IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BOTTLENECK MANAGEMENT, INC., *Plaintiff,* vs. ZURICH AMERICAN INSURANCE CO., *Defendant.*	Case No. 2020-CH-04769 Hon. Michael T. Mullen

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Defendant Zurich American Insurance Company's ("Zurich") Motion for Judgment on the Pleadings pursuant to 735 ILCS 5/2-615(e). Zurich's motion has been fully briefed and the parties have argued their respective positions to the Court. Following argument, both parties provided extensive "Supplemental Authority" to the Court for its review. The Court has thoroughly considered the entirety of the parties' voluminous submissions, as well as the arguments of the parties' very able counsel. For the reasons discussed below, Defendant's motion is granted. The Complaint is dismissed with prejudice.

I. Background

Plaintiff Bottleneck Management, Inc. ("Bottleneck") owns and operates 17 restaurants in seven states.[1] Complaint at ¶1. On January 30, 2020, the International Regulations Emergency Committee of the World Health Organization ("WHO") declared an outbreak of COVID-19, which is the disease caused by the SARS-CoV-2 virus. *Id.* at ¶ 2. In March, the WHO classified

[1] Bottleneck operates its restaurants in Florida, Illinois, Maryland, Massachusetts, Pennsylvania, Texas, and Virginia.

COVID-19 as a pandemic.[2] *Id.* At ¶ 13. Shortly thereafter, State and local governments across the country issued closure orders intended to curb the spread of COVID-19. *Id.* at ¶ 16-22. The stay-at-home orders issued by governors prohibited restaurants, which were not classified as an essential business in the orders, from indoor dining operations. *Id.* at ¶ 15. Because of these orders, Bottleneck restaurants either closed completely or operated only for take-out and delivery services. *Id.*

State and local governments eventually lifted or eased the closure orders, allowing restaurants to resume dine-in service at varying capacity levels. Bottleneck alleges that particles of the SARS-Cov-2 virus were present on Bottleneck's property and items of property. Complaint at ¶¶ 72–74. Bottleneck further alleges that it was harmed by the presence of SARS-Cov-2 particles on Bottleneck's property and the closure orders issued by state and local governments. *Id.*

a. *Bottleneck's Claim*

After the cited closure orders went into effect, Bottleneck timely submitted a claim to Zurich seeking coverage for the significant business-related losses that it incurred because of the referenced closure and capacity limitation orders. Zurich insured Bottleneck at the time it submitted its claim pursuant to policy number CPO 0272226-02. ("Zurich Policy") The policy period covered December 1, 2019 to December 1, 2020, and Bottleneck had paid premiums totaling $342,000. Complaint at ¶¶ 4, 24. Zurich denied the entirety of Bottleneck's claim for coverage of any business losses incurred in connection with the SARS-CoV-2 virus, the COVID-19 Pandemic, and the orders of governors and departments of health that had been issued in the various states in which Bottleneck did business ("the Bottleneck States"). *Id.* at ¶¶ 77, 84. Zurich specifically denied Bottleneck's claim as there was "no direct physical loss of or damage to" the covered property. Further, Zurich concluded that Bottleneck could not recover as its losses had not been caused by a "covered cause of loss", *i.e.*, a cause that was not otherwise excluded by the Zurich Policy.

[2] The Court notes that the Centers for Disease Control and Prevention states that SARS-CoV-2 is the virus that causes the disease COVID-19. Science Brief: SARS-CoV-2 and Potential Airborne Transmission; Centers for Disease Control and Prevention, Updated May 7, 2021, https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html; Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, https://www.cdc.gov/dotw/covid-19/index.html. The Court will refer to the virus and disease by their respective names except when quoting the parties.

b. *The Zurich Policy*

Various portions of the Zurich Policy are at issue, the pertinent parts of which are set forth below.

i. The Coverages

The Business Income Coverage Form provides coverage for lost business income when a direct loss of or damage to physical property at the premises causes a suspension. The Zurich Policy also contains additional coverages for the loss of business income caused by declarations of civil authority and microorganisms. Specifically, additional coverage is provided as follows:

> **Business Income Coverage Form…**
>
> 1. COVERAGE…
> 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 a "premises" at which a Limit of Insurance is shown on the Declarations of Business Income. The loss or damage must be directly caused by a "covered cause of loss." We will not pay more than the application of Limit of Insurance shown on the Declarations for Business Income at that "premises."
>
> 2. ADDITIONAL COVERAGES…
> 1. Civil Authority
> We will pay for the actual loss of "business income" you sustain for up to the number of days shown on the Declarations for Civil Authority resulting from the necessary "suspension," or delay in the start, of your "operations" if the "suspension" or delay is caused by order of civil authority that prohibits access to the "premises" or "reported unscheduled premises" which sustains a "business income" loss. The loss or damage must be caused by a "covered cause of loss."
>
> The most we will pay under this Additional Coverage is the Limit of Insurance shown on the Declarations for Business Income at the "premises" or "reported unscheduled premises" where access was prohibited.
>
> The Limit for this Additional Coverage is included in, and not in addition to, the applicable Limit of Insurance.
>
> 8. Microorganisms

We will pay for the actual loss of "business income" you sustain due to the:

a. Necessary "suspension" of your "operations" from direct physical loss or damage to Covered Property caused by "microorganisms" when the "microorganisms" are the result of a "covered cause of loss"; or:
b. Prolonged "period of restoration" due to the remediation of "microorganisms" from a covered loss.

The most we will pay under this Additional Coverage in any one policy year is the Annual Aggregate Limit of Insurance shown on the Declarations for Microorganisms—Business Income. Regardless of the number of claims, this Limit of Insurance is the most we will pay for the total of all loss, even if the "microorganisms" continue to be present, active, or recur. Ex. 1 at ZAIC 138–140.

Ex. 1 at ZAIC 138. The Policy defines "covered cause of loss" as "a fortuitous cause or event, not otherwise excluded, which actually occurs during this policy period." *Id.* at ZAIC 69. The Policy also states that a "covered cause of loss" does not mean "damage." *Id.* at ZAIC 69–70.

ii. The Microorganisms Exclusion

The exclusions at issue are in both the Business Income Coverage Form and in the Real and Personal Property Form. These exclusions provide:

Business Income Coverage Form...
C. EXCLUSIONS
1. Real or Personal Property
The exclusions in paragraphs 6.,7., 8., and 9. below and the excluded causes of loss in the REAL AND PERSONAL PROPERTY COVERAGE FORM, except Off-Premises Service Interruption, apply to loss of "business income" caused by or resulting from loss of or damage to any property other than:

a. "Fine arts";
b. "Original information property";
c. "Outdoor trees, shrubs, plants, or lawns";
d. "Green roofing system";
e. "Personal property" in transit; or
f. "Scheduled property".

. . .

Real and Personal Property Coverage Form...
B. EXCLUDED CAUSES OF LOSS...

12. Microorganisms

We will not pay for loss or damage consisting of, directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread or any activity of "microorganisms", unless resulting from fire or lightning. Such loss or damage is excluded regardless of any other cause or event, including a "mistake", "malfunction", or weather condition, that contributes concurrently or in any sequence to the loss, even if such other cause or event would otherwise be covered....

We will also not pay for loss, cost, or expense arising out of any request, demand, order, or statutory or regulatory requirement that requires any insured or others to test for, monitor, clean up, remove, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of "microorganisms".

Ex. 1 at ZAIC 89. "Microorganisms" is defined as "any type or form of organism of microscopic or ultramicroscopic size including, but not limited to, 'fungus', wet or dry rot, *virus*, algae, or bacteria, or any by-product." *Id.* at ZAIC 74. (emphasis added). Each of the Relevant Coverages explicitly incorporates the Microorganisms Exclusion from the Real and Personal Property Coverage Form. Ex. 1 at ZAIC 96, 141, 148.

II. Bottleneck's Complaint

In Count I of its two-count complaint, Bottleneck requests, *inter alia*, a declaratory judgment that it was entitled to insurance coverage pursuant to the terms of the Zurich Policy for its business losses. More specifically, Bottleneck requests this Court to make a judicial declaration that:

i. COVID-19, the Pandemic, and the losses incurred due to the orders issued by governors and departments of health are "covered" causes of loss;

ii. there is no applicable exclusion to the coverage of Bottleneck's losses; and

iii. Bottleneck is entitled to coverage for past and future Business Income loss and Extra Expense.

In Count II, Bottleneck realleges its prior allegations and asserts that by denying Bottleneck's timely claim, Zurich materially breached the policy terms. Consequently, Bottleneck has requested an award of damages, as well as its attorney's fees and costs.

Bottleneck specifically alleges that its facilities "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 [SARS-CoV-2] particles and/or the Pandemic." Complaint ¶72. Bottleneck additionally contends that it sustained loss and damage "as a direct and proximate result of the orders issued by the governors and departments of health of the Bottleneck States." *Id.* ¶73. The term "Bottleneck States" is a reference to the seven states in which Bottleneck did business. Bottleneck further asserts that its properties "contain the presence of COVID-19 [SARS-CoV-2] particles on surfaces and items of property," which rendered the properties "unsafe, thereby impairing the premises' value, usefulness and/or normal function." *Id.* at ¶¶68, 59. As a result, the properties have lost "value, usefulness and/or normal function" and also that its properties have sustained "direct physical loss and/or damage." *Id.* at ¶¶57, 58. Bottleneck further alleges that the referenced orders of the State and local governmental authorities and public health officials due to the virus contamination "require[d] Plaintiff to cease and/or significantly reduce operations" and that said orders caused "direct physical loss and damage to property." *Id.* at ¶65.

III. Analysis

In response to Bottleneck's Complaint, Zurich filed an Answer and asserted 18 separate Affirmative Defenses. In addition to its Answer and Affirmative Defenses, Zurich timely brought its present Motion for Judgment on the Pleadings pursuant to Code of Civil Procedure section 2-615. 735 ILCS 5/2-615. Zurich's motion essentially has two separate prongs. First, Zurich maintains that Bottleneck cannot recover for its losses under the Zurich Policy unless Bottleneck demonstrated "direct physical loss of or damage to" covered property. Zurich notes that neither the SARS-CoV-2 virus nor the cited governmental orders caused "direct physical loss of or damage to" any of Bottleneck's properties as the virus did not cause any physical impact to any property. Although it is well known that humans can be permanently affected, some fatally, Zurich notes that the virus was only present on physical surfaces at Bottleneck's properties and also that the virus could be removed with routine cleaning. As such, and as a "matter of law," Zurich maintains that the neither the presence of the virus at Bottleneck's properties nor the referenced governmental directives and mandates caused permanent or total loss to any of Bottleneck's properties.

The second prong of Zurich's motion focuses on the "Additional Microorganism Coverage" and "Microorganisms Exclusion" contained within the Zurich Policy. Zurich maintains that Bottleneck's Complaint seeks coverage exclusively for losses resulting from the presence, spread, or activity of SARS-CoV-2 particles. Zurich argues that despite Bottleneck's assertion to the contrary, the "Additional Microorganism Coverage" is not implicated as it only applies if a "covered loss" results in damage by "microorganisms." Zurich argues that as SARS-CoV-2 virus caused Bottleneck's business losses, any business losses that Bottleneck sustained were not because of a "covered loss."

Zurich further asserts that Bottleneck's claim for coverage falls within the "Microorganisms Exclusion." In other words, even if Bottleneck's losses could be considered as caused by a "covered cause of loss," the Zurich Policy specifically excluded any coverage for loss or damage "consisting of, directly or directly caused by, contributed to, or aggravated by the presence, spread or activity of "microorganisms." Zurich notes that the "microorganisms" term is defined within the Zurich Policy to include and type or form of "virus."

a. *Standard of Review*

Section 2-615(e) provides that "[a]ny party may seasonably move for judgment on the pleadings." 735 ILCS 5/2-615(e). Judgment on the pleadings is proper only where no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Hooker v. Illinois State Bd. of Elections*, 2016 IL 121077, ¶ 21. "A motion for judgment on the pleadings tests the sufficiency of the pleadings by determining whether the plaintiff is entitled to the relief sought by the complaint, or alternatively, whether the defendant by his or her own answer has set up a defense that would entitle him or her to a hearing on the merits." *Smith v. Allstate Ins. Co.*, 292 Ill. App. 3d 432, 434 (1st Dist. 1997). A party moving for judgment on the pleadings concedes the truth of all well-pleaded facts in the complaint. *Allstate Prop. & Cas. Ins. Co. v. Trujillo*, 2014 IL App (1st) 123419, ¶19. In ruling on a Motion that seeks a judgment on the pleadings "a court may consider only those facts appearing on the face of the pleadings, matters subject to judicial notice, and any judicial admissions in the record." *Hooker*, 2016 IL 121077, ¶ 21. All well-pleaded facts and reasonable inferences based on those facts are taken as true. *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 385 (2005). Moreover, the court must construe all the evidence "strictly against the movant and liberally in favor of the

nonmoving party." *Trujillo*, 2014 IL App (1st) 123419, ¶19. However, a court "must" "disregard all surplusage and conclusory allegations." *McCall v. Devine*, 334 Ill. App. 3d 192, 198 (1st Dist. 2002).

b. *SARS-CoV-2 Does Not Cause Direct Physical Loss of or Damage to Property.*

In its motion, Zurich argues that Bottleneck does not and cannot allege facts that would show a "direct physical loss of or damage to" property, a necessary and elemental requirement to trigger coverage. Contrarily, Bottleneck asserts that it has adequately pleaded facts that establishes physical injury to its various properties caused by the presence of SARS-CoV-2 particles. Further, Bottleneck asserts that it has properly and factually pleaded that the cited government-issued closure orders and mandates also caused direct physical loss of or damage to the Bottleneck properties.

In support of their respective positions, both Bottleneck and Zurich cite to numerous decisions from both state trial courts, as well as federal courts that have addressed issues similar to those raised in this case. Although some cases have been helpful to this court's analysis, candidly others have been nothing short of distracting to the review of the issues presented by Bottleneck's complaint and Zurich's Policy. Certainly, none of the cited cases are either binding or precedential.

The Illinois Supreme Court has defined "physical injury" to mean "property that is altered in the appearance, shape, color, or other material dimension, and does not take place upon the occurrence of an economic injury, such as diminution in value." *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill.2d 278, 312 (2001). Utilizing this definition, the overwhelming majority of Illinois state and federal courts have held that SARS-CoV-2 does not cause a direct physical loss of or damage to property. *See* Kenneth R. Goleaner & Stephen M. Murphy, *Majority of Courts Applying Illinois Law Have Not Found Coverage for Claims Arising from COVID-19*, 31 IDC Q. 34, 35–36 (2021). Certain courts have reasoned that no physical loss or damage to a surface occurs when there is a natural, temporary contamination caused by bacteria and viruses that are present on the surface of property. Additionally, some courts have found that an inability to use property does not cause direct loss or damage to a property as there has not an "alteration in the physical condition of the property." Other courts have ruled that economic losses, absent a

physical alteration of any property, cannot be a basis for coverage as the courts have noted that it has been "widely held" that the term "direct and physical" modified the term "loss."

In applying Illinois law, several federal courts that have analyzed similar policy language that is presently at issue, and have concluded that SARS-CoV-2 did not physically alter the property when repairs and improvements were implemented to prevent contamination and spread of SARS-CoV-2 particles. *See Smeez, Inc. v. Badger Mut. Ins. Co.*, No. 3:20-cv-01132, 2021 U.S. Dist. LEXIS 1511686, at *9–12 (S.D. Ill. March 22, 2021) (rejecting the argument that a temporary inability to use the property due to SARS-CoV-2 constituted physical damage); *Bend Hotel Dev. Co., LLC v. Cincinnati Ins. Co.*, 515 F. Supp. 3d 854, 857–58 (N.D. Ill. 2021) (same); *Zajas, Inc. v. Badger Mut. Ins. Co.*, 2021 U.S. Dist. LEXIS 53875, at *6–8 (S.D. Ill. Mar. 23, 2021) (holding that SARS-CoV-2 did not cause direct physical loss or damage to covered property). One court recently concluded that mere alterations or repairs to a property's physical structure were improvements and did not constitute a "direct physical loss" that was caused by the SARS-CoV-2 virus. *Legacy Sports Barbershop LLC v. Cont'l Cas. Co.*, No. 20-C-4149, 2021 U.S. Dist. LEXIS 154157, at *2–3 (N.D. Ill. Aug. 13, 2021). Although the cited federal decisions are neither binding nor precedential, the reasoning contained within these decisions is not only helpful, but persuasive.

Bottleneck argues specifically that the SARS-CoV-2 virus and its "contamination" is similar to the damage that resulted from contamination caused to property by asbestos. Bottleneck cites to *Bd. of Educ. v. A, C & S, Inc.*, 131 Ill. 2d 428, 446 (1989); *U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (1991) as supportive of its position. Many Illinois courts have distinguished SARS-CoV-2 from asbestos in finding that unlike asbestos, SARS-CoV-2 particles were not incorporated into the property. The SARS-CoV-2 particles, unlike asbestos, are not released from components or systems which are a part of Bottleneck's property. Additionally, SARS-CoV-2 particles dissipate without intervention which is unlike asbestos which continues to contaminate until it is affirmatively removed or abated. Further, SARS-CoV-2 particles are not a part of the actual composition of a building but are only temporarily present because of people or things that have carried or transmitted SARS-CoV-2 particles into and onto Bottleneck's properties. Of course, the SARS-CoV-2 virus has and does directly affect human beings negatively and oftentimes fatally. However, that is not the issue in this case. To the point, the SARS-CoV-2 particles do not constitute a "direct physical loss" to property.

Bottleneck has specifically pled that it suffered losses due to the presence of SARS-CoV-2 particles on its properties, as well as the orders and mandates that had been issued by the governors and various departments of health in the seven states in which Bottleneck did business. Complaint at ¶¶72–73. The difficulty for Bottleneck is that the phrase "direct physical loss of or damage to" cannot reasonably be interpreted to include a virus that does not cause a distinct, demonstrable, physical alteration of property, and that does not cause any damage that would require physical property to be repaired, rebuilt, or replaced. Bottleneck has not shown "direct physical loss of or damage to" covered property. As the SARS-CoV-2 particles do not cause physical damage or loss, Bottleneck's allegations fail as a matter of law.

Similarly, civil orders that were issued to address the presence of SARS-CoV-2 particles did not cause Bottleneck to sustain a "direct physical loss of or damage to" covered property. The SARS-CoV-2 virus and the resulting COVID-19 Pandemic led to the issuance of the government restrictions and shutdowns and clearly were the actual cause of any losses that Bottleneck sustained. Further, the losses that Bottleneck asserts that it sustained by the cited civil orders and mandates were, at best, losses that are best characterized as indirect, rather than as direct losses, despite Bottleneck's contrary assertions. In short, Bottleneck has failed to establish in its Complaint that it sustained losses due to "direct physical loss of or damage to" covered property.

c. *The Microorganisms Exclusion*

As a separate basis for its motion, Zurich argues that Bottleneck's losses are excluded from coverage due to the Microorganisms Exclusion that is contained within the Zurich Policy, as any losses are due to the presence, spread and activity of SARS-CoV-2 particles. Bottleneck initially contends that the exclusion is ambiguous as the Zurich Policy failed to include a standard pandemic exclusion. Bottleneck further argues that the Microorganisms Exclusion does not apply to the Business Income Coverage provision. The Microorganisms Exclusion is set forth within the Real and Personal Property Coverage Form's "Excluded Causes of Loss" section. The "excluded causes of loss in the Real and Personal Property Coverage Form" are exclusions in the Business Income and Extra Expense Coverage Forms, which includes Additional Microorganisms coverage and Civil Authority coverage.

An insurance policy is a contract between the company and the policyholder, the benefits of which are determined by the terms of the contract unless the terms are contrary to public policy. *State Farm Mut. Auto. Ins. Co. v. Villicana*, 181 Ill. 2d 436, 453 (1998). In interpreting an insurance policy, the court must ascertain the intent of the parties, and construe the policy as a whole, with due regard to the risk undertaken, the subject matter of the policy, and the purposes, of the entire contract. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992). Put another way, "[a] court's primary objective in construing an insurance policy's language is to ascertain and give effect to the parties' intentions as expressed through that policy's language." *Nationwide Sec. Serv., Inc.*, 2016 IL App (1st) 143924, ¶ 26. Further, when construing an insurance policy, the words used must be given their plain, ordinary, and popular meaning. *W. Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 495 (1985); *Young v. Allstate Ins. Co.*, 351 Ill. App. 3d 151, 158 (1st Dist. 2004); *see Aetna Cas. & Sur. Co. v. Beautiful Signs, Inc.*, 146 Ill. App. 3d 434, 435 (3d Dist. 1986). If words in the policy are unambiguous, the court must afford them their ordinary meaning. *Outboard Marine*, 154 Ill. 2d at 108. But if words are susceptible to more than one reasonable interpretation, they are ambiguous, and the insurance policy should be construed in favor of the insured and against the insurer that drafted the policy. *Id.* The determination of whether a term is ambiguous depends on how an ordinary person would understand it, not how a legally trained mind understands it. *USF&G v. Specialty Coatings*, 180 Ill. App. 3d 378, 391 (1st Dist. 1989). Courts will not strain to find an ambiguity where none exists. *Sw. Disabilities Servs. & Support v. ProAssurance Specialty Ins. Co.*, 2018 IL App (1st) 171670, ¶ 21.

Under Illinois law "[a]n insurer has the right to limit coverage on a policy, and where an insurer has done so, a court must give effect to the plain language of the limitation, absent a conflict with the law." *Phusion Projects, Inc. v. Selective Ins. Co.*, 2015 IL App (1st) 150172, ¶ 47. "[W]here an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005); *Empire Indem. Ins. Co. v. Chicago Province of the Soc'y of Jesus*, 2013 IL App (1st) 112346, ¶ 39; *see also Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 456 (2010) ("'provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer'" (quoting *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997)). "'Absent absolute clarity on the face of the

complaint that a particular policy exclusion applies, there exists a potential for coverage and an insurer cannot justifiably refuse to defend.'" *Lorenzo v. Capitol Indem. Corp.*, 401 Ill. App. 3d 616, 620 (1st Dist. 2010) (quoting *Novak v. Insurance Admin. Unlimited, Inc.*, 91 Ill. App. 3d 148, 151 (2d Dist. 1980)). "[W]here the language of an insurance policy is clear and unambiguous, it will be applied as written." *Hanover Ins. Co. v. MRC Polymers, Inc.*, 2020 IL App (1st) 192337, ¶ 30 (*citing State Farm Fire & Cas. Co. v. Hatherley*, 250 Ill. App. 3d 333, 337 (1st Dist. 1993)). The insurer bears the burden of affirmatively demonstrating that a claim falls within an exclusion. *Am. Zurich Ins. Co. v. Wilcox & Christopoulos, L.L.C.*, 2013 IL App (1st) 120402, ¶ 34; *Continental Cas. Co. v. McDowell & Colantoni, Ltd.*, 282 Ill. App. 3d 236, 241 (1st Dist. 1996).

d. *The Microorganisms Exclusion is Clear and Unambiguous*

Bottleneck makes several arguments to explain why the Microorganisms Exclusion is ambiguous, as well as inapplicable. It is worth emphasizing that courts will not strain to find ambiguity where none exists. *Sw. Disability Servs. & Support*, 2018 IL App (1st) 171670, ¶21. Bottleneck argues that the Microorganisms Exclusion is not included in the Business Income Coverage Form, but in an entirely different and "irrelevant" coverage form for casualty losses, *i.e.*, the Real and Personal Property Form. As such, Bottleneck concludes that the Microorganisms Exclusion does not apply. This argument is dismissive of the fact that the "excluded causes of loss in the Real and Personal Property Coverage Form" are exclusions set forth within the Business Income and Extra Expense Coverage Forms. ZAIC at 89, 141, 148.

The plain language of the exclusion is clear and unambiguous. The Zurich Policy excludes coverage for "loss or damage consisting of, directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread or any activity of 'microorganism.'" ZAIC at 89. The definition of the term "Microorganisms" includes "virus." ZAIC at 74. Thus, the ordinary meaning of the exclusion is that any loss caused by a virus is excluded from coverage. Additionally, Bottleneck argues the exclusion does not apply because the losses result from the Pandemic and orders from government officials and bodies relating to the Pandemic. However, the Pandemic and the orders are not independent of the virus—they were consequences of the SARS-CoV-2 virus, which is excluded from coverage.

e. *Bottleneck's Claim Falls Within the Microorganisms Exclusion*

It is uncontested by the parties that SARS-CoV-2 is a virus. Complaint ¶ 35. Bottleneck alleges that it "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 [SARS-CoV-2] particles and/or the Pandemic." Complaint ¶ 72. Seeking coverage for loss and damage to insured properties caused by a virus is specifically excluded by the Microorganisms Exclusion. The factual scenario in this case is the exact type anticipated by the exclusion. The applicability of the exclusion is free from doubt. This Court determines that Zurich carried its burden in establishing the unambiguous Microorganisms Exclusion applies to the facts alleged in the Complaint and excludes coverage.

f. *The Additional Coverage for Microorganisms Does Not Apply*

In its Complaint, Bottleneck alleges that COVID-19 (and the related government closure orders) caused losses to its properties. Complaint ¶¶ 49, 50, 72. This additional coverage applies "when the 'microorganisms' are the result of a 'covered cause of loss'", or the loss is "due to the remediation of 'microorganisms' from a covered loss." ZAIC at 139. In other words, for this specific additional coverage to apply, there must first be a "covered cause of loss" and then a microorganism resulting from that "covered cause loss." Bottleneck does not allege that it suffered losses due to some other "covered cause of loss" that then resulted in the presence of SARS-CoV-2 particles in its restaurants. Therefore, the Additional Coverage for Microorganisms does not apply to the facts alleged in the Complaint.

Bottleneck makes a further argument that Zurich's cited Microorganisms Exclusion is not contained within the Business Income Coverage Form, and therefore, the exclusion does not apply. The Microorganisms Exclusion is set forth within the Real and Personal Property Coverage Form's "Excluded Causes of Loss" section. The "excluded causes of loss in the Real and Personal Property Coverage Form" are the very first exclusions in the Business Income and Extra Expense Coverage Forms, which includes Civil Authority coverages. Despite Bottleneck's arguments, it is clear that the cited coverages are subject to the Microorganisms Exclusion.

As an ancillary argument, Bottleneck argues that Zurich's position is untenable as it necessarily requires the conclusion that any coverage that is set forth within the Zurich policy, is illusory and improper. Coverage that only applies to uncommon scenarios does not automatically

render the promise for coverage illusory. *CFIT Holding Corp. v. Twin City Fire Ins. Co.*, 20-C-3453, 2021 U.S. Dist. LEXIS 127303, at *16–17 (N.D. Ill. July 8, 2021). A vital purpose of insurance is to provide protection for losses that result from out-of-the-ordinary events. *Id.* A policy is illusory only when "there is no possibility under any set of facts for coverage" and is not illusory if it covers some possibilities. *Atlantic Specialty Ins. Co. v. AC Chicago, LLC*, 272 F. Supp. 3d 1043, 1041 (N.D. Ill. 2017). The Additional Coverage for Microorganisms provides coverage when the microorganisms are the *result* of a covered loss. For instance, a court found coverage in a similar policy when windstorm blew a virus into an area, which infected the insured pigs. *Curtis 0. Griess & Sons, Inc. v. Farm Bureau Ins. Co.*, 247 Neb. 526, 531–33 (Neb. 1995). In that case, the covered loss was caused by a windstorm, which ultimately resulted in the spread of the virus among the insured's property. *Id.* at 528–29. Had the pigs contracted a virus due to natural conditions, there would be no additional coverage as the virus would have directly caused the loss—it would not have been a result of a covered loss. Here, Bottleneck fails to assert that some other covered cause of loss resulted in damage that was inflicted by microorganisms. Although coverage could conceivably apply, none of Bottleneck's allegations identify facts which could trigger additional coverage. Importantly, despite Bottleneck's assertion, the identified coverage is not illusory.

g. *There is No Cause of Action for Breach of Contract*

In Count II, Bottleneck asserts a breach of contract cause of action. To summarize, Bottleneck asserts that as Zurich has failed to honor the terms of its contract, *i.e.*, the Zurich Policy. To state a cause of action for breach of contract, plaintiffs must allege the existence of a valid and enforceable contract, substantial performance by plaintiffs, breach of the contract by defendants and resultant injury to plaintiffs. *Oliva v. Amtech Reliable Elevator Co.*, 366 Ill. App. 3d 148, 152 (1st Dist. 2006). If the contract is one for insurance, the burden is on the insured to prove that its claim falls within the scope of the policy's coverage. *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 204 (1991). The existence of coverage is an essential element of an insured's case, and the insured has the burden of proving that his loss falls within the terms of his policy. *Morgan v. C U N A Mut. Ins. Soc'y*, 242 Ill. App. 3d 1027, 1030 (3d Dist. 1993) (citing *St. Michael's Orthodox Catholic Church v. Preferred Mut. Ins. Co.*, 146 Ill. App. 3d 107, 109 (1st Dist. 1986)). This Court has concluded that Bottleneck has not and cannot

establish that its claim falls within the scope of the Zurich Policy. As such, Bottleneck's breach of contract cause of action necessarily fails. Judgment is entered on behalf of Zurich and against Bottleneck on Count II.

IV. Conclusion

The SARS-CoV-2 virus, the COVID-19 Pandemic, and the civil authority orders did not cause a physical loss of or damage to Bottleneck's property. Even if there were physical loss or damage, Bottleneck's losses are clearly excluded under Zurich's Microorganisms Exclusion. Additionally, the Additional Microorganisms Coverage does not provide any coverage. Despite the Court's great empathy for Bottleneck, the Court grants Zurich's motion for judgment on the pleadings.

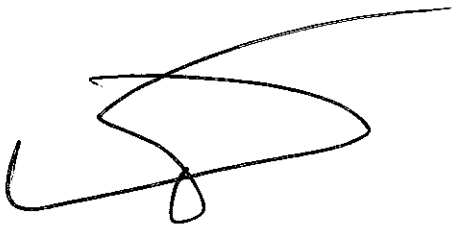
For the foregoing reasons, it is hereby ordered that:

1. Defendant's Defendant Zurich American Insurance Company's Motion for Judgment on the Pleadings pursuant to 735 ILCS 5/2-615(e) is granted;
2. The previously set status date of October 22, 2021 at 9:30 a.m.is stricken; and
3. This case is dismissed with prejudice.

IT IS SO ORDERED.

THIS IS A FINAL ORDER.

ENTERED:



Judge Michael T. Mullen, No. 2084

Judge Michael T. Mullen
OCT 12 2021
Circuit Court - 2084