orders trigger coverage;
- e. The Policy includes coverage for losses caused by the Civil Authority Orders;
- f. The Policy includes coverage for losses caused by the Coronavirus;
- g. The Policy provides coverage to Plaintiffs for any current and future civil authority closures of businesses in Kings County and New York State due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters;
- h. The Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Covered Properties; and,
- i. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

87. Plaintiff seeks a Declaratory Judgment to determine whether the Civil Authority Orders prohibit access to the premises in whole or in part of Plaintiff's Covered Property as set forth in the Policy's Civil Authority provision.

88. Plaintiff further seeks a Declaratory Judgment to affirm that the Civil Authority Orders trigger coverage.

89. Plaintiff further seeks a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiff for any current and future Civil Authority closures of businesses in Kings County and New York State due to physical loss or damage from the Coronavirus and the policy

provides business income coverage in the event that Coronavirus has caused a loss or damage at the Covered Property.

90. Plaintiff does not seek any determination of whether the Coronavirus is physically in or at the Covered Property specifically, the amount of damages, or any other remedy other than declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff herein prays as follows:

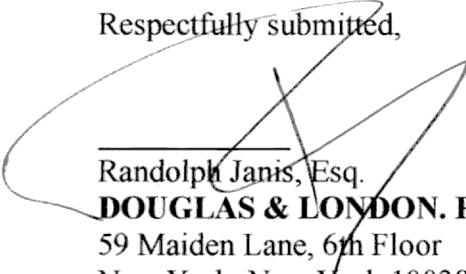
- 1) For a declaration that the Civil Authority Orders constitute a prohibition of access in whole or in part to Plaintiff's Covered Property.
- 2) For a declaration that the prohibition of access by the Civil Authority Orders "prohibits access to the premises" in whole or in part as stated in the Policy.
- 3) For a declaration that the Civil Authority Orders trigger coverage under the Policy.
- 4) For a declaration that the Policy provides coverage to Plaintiff for any current, future and continued civil authority closures of businesses in Kings County and New York State due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters.
- 5) For a declaration that the virus exclusion does not preclude coverage of Plaintiff's loss of business income or the physical loss or damage suffered at the Insured Property;
- 6) For a declaration that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiff's Covered Property or the immediate area of the Plaintiff's Covered Property; and,
- 7) For such other relief as the Court may deem proper.

TRIAL BY JURY IS DEMANDED

Plaintiff hereby demands trial by jury.

Dated: July 3, 2020

Respectfully submitted,



Randolph Janis, Esq.

DOUGLAS & LONDON. P.C.

59 Maiden Lane, 6th Floor
New York, New York 10038

Phone: (212) 566 7500

Fax: (212) 566 7501

rjanis@douglasandlondon.com

