UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

EMERALD COAST RESTAURANTS, INC., d/b/a O'Quigley's Seafood Steamer & Oyster Sports Bar,

Plaintiff,

v. **Case No. 3:20cv5898-TKW-HTC**

ASPEN SPECIALTY INSURANCE COMPANY,

Defendant.
_____/

ORDER DISMISSING CASE

This case is before the Court based on Defendant's motion to dismiss (Doc. 10) and Plaintiff's response in opposition (Doc. 13). Upon due consideration of those filings, their attachments,[1] and the parties' notices of supplemental authority (Docs. 15, 16), the Court finds that the motion to dismiss is due to be granted.

[1] The Court did not consider the hearing transcripts attached as Exhibits B, C, and D, to the affidavit of defense counsel (Doc. 10-1) attached to the motion to dismiss because those documents were not referred to in the amended complaint. *See Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007) (holding that a court may only consider a document not attached to the complaint when ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) when "a plaintiff refers to [the] document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss"). By contrast, the Court did consider the other documents attached to the affidavit because they were referred to in the amended complaint (Exhibit A) or were merely copies of unreported judicial opinions (Exhibits E, F, G, H).

This is an insurance coverage dispute between an insured (Plaintiff) and the insurer (Defendant) stemming from the restaurant closure orders issued by state and local governments to slow the spread of COVID-19. The amended complaint (Doc. 7) asserts 14 counts and seeks (1) declarations that the economic losses allegedly sustained by Plaintiff's restaurant as a result of COVID-19 and the closure orders are covered under various provisions of the "all risk" insurance policy issued by Defendant, and (2) damages for Defendant's alleged breach of the policy for not providing coverage for the losses. Defendant argues that the complaint should be dismissed for failure to state a claim upon which relief can be granted because the losses allegedly suffered by Plaintiff are not covered under the clear and unambiguous policy language. The Court agrees with Defendant.

"[A]n 'all risk' policy is not an 'all loss' policy, and thus does not extend coverage for every conceivable loss." *Sebo v. Am. Home Assurance Co.*, 208 So.3d 694, 696-97 (Fla. 2016) (citation omitted). Here, the policy issued by Defendant provides coverage "for direct physical loss of or damage to" Plaintiff's property, as well as coverage for the loss of business income (and extra expenses) sustained by Plaintiff due to a suspension of operations "caused by direct physical loss or damage to" Plaintiff's property.[2] This language clearly and unambiguously requires actual

[2] The policy also provides coverage for the loss of business income (and extra expenses) when a civil authority prohibits access to the covered premises, but based on the allegations in the amended complaint, that coverage is clearly not applicable here because it only applies if the

physical damage to the property. *See Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. 2020).

Although the Eleventh Circuit has not yet squarely addressed the precise issue framed in this case,[3] a growing number of state and federal courts in Florida and around the country have considered the issue and have almost uniformly held that economic losses resulting from state and local government orders closing businesses to slow the spread of COVID-19 are not covered under "all risk" policy language identical to that in this case because such losses were not caused by direct physical loss of or damage to the insured property. *See, e.g., El Novillo Restaurant v. Certain Underwriters at Lloyd's London*, 2020 WL 7251362 (S.D. Fla. Dec. 7, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020); *see also* Doc. 10, at 24 n.10 (collecting cases). The Court agrees with the reasoning in those cases, and for sake of brevity, the Court incorporates their reasoning into this Order.

covered premises is within the area immediately surrounding (and not more than a mile from) another property that sustained damage due to a covered loss and the action of the civil authority was taken in response to a dangerous physical condition resulting from the damage to the other property or was necessary for the civil authority to have unimpeded access to the damaged property.

[3] The issue is currently pending before the Eleventh Circuit in case number 20-14156, which is the appeal of the dismissal order in *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020).

In sum, because the losses claimed by Plaintiff are not covered under the clear and unambiguous provisions of the policy, the amended complaint fails to state a plausible claim for relief.[4] Any further amendment of the claims would be futile under the circumstances. Accordingly, it is

ORDERED that Defendant's motion to dismiss (Doc. 10) is **GRANTED**, the amended complaint is **DISMISSED with prejudice**, and the Clerk shall close the file.[5]

DONE and ORDERED this 18th day of December, 2020.

T. Kent Wetherell, II

T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE

[4] Based on this conclusion, the Court need not address Defendant's alternative argument that the losses allegedly suffered by Plaintiff would be excluded under the policy in any event.

[5] The Court did not overlook Plaintiff's request that the Court certify a question to the Florida Supreme Court, *see* Doc. 13, at 41, but the Court is unaware of any authority (and Plaintiff cites none) that would allow the Florida Supreme Court to consider a certified question from this Court. Indeed, Florida law only allows the Florida Supreme Court to consider certified questions from the United States Supreme Court or a United States Court of Appeals *See* art. V, §3(b)(6), Fla. Const.; §25.031, Fla. Stat.; Fla. R. App. P. 9.150(a). Accordingly, the Court could not certify a question to the Florida Supreme Court even if it wanted to do so. *See* 17A C. Wright, A. Miller, & E. Cooper, *Fed. Prac. & Proc. Juris.* §4248 (3d ed.) ("[A] federal court cannot compel a state court to answer questions in the absence of a state procedure."); *see also Fed. Deposit Ins. Corp. v. Blue Rock Shopping Ctr., Inc.*, 599 F. Supp. 684, 687 (D. Del. 1984), (refusing to certify a question to the Delaware Supreme Court at the suggestion of the Third Circuit because the Delaware Constitution only authorized the District Court to certify questions to the Delaware Supreme Court and "'[i]t would be a contravention of that apparently purposeful decision of the state if [the District] Court were to allow the . . . Third Circuit to do indirectly . . . what the Delaware constitution does not allow to be done directly").