

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

BIG ONION TAVERN GROUP, LLC;)
HEADQUARTERS BEERCADE LLC;)
MACHINE 1846 LLC; THE NEW 400 LLC;)
HARPER THEATER LLC; WELCOME)
BACK LLC; LEGACY HOSPITALITY)
LLC; MCBRIDES AURORA INC.;)
MCBRIDE’S PUB INC.; MCBRIDE’S ON)
52 INC.; HOMESLYCE IS WHERE THE)
HEART IS LLC; 3458 NORCLARK)
RESTAURANT LLC; HAPPY CAMPER)
PIZZERIA LLC; 1913 NORTHCO LLC;)
THE BURGER PHILOSOPHY LLC;; TAI’S)
LOUNGE INC.; ALEXANDERS CAFE 64)
INC.; ALEXANDERS RESTAURANT)
INC.; BK & MM VENTURES LLC;)
DOUBLE K & A SPORTS INC.; OR1 INC.;)
ROOKIES 5-ROSELLE INC.; TRIPLE K &)
A SPORTS BAR INC.; VILLAGE SQUIRE)
INC.; VILLAGE SQUIRE NORTH INC.;)
VILLAGE SQUIRE OF MCHENRY INC.;)
VILLAGE SQUIRE SOUTH INC.; 3471 N)
ELSTON INC.; CALM & CHAOS LLC; 108)
KINZIE LLC; SANCERRE HOSPITALITY)
I LLC; HARLEN-RASCALS, INC.; YMPV)
INC.; OVIE BAR & GRILL LLC;)
WOODFIRE BRICK OVEN PIZZA LLC;)
ANDERSONVILLE 5310 LLC; CLARK)
5260 LLC; MUNSTER TAVERNS, INC.;)
WELLS 1525 LLC; 1270 STOREFRONT)
LLC; 2450 N MILWAUKEE LLC; 806 W)
RANDOLPH LLC; A PITZALLA BLUES)
LLC; QUEEN MARY LLC; RAMBUTTAN)
LLC; ROBERTA NOWAKOWSKI INC.;)
3478 N CLARK STREET INC; EXIT PLAN)
HOLDINGS LLC; GOUNTANIS)
ENTERPRISES, INC.; ALL DAY)
BROADWAY LLC; TS2 INC.; OLMAR)
CORP INC.; THE BARRELMAN TAVERN)
INC.; 540 WEST MADISON)
HOSPITALITY GROUP LLC; NICHE)
RESTAURANT GROUP LLC)
)

Hon. Judge Edmond Chang

Case No. 20-cv-02005

	Plaintiffs,)
)
v.)
)
SOCIETY INSURANCE, INC.)
)
	Defendant.)
)

DEFENDANT SOCIETY INSURANCE’S MOTION TO DISMISS UNDER RULE 12(b)(6) OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

NOW COMES, Defendant, SOCIETY INSURANCE (“Society”), by and through its attorneys Thomas B. Underwood, Michael D. Sanders, Michelle A. Miner and Amy E. Frantz of Purcell & Wardrope, Chtd., and hereby moves to dismiss under Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for summary judgment pursuant to Federal Rules of Civil Procedure 56(a) on Plaintiffs’ BIG ONION TAVERN GROUP, LLC, et al., First Amended Complaint. In support of said motion, Society states as follows:

1. The threshold issue in this case is a question of law: whether the losses claimed by Plaintiffs fall within the coverage provided by the insurance contracts entered into between Plaintiffs and Society (“the Society Policies”). Under Illinois law, which applies to insurance policies issued in Illinois to Illinois businesses, the construction of an insurance policy is a question of law, not fact, and is properly determined by the court. *Roman Catholic Diocese of Springfield in Ill. v. Maryland Cas. Co.*, 139 F.3d 561, 565 (7th Cir.1998) (citing *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 620 N.E.2d 1073, 1077 (Ill.1993)); *Phillips v. Prudential Ins. Co. of America*, 714 F.3d 1017, 1023-24 (7th Cir. 2013).

2. Plaintiffs’ First Amended Complaint asserts three causes of action: Count I – declaratory judgment, Count II – Breach of Contract, and Count III – Statutory Bad Faith pursuant to 215 ILCS 5/155. It alleges that as a result of executive orders issued by Illinois Governor J.B.

Pritzker related to COVID-19, Plaintiffs have temporarily suspended normal operations at their businesses.

4. Under the Executive Orders, restaurants and other establishments that serve food, including many of the businesses operated by Plaintiffs, are designated as Essential Businesses and have been allowed to operate on their premises for purposes of preparing and serving food for off-premises consumption. (Society’s Statement of Undisputed Material Facts (“SOF”) at ¶¶ 7, 12-13.) Further, establishments that serve alcohol, including many of the businesses operated by Plaintiffs, were allowed to sell packaged alcohol to-go for off-premises consumption, providing the business had the proper licenses. (*Id.* at ¶¶ 23-26.) Finally, all businesses were allowed to access their insured premises in order to perform Minimum Basic Operations, such as processing payroll and employee benefits, ensuring security of the premises, maintaining inventory, and preserving the condition of the premises. (*Id.* at ¶ 16.)

5. Plaintiffs assert that the COVID-19 pandemic and the executive orders issued by Governor Pritzker have led to a reduction in their business income. (Amd. Compl. at ¶ 100-101.)

6. When ruling on a Rule 12(b)(6) motion to dismiss, courts accept as true only a complaint’s well-pleaded facts and not statements of law or unsupported conclusory factual allegations. *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 915 (7th Cir. 2013). To survive a motion to dismiss, the complaint must state a claim to relief that is plausible on its face, requiring the plaintiff to plead “factual content that allows the court to draw the reasonable inference that the defendant is liable.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

7. Summary judgment is appropriate where the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

Fed. R. Civ. P. 56(a). To survive summary judgment, once the moving party has established that there is no genuine issue of material fact, the non-moving party must show the existence of a genuine issue of material fact with respect to essential elements of the party's case that it will have the burden of proving at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Waldon v. Wal-Mart Stores, Inc., Store No. 1655*, 943 F.3d 818, 821 (7th Cir. 2019).

8. Plaintiffs seek coverage under four coverage parts of the Society Policies, all of which are additional coverages in the Businessowners Special Property Coverage Form: Business Income, Extra Expense, Civil Authority, and Contamination. The terms and conditions required for coverage under these additional coverages have not been met.

9. Coverage under the Business Income and Extra Expense additional coverages of the Society Policies is limited to loss of business income that results from a "direct physical loss of or damage to covered property" at the premises described in the policy that is caused by a Covered Cause of Loss. A Covered Cause of Loss under the Society Policies is a "direct physical loss." There is no insurance coverage, as a matter of law, under the Society Policies because there has been no "direct physical loss of or damage to covered property" and there has been no Covered Cause of Loss as those terms are defined in the Society Policies and the law.

10. In Illinois, physical loss or damage requires an alteration of the physical characteristics of the covered property, which has not happened here. *Traveler's Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301-02, 757 N.E.2d 481 (2001). There are no allegations or evidence that the physical characteristics of Plaintiffs' buildings, real estate, or business personal property, have incurred any physical changes. For example, Plaintiffs do not allege that its covered property has incurred any physical alteration from a fire, tornado, storm damage, or the like.

11. Neither the COVID-19 pandemic nor the temporary limitations on business operations contained in Governor Pritzker's recent executive orders constitute a physical loss or damage to the property covered under the Society Policies or a Covered Cause of Loss as a matter of law. The physical condition of the properties has not changed, and they remain fit for use as evidenced by the fact that Plaintiffs' restaurants have been used to prepare and serve orders for takeout and delivery under the Executive Orders. As a result, there is no insurance coverage because there has been no "direct physical loss of or damage to covered property" and no "Covered Cause of Loss."

12. Coverage under Civil Authority only applies where all four requirements have occurred: (i) damage to property other than property at the described premises that is caused by a Covered Cause of Loss, (ii) an action by a civil authority that prohibits access to the described premises, (iii) the action of civil authority prohibits access to the area immediately surrounding the damaged property, and the insured premises are within that area, and (iv) the action of civil authority is taken in response to dangerous physical conditions that result from the property damage or continuation of the Covered Cause of Loss that caused the damage.

13. None of the requirements for Civil Authority have been met here. There has been no Covered Cause of Loss, Plaintiffs have retained access to their premises, public spaces surrounding Plaintiffs' premises have remained accessible and in-use, and Governor Pritzker's executive orders were issued to reduce future transmission of COVID-19 and not as a result of pre-existing damage to other property. Accordingly, there is no coverage under Civil Authority.

14. The Contamination provision provides coverage for loss of business income only in specific situations, the terms and conditions for which have not been met here. Access to Plaintiffs' premises has not been prevented by any governmental authority. In addition, no third

party has threatened to adulterate Plaintiffs' food or otherwise cause a defect, deficiency, or dangerous condition to their premises, nor has there been any media coverage suggesting that Plaintiffs' food or premises has a defect, deficiency, or dangerous condition.

15. Because there is no coverage for Plaintiffs' losses under the Society Policies, and because there is a *bona fide* dispute regarding coverage and interpretation of Society's Policy, Plaintiffs are not entitled to an award of attorneys' fees pursuant to 215 ILCS 5/155 and Plaintiffs' prayer for attorney's fees should be dismissed with prejudice, or in the alternative, summary judgment should be granted in Society's favor.

16. Therefore, this Court should dismiss Plaintiffs' Complaint with prejudice or, in the alternative, enter summary judgment in favor of Society on Plaintiffs' Complaint and should find and declare that there is no insurance coverage for Plaintiffs' claims under the Society Policy.

17. Society adopts and incorporates its Memorandum of Law in support of its Motion to Dismiss Pursuant to Rule 12(b)(6) or, in the Alternative, for Summary Judgment pursuant to Local Rule 56.1(a)(2) and its Local Rule 56.1(a)(3) statement of material facts, filed contemporaneously herewith.

WHEREFORE, Defendant SOCIETY INSURANCE moves this Court to dismiss with prejudice the Complaint under Rule 12(b)(6) or, in the alternative, to enter summary judgment pursuant to Rule 56 in its favor and against Plaintiffs BIG ONION TAVERN GROUP, LLC, et al., and to grant Society such other and further relief as this Court deems just.

Date: July 13, 2020

Respectfully submitted,

Society Insurance

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