

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TOPPERS SALON & HEALTH SPA, INC.
702 N. 3rd Street
Philadelphia, PA 19123

Plaintiff,

v.

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA
485 Lexington Ave 8th Floor
New York, NY 10017

Defendant.

Civil Action No.

COMPLAINT

Toppers Salon & Health Spa, Inc. (“Toppers”) complains against Travelers Property Casualty Company of America (“Travelers”) as follows:

Nature of the Action

1. This is an action arising out of Travelers’s denial of insurance coverage to which Toppers is entitled under the policy Toppers purchased and paid for.

2. The coronavirus and Covid-19 pandemic has devastated the U.S. economy.

3. Toppers operates a number of day spas at six locations in Southeastern Pennsylvania, Marlton, NJ, and Dover, DE. Like most American businesses, its business was forced to close on account of the pandemic and the resultant government stay-at-home orders in the states in which it operates.

4. Toppers purchased Commercial Property insurance from Defendant Travelers. Applicable provisions of this insurance contemplate and provide coverage for the continuing operating expenses that Toppers has incurred from the suspension of its business operations at its locations due to the pandemic.

5. Although Toppers has complied with all provisions of the subject insurance policy, and although application of the standard rules of insurance contract interpretation makes clear that coverage exists for Toppers under the instant circumstances, Travelers denied coverage and refuses to reimburse Toppers under this insurance, in breach thereof.

6. Toppers brings claims for breach of contract to obtain the coverage under this insurance that Travelers is contractually obligated to provide.

The Parties

7. Toppers is a Pennsylvania corporation with its headquarters in Philadelphia.

8. Travelers is a Minnesota corporation with its headquarters in New York.

Jurisdiction and Venue

9. Jurisdiction exists pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

10. Venue is proper in this Court under 28 U.S.C. § 1391 because the breach of contract occurred in this district.

Background

11. Travelers issued to Toppers a “Commercial Property” policy of insurance (“the Policy”), no. I-660-2P891553-TIL-19, with a policy period of October 11, 2019 to October 11, 2020. (A copy of the Policy is attached hereto as Exhibit 1.)

12. The “Business Income” insuring agreement in the Policy provides that:

We will pay for the actual loss of Business income you sustain due to the necessary “suspension” of your “operations” during the period of restoration.” The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of loss...

13. The prerequisite to coverage under the insuring agreement for “Business Income” is that the suspension of the insured’s operations have been caused by “direct physical loss of or damage to property” at the insured premises (*i.e.*, Toppers’ business locations).

14. The “Civil Authority” insuring agreement in the Policy provides that:

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 Business Income you sustain and the reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property

15. Thus, the prerequisites to coverage under the insuring agreement for “Civil Authority” is that (i) a civil authority must prohibit access to the described premises, *i.e.* Toppers’ locations; (ii) the described premises are within one mile of the area to which a civil authority prohibited access; and (iii) the action by the civil authority is taken in “response to dangerous physical conditions resulting from the damage or continuation of the physical loss of the Covered Cause of Loss that caused the damage.” Travelers concedes that the first two requirements were satisfied by the government shut down orders issued beginning March 16, 2017, which prohibited access to all of Toppers’ locations.

16. The “Location Schedule” attached to the Policy identifies and describes each of the Toppers’ premises in Philadelphia, Wayne, and Newtown in Philadelphia, Marlton, NJ, and Dover, DE covered by the Policy.

17. “Covered Cause of Loss” is defined as “Risks of Direct Physical Loss.” The coronavirus and Covid-19 pandemic fall within this definition.

18. The Policy provides coverage for any loss of “business income,” and the policy defines that term to include not only “losses” (*i.e.*, lost income) but also “continuing operating expenses.”

19. In March 2020, government stay-at-home directives by Pennsylvania, New Jersey, and Delaware caused Toppers to suspend operations at its all its locations as of March 16, 2020.

20. Coverage exists under the Policy under the insuring agreement for “Business Income” because Toppers temporarily closed its business due to a direct physical loss of property. The word “loss,” as defined in the dictionary and as applicable here, means detriment or disadvantage. The words “loss . . . of” property, as used in the Policy, can thus only refer to a “loss of” use of the property. The pandemic has caused Toppers a loss of use of its property, which triggers coverage under the Policy.

21. In addition, coverage exists under the Policy under the “Business Income” insuring agreement because Toppers suspended its operations because of direct physical damage to property. The coronavirus lives on surfaces, including building surfaces, from which it can come into contact with (and harm and kill) people, and so the presence of the coronavirus virus on building surfaces thus constitutes damage to the building. As a result, coverage is triggered under the Policy for this reason as well.

22. Coverage also exists under the Policy’s “Civil Authority” insuring agreement, because (i) there was a “denial of access” to Toppers’ premises due to the government stay-at-home orders; (ii) the government acted as it did because the virus was on surfaces throughout

these areas, necessarily including surfaces within one mile of Toppers' offices; and (3) the damage to property was at the very least a risk of a direct physical loss.

23. No exclusion eliminates coverage under the policy for Toppers' "continuing operating expenses" incurred after the shutdown order and Toppers' suspension of its business at each of its locations.

24. Toppers wrote to Travelers on June 10, 2020, making a claim for coverage under the Policy for its "continuing operating expenses," which is an element of "Business Income" under the Policy. A copy of its claim is attached as Exhibit 2.

25. Travelers refused to provide coverage under the Policy or to pay Toppers the amounts to which it is entitled under the Policy, in breach thereof. A copy of Travelers' letter of denial is attached as Exhibit 3.

Count I – Breach of Contract

26. The Policy is a contract of insurance binding upon Travelers, as insurer, and Toppers, as insured.

27. Toppers has complied with all applicable provisions of the Policy and is entitled to coverage under the Policy.

28. Travelers has refused to reimburse Toppers for amounts owed under the Policy for its continuing operating expenses, in breach thereof.

29. None of the Policy's exclusions applies to the continuing operating expenses Toppers has paid during the suspension of operations at its six locations beginning March 16, 2020.

30. Toppers has been proximately damaged as a result in an amount in excess of \$75,000, exclusive of interests and costs.

WHEREFORE, the court should (i) enter judgment in favor of Toppers and against Travelers for damages in excess of \$75,000 to cover its continuing operating costs incurred during the suspension of its operations at all its locations , plus costs and attorney's fees, and (ii) award such other relief as it deems equitable and just.

/s/ Daniel J. Dugan

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