

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

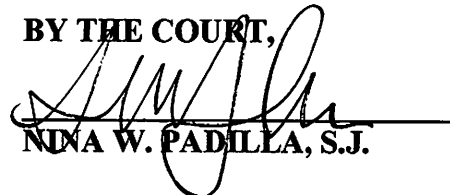
SPECTOR GADON ROSEN VINCI P.C.,	:	May Term 2020
Plaintiff,	:	
v.	:	No. 1636
VALLEY FORGE INSURANCE COMPANY,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Nos. 20081591/20091764

ORDER

AND NOW, this 17th day of June, 2021, upon consideration of Plaintiff Spector Gadon Rosen Vinci P.C.'s partial motion for summary and Defendant Valley Forge Insurance Company's response in opposition and Defendant Valley Forge Insurance Company's cross motion for summary judgment and Plaintiff Spector Gadon Rosen Vinci P.C.'s response in opposition, all supplemental filings and in accord with the attached Opinion, it hereby is **ORDERED** as follows:

1. Plaintiff's motion for partial summary judgment is **Denied**.
2. Defendant's cross motion for summary judgment is **Granted** and the complaint filed in this action is dismissed.

BY THE COURT,


NINA W. PADILLA, S.J.

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Defendant.	:	Commerce Program
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OPINION

This is an insurance coverage dispute. The novel COVID-19 virus, first discovered in China in December 2019, spread to the United States and created a public health crisis wreaking havoc in every aspect of our lives. On March 6, 2020, in order to stop the spread of the COVID-19 virus, Governor Tom Wolf issued a Proclamation of Disaster Emergency. This proclamation was followed by a number of executive orders which effected businesses across the Commonwealth of Pennsylvania including plaintiff Spector Gadon Rosen Vinci P.C.’s law firm.

In this action, plaintiff Spector Gadon Rosen Vinci P.C. (“SGRV”) seeks insurance coverage from its insurance company defendant Valley Forge Insurance Company (“Valley Forge”) for business interruption losses allegedly caused by Governor Wolf’s executive orders. Presently pending before this court is SGRV partial motion for summary judgment and Valley Forge’s cross motion for summary judgment. For the reasons set forth below, SGRV’s partial motion for summary judgment is denied and Valley Forge’s cross motion for summary judgment is granted.

Factual Background

SGRV is a law firm with offices at 1635 Market Street as well as other locations. Defendant Valley Forge, an insurance company, issued a commercial policy of insurance to

SGRV effective October 20, 2019 through October 20, 2020. On April 13, 2020, SGRV wrote to Valley Forge and submitted a claim requesting coverage for business interruption of its operations caused by Governor Wolf's stay at home order and closure of non-essential businesses. SGRV sought coverage for continuing operating expenses under the Business Income, Business Income and Extra Expense and Civil Authority provisions of the policy. On July 20, 2020, Valley Forge denied coverage.

On May 27, 2020, SGRV filed a complaint against Valley Forge for breach of contract and declaratory judgment. The pleadings are closed. SGRV filed its motion for partial summary judgment before any discovery was taken arguing as a matter of law that it was entitled to coverage as it suffered a direct physical loss and damage to its property.¹ Valley Forge filed a cross motion for summary judgment arguing SGRV is not entitled to coverage under the policy since it has not established a direct physical loss of or damage to the property as required under the Business Income, Business Income and Extra Expense and Civil Authority provisions of the policy. Additionally, Valley Forge also argues that in the event this court finds that SGRV did suffer a direct physical loss of or damage to the property, SGRV's claims are excluded from coverage as a result of various exclusions within the subject policy. The motions are now ripe for consideration.

DISCUSSION

I. SGRV is not entitled to coverage under the Business Income and Business Income and Extra Expense provisions of the Valley Forge Policy.

Insurance policies are contracts between an insurer and a policyholder. The goal in construing and applying the language of an insurance contract is to effectuate the intent of the

¹The court agrees that the instant motions present questions of law and that factual discovery is not necessary to resolve the motions before it.

parties as manifested by the language of the specific policy.² When the language of an insurance policy is plain and unambiguous, a court is bound by that language.³ Alternatively, if an insurance policy contains an ambiguous term, “the policy is to be construed in favor of the insured to further the contract’s prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage.”⁴

Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning. However, a contract provision is not ambiguous simply because the parties do not agree on the construction of the provision.⁵ The initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy, but if the insured is able to make this showing the insurer then has the burden to demonstrate that there is an applicable policy exclusion which denies coverage.⁶

With these principles in mind, SGRV argues that it is entitled to coverage under the Business Income and Business Income and Extra Expense provisions for the “loss of use” of its property caused by the government ordered shutdowns aimed to stop the spread of COVID-19. SGRV argues that its “loss of use” of the property is a direct physical loss of the property and subject to coverage under the Business Income and Business Income and Extra Expense provisions of the policy. Additionally and in the alternative, SGRV argues that it suffered

² *Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 14, 630 Pa. 1, 23–24 (Pa. 2014), citing *401 Fourth St. Inc. v. Investors Ins. Grp.*, 583 Pa. 445, 879 A.2d 166, 171 (2005); *Lititz Mut. Ins. Co. v. Steely*, 567 Pa. 98, 785 A.2d 975, 978 (2001).

³ *Id.*

⁴ *Id.*

⁵ *Weisman v. Green Tree Ins. Co.*, 447 Pa. Super. 549, 670 A.2d 160, 161 (Pa. Super. 1996).

⁶ *State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009).

damage to its property since the virus was “most likely” at its law office and the presence of the virus constitutes damage to the property. Valley Forge, on the other hand, argues that “direct physical loss of property” requires some change in the physical condition of the insured’s premises in order for coverage under the Business Income and Business Income and Extra Expense provisions to apply.

The particular insurance provisions⁷ at issue state in pertinent part as follows:

a. Business Income Coverage

The Insurer [Valley Forge] will pay for the actual loss of business income the Named Insured [SGRV] sustains during the period of restoration due to the necessary suspension of operations caused by direct physical loss of or damage to property at a location directly caused by a covered peril.

c. Business Income and Extra Expense Coverage

If a Business Income and Extra Expense Coverage Limit of Insurance is shown in the Business Property Schedule of Locations at a location, the Insurer [Valley Forge] will pay for the actual loss of business income the Named Insured [SGRV] sustains during the period of restoration due to the necessary suspension or delay of operations, and extra expense, caused by direct physical loss of or damage to property at that location directly caused by a covered peril.⁸

The policy defines “period of restoration” as follows:

Period of Restoration

A. Period of restoration means the period of time that begins with:

1. The time and date that the physical loss or damage that causes suspension of operations occurs; or
2. The date operations would have begun if such loss or damage delays the start of operations and such loss or damage is to any of the following:

⁷ SGRV argues that the policy provisions set forth herein are ambiguous and should be construed in its favor as the insured. The court finds that the applicable policy provisions are not ambiguous.

⁸ Policy p. 65 attached hereto to SGRV’s partial motion for summary judgment as Exhibit “A”.

- a. buildings whether complete or under construction;
 - b. machinery, equipment, supplies or materials that are”
 - (1) used in such construction, alterations or additions;
 - (2) incidental to the occupancy of the areas intended for construction, alteration or addition; or
 - (3) incidental to the alteration of the occupancy of an existing building.
- B.** If the Named Insured [SGRV] resumes operation, with reasonable speed, the period of restoration ends on the earlier of:
- 1. the date when the premises where the loss or damage occurred could have been physically capable of resuming the level of operations which existed prior to the loss or damage; or
 - 2. the date when a new permanent premises is physically capable of resuming the level of operations which existed prior to the loss or damage, if business is resumed at a new permanent premises.⁹

At the forefront of this analysis and the key to resolving the pending motions is the meaning of the phrase “direct physical loss of or damage to property”. After reviewing the parties’ submissions and after examining the growing body of case law in this area, this court concludes and agrees with those courts that have found that “loss of use” of the property alone, as SGRV argues here, is not enough to trigger coverage.¹⁰ The economic loss resulting from the

⁹ Policy p. 31-32, attached hereto to SGRV’s partial motion for summary judgment as Exhibit “A”.

¹⁰ SGRV argues that “physical loss of...property” does not require physical alteration to property, but instead solely requires a “loss of use” of property. This court does not accept this interpretation. However, even if the court did accept this interpretation, coverage would still not exist. Using SGRV’s definition of “physical loss of...property” that is “loss of use”, SGRV must show that it was “dispossessed of the property permanently” in order for coverage to exist. See, *Daneli Shoe Company v. Valley Forge Insurance Company*, 2021 WL 112710 (S.D. Cal. March 17, 2021) citing *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020) and *Total Intermodal Servs. Inc.*, 2018 WL 3829767 (C.D. Cal. July 11, 2018). This has not occurred. Once the stay at home orders were lifted, SGRV did regain access to the property. Moreover, SGRV’s definition of “direct physical loss of or damage to property” as “loss of use”, is subject to the policy’s loss of use exclusion which provides as follows: “6. Delay, Loss of Use or Loss of Market. The Insurer will not pay for loss or damage caused by or resulting from delay, loss of use or loss of market. (Policy p. 89 attached to Valley Forge’s cross motion for summary judgment as Exhibit “A”.

inability to use the subject property as intended must have some direct nexus to the physical condition of the covered premises for coverage to apply.¹¹ There must be some issue with the *physical* premises which precludes or impedes the business operations of the premises as intended.¹² Hence, even if the COVID -19 virus was present at the subject property, and there is no evidence that was the case, SGRV's claim for coverage would still fail because the virus did not create a "distinct, demonstrable, physical alteration" of the property.¹³

In *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co*¹⁴, the Third Circuit explained that damage by sources unnoticeable to the naked eye must "meet a higher threshold" than "typical examples of physical damage from an outside source that may demonstrably alter the components of a building."¹⁵ The *Port Authority* court determined that asbestos causes physical damage if it is present in such large quantities that it makes the structure "uninhabitable and unusable", but if the building continues to function and remains usable then the building owner has not suffered a loss.¹⁶ The *Port Authority* court concluded that "the mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first party insurance coverage."¹⁷ A panel of the Third

¹¹ See, *4431, Inc. v. Cincinnati Insurance Companies*, ___ F. Supp. 3d ___, 2020 WL 7075318 (E.D. Pa. 2020).

¹² *Id.*

¹³ *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co*, 311 F.3d 226 (3rd. Cir. 2002).

¹⁴ 311 F.3d 226 (3rd. Cir. 2002).

¹⁵ *Id.* at 235.

¹⁶ *Id.* at 311 F.3d 226, 235 (3d Cir. 2002).

¹⁷ *Id.*

Circuit has explained that this test is consistent with Pennsylvania law.¹⁸ Additionally, *Port Authority* has been affirmatively cited by numerous courts in Pennsylvania as instructive on whether the threat of COVID-19 and or the resultant government shut down orders to prevent the spread of COVID-19 constitute “direct physical loss of or direct physical damage to property.”¹⁹

Applying *Port Authority* and its progeny to facts here, it is clear that SGRV is not entitled to coverage for its claim arising from the government shut down orders. While SGRV has been precluded from using its office building as a result of the government closure orders, there is no allegation or evidence that SGRV’s property sustained a physical loss rendering the offices unusable, uninhabitable, eliminated or destroyed. The threat of the virus spreading did prevent SGRV from accessing the property, however, there is no allegation or evidence that the virus was actually present at the building or that the threat of the virus spreading made the property “uninhabitable and unusable”. SGRV was denied access to the premises for a period of time to prevent the spread of the virus but the government shut down orders did not condemn SGRV’s property or bar access permanently. As such, the absence of direct physical loss of or damage to the property as described by *Port Authority* fails to trigger coverage under the Business Income and Business Income Extra Expense Coverage of Valley’s Forge’s policy.²⁰

Requiring physical loss to property to trigger coverage under the Business Income and Extra Expense policy provisions is a reasonable interpretation given that coverage is available to

¹⁸ See *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 826 (3d Cir. 2005).

¹⁹ Pennsylvania courts are permitted to turn to federal authorities for persuasive authority. *Bochetto v. Piper Aircraft Co.*, 94 A.3d 1044, 1050 (Pa.Super. 2014)

²⁰ Any claim for continuing operating expenses is included in the definition of Business Income and therefore subject to the same terms, conditions and requirements.

an insured during the “period of restoration” language. The “period of restoration” inherently contemplates addressing some physical condition of the property. Adopting SGRV’s interpretation that coverage exists any time there is economic loss without any physical loss of or damage to the premises would render the “the period of restoration” within the applicable policy provision meaningless. Based on the foregoing, SGRV’s partial motion of summary judgment is denied and Valley Forge’s cross motion for summary judgment is granted.

II. SGRV is not entitled to coverage under the Civil Authority Provision of the Policy.

SGRV argues that the Civil Authority provision of the policy affords it coverage for Business Income “during the period of restoration” if (1) the operations were suspended because of the “action of civil authority that prohibits access to the location.., “ and 2) the civil authority’s denial of access constituted a “response to direct physical loss of or damage to property located away from” the insured premises (but within five miles of the insured premises), and (3) the damage to the property was directly caused by a covered peril. (SGRV brief p. 14).²¹ As discussed *surpa.*, the presence or threat of COVID -19 does not constitute “physical loss of or damage to property” which is a specific requirement to trigger coverage under the Civil Authority provision of the policy. There is no evidence that the virus was present at the property necessitating the issuance of the government shut down orders or that the virus was present at a property located within five miles of SGVR’s law office. Moreover, the government shut down orders did not deny SGRV access to the premises completely. On the contrary, the government shut down orders were issued to prevent the spread of the virus, a health crisis. The government shut down orders were no issued in response to “direct physical

²¹ Policy p. 73 attached hereto to plaintiff’s partial motion for summary judgment as Exhibit “A”.

loss of or damage to” SGVR’s property or a property within five miles of SGRV’s property. As such, SGRV’s partial motion of summary judgment is denied and Valley Forge’s motion for summary judgment is granted

III. SGRV claim is barred by the Valley Forge Policy Exclusions.

Notwithstanding the foregoing, if the COVID-19 virus was on the property and caused direct physical loss of or damage to the property, a policy exclusion applies to bar coverage for SGRV’s loss. The policy contains an exclusion for loss or damage caused by “microbes”, which the policy defines as including “virus”. The exclusion provides in pertinent part as follows:

A Excluded Perils Subject to Concurrent Causation Provisions

With respect to the excluded perils below, the Insurer will not pay for loss of or damage to property directly or indirectly caused by or resulting from the following causes of loss or events: Biological or Chemical Materials; Earth Movement; Electronic Vandalism; Flood; Fungi, Wet Rot; Dry Rot and Microbes; Governmental Action; Nuclear Hazard; Utility Services; and War and Military Action, regardless of: the causes of such excluded causes or events; other causes of such loss; any other cause or event, whether or not insured under the coverage part, which may have contributed concurrently, or in any sequence, to produce such loss even if such other cause or event would otherwise be covered; and whether the event occurred suddenly or gradually, involved isolated or widespread damage, arose from natural or external sources or acts or omissions, or occurred as a result of any combination of any such causes or events.

5. Fungi, Wet Rot, Dry Rot and Microbes

The Insurer [Valley Forge] will not pay for loss or damage caused by directly or indirectly by or resulting from the presence, growth, proliferation, spread or any activity of fungi, wet or dry rot, or microbes. However this exclusion does not apply when fungi, wet or dry rot, or microbes results from fire or lightning.

Microbes means any:

- A. Non-fungal microorganism;
- B. Non-fungal, colony –form organism
- C. Virus; or

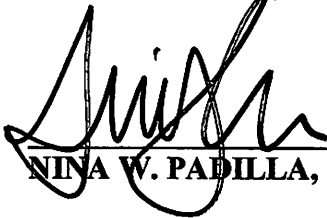
D. Bacteria.²²

The plain language of this exclusion unambiguously states that Valley Forge will not pay for loss or damage caused directly or indirectly by viruses. The government shut down orders were issued to prevent the spread of COVID-19, a highly contagious virus. While SGRV is not making a claim directly for COVID-19, SGRV is making an indirect claim through the government shut down orders which were issued to stop the spread of the virus. Based on the the plain language of the policy exclusion, as a matter of law, the exclusion applies to bar coverage for SGRV purported damages.²³

CONCLUSION

Based on the foregoing, SGRV's motion for partial summary judgment is denied and plaintiff's motion for summary judgment is granted.

BY THE COURT,



NINA W. PADILLA, S.J.

²² Policy pp. 29, 87 attached to defendant's cross motion for summary judgment as Exhibit "A".

²³ Moreover, the additional coverage for microbes does not apply since there is no "direct physical loss of or damage" to the property.