NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARILYN'S KIDS, INC. d/b/a/ DENNY'S, Plaintiff, v. CONTINENTAL CASUALTY COMPANY, Defendant.	Civil Action No. 20-8641 (MAS) (TJB) **MEMORANDUM OPINION**

SHIPP, District Judge

This matter comes before the Court upon Defendant Continental Casualty Company's ("Defendant") Motion to Dismiss Plaintiff Marilyn's Kids, Inc. d/b/a Denny's ("Plaintiff") Complaint. (ECF No. 9.) Plaintiff opposed (ECF No. 12), and Defendant replied (ECF No. 15). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Rule 78.1. For the reasons set forth herein, Defendant's Motion to Dismiss is granted.

I. BACKGROUND

This case is one of many involving COVID-19-related insurance coverage disputes. Plaintiff owns and operates children's retail stores throughout New Jersey. (Compl. ¶¶ 9, 11, ECF No. 1.) Defendant is an Illinois-based insurance company that issued Plaintiff a policy for the period of October 2019 to October 2020 (the "Policy"). (*Id.* ¶¶ 10, 12–13.)

A. The Policy

The Policy identifies three of Plaintiff's retail stores and indicates that coverage is available for Plaintiff's Business Personal Property—but not the Buildings—at those locations. (*See* Policy *12–13, Ex. A to Compl., ECF No. 1-3.) Defendant's "all-risk" Policy protects against "direct physical loss of or damage to Covered Property at the premises . . . caused by or resulting from a Covered Cause of Loss." (*Id.* at *21, § A; Compl. ¶ 16.) "Covered Cause of Loss" means "risks of direct physical loss unless the loss is[]" limited or excluded. (Policy *23–24, § A(3).) "The [P]olicy does not contain any limitations or exclusions for viruses[.]" (Compl. ¶ 39.)

The Policy provides "Business Income and Extra Expense" coverage as well as "Civil Authority" coverage. (Policy *43–44, 69.)

The Business Income provision provides that "[Defendant] will pay for the actual loss of Business Income [Plaintiff] sustain[s] due to the necessary 'suspension' of [Plaintiff's] 'operations' during the 'period of restoration.'" (*Id.* at *43, § 1(b).) The "suspension" of operations "must be caused by direct physical loss of or damage to property at the described premises[,]" and such "loss or damage must be caused by or result from a Covered Cause of Loss." (*Id.*) The "period of restoration . . . [b]egins with the date of direct physical loss or damage caused by or resulting from any" covered loss and "ends on the earlier of: (1) [t]he date when the property . . . should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location." (*Id.* at *38, § 20.)

Similarly, coverage under the Extra Expense provision is available for costs "incur[red] during the 'period of restoration' that [Plaintiff] would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss." (*Id.* at *44, § 2(a).)

Under the Civil Authority provision, the Policy provides that Business Income and Extra Expense coverage may extend to losses and expenses "caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than [the] described premises, caused by or resulting from" a covered loss. (*Id.* at *69, § 1.)

B. Plaintiff's Insurance Claim

On March 9, 2020, New Jersey Governor Phil Murphy "issued a Proclamation of Public Health Emergency and State of Emergency, the first formal recognition of an emergency situation in the State of New Jersey as a result of COVID-19." (Compl. ¶ 48.) Shortly thereafter, Governor Murphy issued orders requiring non-essential businesses to cease operations and close all physical locations. (*Id.* ¶¶ 49–50.) Due to these orders, Plaintiff "ceased retail operations and closed its doors to customers beginning on March 15, 2020[.]" (*Id.* ¶ 56.) On March 30, 2020, Plaintiff submitted a claim under the Policy, which Defendant denied. (*Id.* ¶¶ 40–41.)

C. Procedural History

On July 10, 2020, Plaintiff filed the instant four-count action against Defendant. (*See generally* Compl.) Count One asserts a claim for declaratory relief. (*Id.* ¶¶ 64–70.) Counts Two through Four, respectively, assert claims for breach of contract based on Defendant's denial of coverage under the Policy's Business Income, Extra Expense, and Civil Authority provisions. (*Id.* ¶¶ 71–100.) On November 10, 2020, Defendant moved to dismiss the Complaint. (*See* Def.'s Moving Br., ECF No. 9-10.) Plaintiff opposed on December 7, 2020, (*see* Pl.'s Opp'n Br., ECF No. 12), and Defendant replied on December 28, 2020 (*see* Def.'s Reply Br., ECF No. 15).

II. LEGAL STANDARD

Rule 8(a)(2)[1] "requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

A district court conducts a three-part analysis when considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). "First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). Second, the court must accept as true all of the plaintiff's well-pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (citing *Iqbal*, 556 U.S. at 678). The court, however, may ignore legal conclusions or factually unsupported accusations that merely state "the-defendant-unlawfully-harmed-me." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Finally, the court must determine whether "the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler*, 578 F.3d at 211 (quoting *Iqbal*, 556 U.S. at 679). A facially plausible claim "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 210 (quoting *Iqbal* 556 U.S. at 678). On a Rule 12(b)(6) motion, the "defendant bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

[1] All references to a "Rule" or "Rules" hereinafter refer to the Federal Rules of Civil Procedure.

III. DISCUSSION

A. Parties' Positions

Defendant argues that "[t]he Complaint should be dismissed for failure to allege any 'direct physical loss of or damage to' property[,]" which is required to trigger coverage under the disputed Business Income, Extra Expense, and Civil Authority provisions. (Def.'s Moving Br. 11.) According to Defendant, the phrase "direct physical loss of or damage to"—which is not defined in the Policy—requires some form of tangible loss or damage to the insured property. (*Id.* at 13.) Defendant, therefore, argues that Plaintiff's claims fail because (1) COVID-19 does not cause property damage and (2) the closure of stores only amounts to an economic loss. (*Id.* at 13, 23.)

In opposition, Plaintiff argues that whether it "sustained [a] physical loss or damage presents a question of fact, not a legal issue that can be decided at this early stage." (Pl.'s Opp'n Br. 6.) Plaintiff also contends that, as is the case here, a "physical loss may occur when a property is uninhabitable or unusable for its intended purposes[.]" (*Id.*) Finally, Plaintiff argues that COVID-19 "can cause direct physical loss and property damage." (*Id.*)

B. Insurance Contract Interpretation

Under New Jersey law, the determination of "the proper coverage of an insurance contract is a question of law."[2] *Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284, 288 (3d Cir. 2004) (citation omitted). "In attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 948 A.2d 1285, 1289 (N.J. 2008) (citation omitted). "If the language is clear, that is the end of the inquiry." *Id.* "If the plain language of the policy is unambiguous," the Court should "not engage in a strained construction to support the imposition of liability or write a better policy for the

[2] The parties do not dispute that New Jersey law applies.

insured than the one purchased." *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 129 A.3d 1069, 1075 (N.J. 2016) (citation omitted). In a dispute over the interpretation of an insurance contract, the "burden is on the insured to bring the claim within the basic terms of the policy." *Reliance Ins. Co. v. Armstrong World Indus., Inc.*, 678 A.2d 1152, 1158 (N.J. Super. Ct. App. Div. 1996) (citation omitted).

C "Direct Physical Loss Of Or Damage To"

Unlike the majority of COVID-19-related insurance cases that have been decided in this District, the Policy at issue does not include a virus exclusion provision. *See Arrowhead Health & Racquet Club, LLC v. Twin City Fire Ins. Co.*, No. 20-8968, 2021 WL 2525739, at *3 (D.N.J. June 21, 2021) (collecting cases finding that virus exclusion provisions precluded coverage in similar COVID-19-related insurance disputes). Having found that the virus exclusion barred coverage, most courts in this District have declined to address the question presented here: what constitutes "direct physical loss of or damage to" property. *See, e.g., Beach Glo Tanning Studio Inc. v. Scottsdale Ins. Co.*, No. 20-13901, 2021 WL 2206077, at *8 (D.N.J. May 28, 2021) (finding "whether [the insured] has sustained any physical loss or damage [was] irrelevant" because the virus exclusion barred coverage under the policy); *see Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, No. 20-8676, 2021 WL 1040490, at *4 n.2 (D.N.J. Mar. 18, 2021) (collecting cases).

The few cases that have addressed the disputed language, however, have found that some form of physical damage is required to trigger coverage. *See, e.g., 7th Inning Stretch LLC v. Arch Ins. Co.*, No. 20-8161, 2021 WL 1153147, at *2 (D.N.J. Mar. 26, 2021). In *7th Inning Stretch*, the policy at issue lacked a virus exclusion and "unambiguously" required "'direct physical loss of or damage to property' to trigger coverage." *Id.* (citation omitted). In granting the insurer's motion for judgment on the pleadings, the *7th Inning Stretch* court concluded that the plaintiff failed to

show that its claims fell within the terms of the policy because the plaintiff did "not allege[] any facts that support a showing that its property was physically damaged." *Id.* In doing so, the *7th Inning Stretch* court found that it was insufficient to plead that the executive orders "forced the cessation of the [business] and caused [the] [p]laintiff to lose income and incur expenses." *Id.* And consistent with other district courts, the *7th Inning Stretch* court also found "the presence of a virus that harms humans but does not physically alter structures does not constitute coverable property loss or damage." *Id.* (collecting cases). Under *7th Inning Stretch*, therefore, Plaintiff's argument that COVID-19 caused direct physical loss and damage to its insured property fails.

7th Inning Stretch is consistent with a recent decision from the Eastern District of Pennsylvania that analyzed the same language. *Hair Studio 1208, LLC v. Hartford Underwriters Ins. Co.*, No. 20-2171, 2021 WL 1945712, at *5 (E.D. Pa. May 14, 2021) (granting motion for judgment on the pleadings). In *Hair Studio 1208*, the court observed that the disputed "phrase is crafted in the disjunctive, meaning there must either be 'direct physical loss' *or* 'direct physical damage to the property.'" *Id.* (citation omitted). Similar to *7th Inning Stretch*, the *Hair Studio 1208* court explained that "[d]irect physical damage is 'a distinct, demonstrable, physical alteration of the property damage.'" *Id.* at *6 (citation omitted).

The *Hair Studio 1208* court further explained that "'[d]irect physical loss,' on the other hand, exists when a structure has been rendered 'uninhabitable and unusable,' causing the owner to suffer a 'distinct loss.'" *Id.* (citations omitted). After examining Third Circuit cases—among others—that considered the same language in non-Covid-19 cases, the *Hair Studio 1208* court found that for a plaintiff:

> to assert an economic loss resulting from their inability to operate their premises as intended within the coverage of the [p]olicy's 'physical loss' provision, the loss and the bar to operation from which it results must bear a causal relationship to some *physical*

> *condition* of or on the premises and that the premises must be uninhabitable and unusable, or nearly as such.

Id. at *7–8 (emphasis in original) (citing in part *Motorists Mutual Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 266 (3d Cir. 2002)).

Thus, the *Hair Studio 1208* court found, in relevant part, that the phrase "physical loss" requires some impact on the physical condition of the insured property.[3] *Id.* at *8. "[T]his interpretation is amplified by the language" in the Business Income provision that Defendant is responsible for "the actual loss of Business Income [Plaintiff] sustain[s] due to the necessary 'suspension' of [Plaintiff's] 'operations' during the 'period of restoration.'" *Id.* at *9; (Policy *43 § 1(b).) Defendant's Policy defines "period of restoration" as beginning after "the direct physical loss or direct physical damage" and ending on the earlier of "[t]he date when the property . . . should be repaired, rebuilt[,] or replaced with reasonable speed and similar quality" or "[t]he date when [the] business is resumed at a new, permanent location." *Hair Studio 1208*, 2021 WL

[3] Regarding Plaintiff's insured property, the Complaint and Opposition appear to suggest that the buildings at Plaintiff's locations are covered under the Policy. (*See* Compl. ¶ 27 ("the COVID-19 pandemic renders the Covered Properties unsafe, uninhabitable, or otherwise unfit for their intended use, which constitutes direct physical harm."); *see also* Pl.'s Moving Br. 6 (arguing that several cases "have held physical loss may occur when a property is uninhabitable or unusable for its intended purpose, as Plaintiff has alleged in this case."). But as Defendant notes—and Plaintiff does not address—the Policy indicates that only Plaintiff's Business Personal Property, not the Buildings, are covered. (*See* Def.'s Moving Br. 3–4.) Similarly, the Complaint contains other allegations that appear to be inapplicable to Plaintiff's claims. For example, despite only operating retail stores, the Complaint indicates that Plaintiff purchased the "Policy expecting to be insured against . . . business income losses at the *medical practice*." (Compl. ¶ 20 (emphasis added).) In another instance, the Complaint states that based on the "scientific community['s] . . . recognition that the Coronavirus is a cause of real physical loss and damage[,] [i]t is clear that contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the *restaurant*." (*Id.* ¶ 43 (emphasis added).) The Complaint in one instance even asserts that New York Governor Andrew Cuomo issued the executive orders that purportedly caused Plaintiff's losses. (*Id.* ¶ 38.)

1945712, at *9; (*Id.* at *38, § 20.) In other words, as the *Hair Studio 1208* court noted, the Policy "provides coverage during a 'period of restoration' requiring some correction of a physical condition at the property." *Hair Studio 1208*, 2021 WL 1945712, at *9.

Here, the Court finds that Plaintiff has not met its burden of showing a covered loss under the Policy. Nothing in the Complaint suggests that Plaintiff's insured property was damaged or physically impacted such that the property needed to be repaired, rebuilt, or replaced. To the extent that Plaintiff may argue the executive orders—not COVID-19—caused "physical loss," that argument also fails. *See Hair Studio 1208*, 2021 WL 1945712, at *8 ("The Closure Orders, however, have no impact on the physical condition of the insured [property]"). Based on the foregoing, the Court grants Defendant's Motion to Dismiss.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is granted. The Court will enter an Order consistent with this Memorandum Opinion.

/s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE