IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

K D UNLIMITED INC. doing business as The Artisan Gathering Salon, Plaintiff, v. OWNERS INSURANCE COMPANY, Defendant.	CIVIL ACTION FILE NO. 1:20-CV-2163-TWT

OPINION AND ORDER

This is a declaratory action. It is before the Court on the Defendant's Motion to Dismiss [Doc. 23]. For the reasons set forth below, the Court GRANTS the Defendant's Motion to Dismiss [Doc. 23].

I. Background

On April 2, 2020, Governor Brian Kemp issued a statewide shelter in place order in response to the worldwide COVID-19. First. Am. Compl., at ¶ 34. The shelter in place order mandating that all non-essential businesses shut down was in effect until April 24, 2020. *Id.* The Plaintiff K D Unlimited Inc., doing business as The Artisan Gathering Salon, owns and operates a salon in Lawrenceville, Georgia. *Id.* at ¶ 8. The Defendant Owners Insurance Company is an insurance carrier which provides business interruption insurance to the Plaintiff. *Id.* at ¶ 9. The Defendant issued a policy, policy number 50-468-158-

00, to the Plaintiff that was in effect from August 18, 2019 until August 28, 2020. *Id.* at ¶ 10. The Plaintiff allegedly purchased the policy with an expectation that the policy would provide coverage in the event of business interruption and extended expenses, such as that suffered by the Plaintiff as a result of the COVID-19 pandemic. *Id.* at ¶ 19. Due to the stay at home order, the Plaintiff's business was unable to operate and lost business. *Id.* at ¶ 38. As a result of the Orders put in place by state and local authority regarding COVID-19, the Plaintiff shut its doors to customers on March 23, 2020. *Id.* at ¶ 45. On May 1, 2020, the State of Georgia allowed the Plaintiff's business to reopen at a reduced capacity. *Id.* at ¶¶ 36, 45. The Plaintiff alleges that its business continues to suffer. *Id.* at ¶ 36.

The Plaintiff's policy with the Defendant provides coverage for business income loss and extra expense. The basic insuring agreement in the Plaintiff's policy states as follows:

> **A. COVERAGE**
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

Policy, at 92. "Covered Property" means property of the insured "at the premises described in the Declarations," specifically the Plaintiff's salon. *Id.* "Covered Cause of Loss" is defined in pertinent part as "RISKS OF DIRECT PHYSICAL LOSS unless the loss is a. Excluded in Section B., Exclusions . . . ." *Id.* at 93. The general grant of coverage for direct physical loss is also

expressly extended to certain consequential expenses entitled "Business Income" and "Extra Expense" coverage, as modified by Endorsement 54227 8-00 which states:

> **f. Business Income**
>
> Subject to the Limit of Insurance provisions of this endorsement, 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 the described premises, including personal property in the open (or in a vehicle) within the distance shown in the Declarations under BUSINESS PERSONAL PROPERTY – EXPANDED COVERAGE, caused by or resulting from any Covered Cause of Loss.
>
> **g. Extra Expense**
>
> Subject to the Limit of Insurance provisions of this endorsement, we will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises, including personal property in the open (or in a vehicle) within the distance shown in the Declarations under BUSINESS PERSONAL PROPERTY – EXPANDED COVERAGE, caused by or resulting from a Covered Cause of Loss.

Id. at 28. Business Income loss coverage is triggered when the Plaintiff's operations are suspended due to "direct physical loss of or damage to property at [the insured property] . . . caused by or result[ing] from a Covered Cause of Loss" and provides for payment of expenses during the "period of restoration" *Id.* Extra Expense coverage is trigged when the Plaintiff incurs expenses during the "period of restoration" "that [Plaintiff] would not have incurred if there had been no direct physical loss or damage to property caused by or

resulting from a Covered Cause of Loss." *Id.* The policy defines "Period of Restoration" as the period of time that:

1. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and

2. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

Id. at 20.

The Plaintiff alleges that contamination and damage to the Plaintiff's insured properties and surrounding property caused by the Coronavirus constitute "direct physical loss" and are Covered Causes of Loss within the meaning of the policy. *Id.* at ¶ 53. The Plaintiff filed a Complaint on May 20, 2020, which was amended on July 6, 2020. On July 20, 2020, the Defendant filed a Motion to Dismiss.

II. Legal Standard

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible" claim for relief. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); Fed. R. Civ. P. 12(b)(6). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is "improbable" that a plaintiff would be able to prove those facts; even if the possibility of recovery is extremely "remote and unlikely." *Atlantic v. Twombly*, 550 U.S. 544, 556 (2007). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light

most favorable to the plaintiff. *See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.,* 711 F.2d 989, 994-95 (11th Cir. 1983); *see also Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (noting that at the pleading stage, the plaintiff "receives the benefit of imagination"). Generally, notice pleading is all that is required for a valid complaint. *See Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests.

III. Discussion

The Plaintiff alleges that the policy contains among other things "personal property, business income and extra expense, contamination coverage and additional coverage." First Am. Compl., at ¶ 11. The Plaintiff incorrectly alleges the existence of Civil Authority Coverage in the policy. The only civil authority language in the policy appears in an Electronic Equipment endorsement involving direct physical loss of or damage to Electronic Equipment, which is not alleged here. Policy, at 33. The Plaintiff acknowledges, however, that a covered Cause of Loss under the policy means a "direct physical loss or physical damage to" the Plaintiff's insured property. Pl.'s Resp., at 5.

By way of declaratory judgment, the Plaintiff asks the Court to decide: (1) whether the [Civil Authority] Orders trigger Business Income and Extra

Expense coverage as defined in the policy and (2) whether the policy provides coverage to the Plaintiff for any current and future Civil Authority closures of business in the State of Georgia due to physical loss or damage from the Coronavirus. First Am. Compl., at ¶¶ 61-63. To receive coverage under the policy, the Plaintiff first argues that access to the Plaintiff's business was prohibited by Civil Authority Orders which were the direct result of physical loss of or damage to property at or near the insured property. *Id.* at ¶ 22. The Plaintiff alleges that the business suffered direct physical loss or damage because of the loss of intended use of property. *Id.* at ¶ 25.

The Plaintiff's policy contains a property insurance form under which coverage is triggered by "direct physical loss of or damage to Covered Property . . . ." Policy, at 92. "In Georgia, insurance is a matter of contract, and the parties to an insurance policy are bound by its plain and unambiguous terms." *Hays v. Ga. Farm Bureau Mut. Ins. Co.*, 722 S.E.2d 923, 925-926 (Ga. Ct. App. 2012) (punctuation and internal citations omitted). Construction of the policy's terms are questions of law:

> The court undertakes a three-step process in the construction of the contract, the first of which is to determine if the instrument's language is clear and unambiguous. If the language is unambiguous, the court simply enforces the contract according to its terms, and looks to the contract alone for the meaning.

American Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 707 S.E.2d 369, 371 (Ga. 2011) (internal citations omitted). Unambiguous terms must be given effect "even if beneficial to the insurer and detrimental to the insured,"

and Georgia courts "will not strain to extend coverage where none was contracted or intended." *Jefferson Ins. Co. of New York v. Dunn*, 496 S.E.2d 696, 699 (Ga. 1998). By Georgia statute, "the whole contract should be looked to in arriving at the construction of any part." O.C.G.A. § 13-2-2.

Because the Plaintiff and the Defendant argue that the plain language of the policy leads to different results, an analysis of the relevant provision is required. The parties agree that the key phrase is "direct physical loss of or damage to" the covered property. The Plaintiff argues that "direct physical loss of or damage to" includes a loss of use of the property when it was not physically available to patrons because of the Civil Authority Orders. Pl.'s Resp., at 5-16. The Defendant argues that a "direct physical loss of or damage to" requires some form of physical change to the covered property. Def.'s Motion to Dismiss, at 11-20. Because no physical change occurred at the Plaintiff's property as a result of COVID-19, the Defendant maintains that no coverage can extend to its losses. *Id.* The Defendant insists that the Plaintiff's claims are essentially economic loss claims stemming from the "loss of use" of its facilities during the shutdown. *Id.* The Defendant asks the Court to decline the Plaintiff's invitation to interpret "direct physical loss of or damage to" as allowing for mere loss of use untethered to any physical damage. *Id.*

While some courts have found physical loss even without tangible destruction, the line of cases requiring tangible injury to property is more persuasive. Multiple courts have now considered and rejected the Plaintiff's

loss of use theory in the COVID-19 business interruption context, finding that the ordinary meaning of "physical loss of or damage to" requires a physical or tangible change. *See, e.g.*, *Uncork and Create LLC v. Cincinnati Insurance Co.*, No. 2:20-cv-0041, 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020); *Raymond H Nahmad DDS PA v. Hartford Casualty Insurance Co.*, No. 1:20-cv-22833, 2020 WL 6392841, (S.D. Fla. Nov. 1, 2020); *Seifert v. IMT Insurance Co.*, No. 20-1102, 2020 WL 6120002, (D. Minn. Oct. 16, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's…*, No. 8:20-cv-1605, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020); *Sandy Point Dental, PC v. Cincinnati Insurance Co.*, No. 20-CV-2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020); *Pappy's Barber Shops, Inc. v Farmers Group, Inc.*, No. 20-cv-907, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020); *10E, LLC v. Travelers Indemnity Co.*, No. 2:20-cv-04418, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020*); Malaube, LLC v. Greenwich Insurance Co.*, No. 20-22615, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020). The Court agrees with the Defendant that the Plaintiff's position does not comport with the plain meaning of the words "direct physical loss of or damage to" as recognized by Georgia courts and it cannot be read consistently with other policy terms. Under Georgia law, losses from inability to use property do not amount to "direct physical loss of or damage to" the property within the ordinary and popular meaning of the phrase. In *AFLAC, Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306 (2003), the

Georgia Court of Appeals analyzed the phrase "direct physical loss of or damage to" as related to an insurance contract. The court found that the "or" is a coordinating conjunction meaning that "direct physical" modifies the word "damage" as connected to the word "loss" *Id.* at 308. The court held that:

> [T]he words "loss of" . . . and the words "damage to" . . . make it clear that coverage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory.

Id. The court also defined "direct" as "without intervening persons, conditions, or agencies; immediate." *Id.* (internal quotation marks and punctuation omitted). The common meaning of the words combined with other policy terms indicates the requirement of "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *Id.* Since "direct physical" modifies both loss and damage, any interruption in business must be caused by some physical problem with the covered property.

Although the Court construes insurance contracts in favor of the insured, the Court cannot rewrite the contract to manufacture additional coverage, such as expanding "direct physical loss" to include loss-of-use damages when the property has not been physically impacted. *See Northeast Georgia Heart Center, P.C. v. The Phoenix Insurance Co.*, No. 2:12-cv-00245, 2014 WL 12480022, at *6 (N.D. Ga. May 23, 2014). "To do so would be

equivalent to erasing the words 'direct' and 'physical' from the policy." *Id.* Even where courts have allowed coverage for pure loss-of-use damages, the court "required some outside physical force to have induced a detrimental change in the property's capabilities." *Id.* The interaction between the property and some outside physical force that justifies those decisions is entirely absent here. *Id.* An insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage.

The understanding of the contract language is further emphasized by the policy's definition of the "period of restoration." Because Georgia law requires that the whole contract should be analyzed to give meaning to its parts, this definition is instructive in analyzing undefined words and phrases. O.C.G.A. § 13-2-2. The "period of restoration" terms found in the Business Income and Extra Expense coverage contemplate physical damage to the insured premises. This gives reasonable meaning and effect to the policy as a whole. *See Lavoi Corp., Inc. v. National Fire Ins. of Hartford*, 666 S.E.2d 387, 391 (Ga. Ct. App. 2008). The "period of restoration" is the time period during which the insurer will cover the insured's business income losses, and is defined as the period of time that:

1. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and

2. Ends on the date when the property at the described premises should

> be repaired, rebuilt or replaced with reasonable speed and similar quality.

Policy, at 20. This definition appears to contemplate potentially covered damages, ranging from the date of the direct physical loss or damage to the date when the property should be repaired, rebuilt or replaced. This range of contemplated harms aligns with an understanding that "direct physical loss or damage to" requires a physical change in the property subject to restoration.

Additionally, the Plaintiff alleges that there was a "physical impact" at the Plaintiff's property and surrounding properties "due to the presence of Coronavirus," although not "detectable other than through microscopic means and occurrence of illness." First Am. Compl., at ¶ 44. The Plaintiff claims that its business is highly susceptible to rapid transmission of the Coronavirus and that there is an ever-present risk that the property would be contaminated. *Id.* at ¶¶ 47-49. The Plaintiff refers to the possibility of replacing potentially contaminated products. *Id.* at ¶ 50. The Plaintiff also alleges that it is required to undergo extra expenses to sanitize and clean the property on an ongoing basis as a result of the contamination of the Coronavirus, including use of disinfectants and face masks. *Id.* at ¶ 54. The Plaintiff argues that the Plaintiff's clients will continue to delay appointments because the Virus is contaminating the insured property and/or surrounding area and maintains that as a result of the "physical impact of the virus" and the Civil Authority Orders the business' total income is down 40%. *Id.* at ¶ 56.

But the Plaintiff makes no specific allegations that COVID-19 was ever detected on the premises and caused the business to cease or suspend operation after re-opening due to a confirmed COVID-19 case. The Plaintiff even specifies that it "does not seek any determination of whether the Coronavirus is physically in or at the Insured Property . . . ." *Id.* at ¶ 64. The mere threat of exposure is insufficient to trigger coverage. There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus. Even if the Plaintiff did allege that COVID-19 was physically present in the premises, the Court still does not find that the presence of COVID-19 particles on the Plaintiff's property, without more, constitutes a "direct physical loss or damage to" the property. Routine cleaning performed with greater frequency and care eliminates the virus on surfaces.

To the extent that the Plaintiff's claim does rely on cleaning costs, the Eleventh Circuit recently affirmed a Florida district court decision which adopted the *AFLAC* definition of "direct physical loss of or damage to" as holding that an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical." *See Mama Jo's Inc. v. Sparta Insurance Co.*, 823 F. App'x 868 (11th Cir. 2020). The Eleventh Circuit explained that the definition of "direct physical loss" is the diminution of value of something. *Id.* Specifically, "[d]irect and physical modify loss and impose the requirement that the damage be actual." *Id.* at 879. Although *Mama Jo's* was

not about closures related to COVID-19, the initial claim had two components: one for cleaning the restaurant and another for business income loss related to nearby road construction that caused dust and debris to interfere with the operation of the plaintiff's restaurants. The Eleventh Circuit held that even if the plaintiff had shown a "suspension" of operations as a result of the construction, the plaintiff did not establish that "it suffered a direct physical loss of or damage to its property during the policy period." *Id.* The Eleventh Circuit found that the cleaning claim did not constitute a direct physical loss because the expenses were merely economic loss. Thus, even if the Plaintiff here claimed that the Coronavirus contaminated the property, the act of cleaning the infected surfaces would be merely an economic loss.

And when comparing *Mama Jo's* to the allegations in this case, the Plaintiff's allegations are weaker. Although the plaintiff in *Mama Jo's* failed to put forth any evidence that his cleaning claim constituted a direct physical loss, he at least alleged that there was a physical intrusion, the dust and debris, into his restaurant. The Plaintiff does not allege facts demonstrating that the Coronavirus was physically present on the premises and caused them to cease or suspend operation. The Plaintiff merely claims that the Orders closed the salon, and it was likely that the Coronavirus was present in or around the property at some point. But the loss must arise to actual damage, and it is not plausible how government orders meet that threshold when the salon merely suffered economic losses, not anything tangible, actual or

physical.

Although the Court is sympathetic to the Plaintiff and all insureds that experience economic losses associated with COVID-19, there is simply no coverage under similar factual allegations if the insurance policies require "direct physical loss of or damage to" property. The Plaintiff has no right to discovery where its Amended Complaint states no specific facts that would trigger coverage benefits. Thus, the Court grants the Defendant's Motion to Dismiss.

IV. Conclusion

For the reasons stated above this Court GRANTS the Defendant's Motion to Dismiss [Doc. 23].

SO ORDERED, this 5 day of January, 2021.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge