

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

C.A. SPALDING COMPANY,	:	
	:	CIVIL ACTION
	:	
Plaintiff	:	Case no. 2:20-cv-01967-TJS
	:	
v.	:	
	:	
SELECTIVE INSURANCE GROUP, INC. and	:	
SELECTIVE INSURANCE COMPANY OF	:	
AMERICA,	:	
	:	
Defendants	:	

**MEMORANDUM OF LAW OF SELECTIVE INSURANCE GROUP, INC.
AND SELECTIVE INSURANCE COMPANY OF AMERICA IN SUPPORT OF
ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Respectfully submitted,

/s/ David Smith

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Defendants, Selective Insurance Group, Inc, and Selective Insurance Company of America (collectively “Selective”) submit this memorandum of law in support of their motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint of plaintiff, C.A. Spalding Company. Plaintiff’s complaint should be dismissed because:

1. The Civil Authority provision of Plaintiff’s insurance policy (the “Policy”) does not cover loss of Business Income incurred as a result of compliance with the closure order issued by the Governor to combat the Coronavirus pandemic; and

2. For the same reasons Plaintiff fails to state a claim under the Civil Authority provision of the Policy, it cannot state a claim under the loss of business income provision of the Policy; and

3. Plaintiff Fails to State a Claim for Loss of Business Income for the additional reason that it has failed to allege loss of a contract.

FACTUAL BACKGROUND

Plaintiff seeks a declaratory judgment that the civil authority coverage in the Business Owners Coverage insurance policy it purchased from Selective on June 1, 2019 covers its claimed loss of Business Income incurred when, according to the complaint, it “shut its doors on March 23, 2020” “[i]n light of the Coronavirus global pandemic and state orders mandating all non-life-sustaining businesses in the Commonwealth to close operations and stay at home.” Compl. ¶¶ 2, 11.

LEGAL STANDARD

To survive a motion to dismiss, a complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’” *Victaulic Co. v.*

Tieman, 499 F.3d 227, 234 (3d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff’s claim is not plausible on its face because Plaintiff has failed to plead facts that would allow the court to “draw the reasonable inference that the defendant is liable for [its claim].” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although there is no probability requirement, plaintiff must allege more than a “sheer possibility” that the defendant is liable. *Id.*

Plaintiff’s complaint lacks the *factual* basis necessary to withstand the scrutiny of its claims to relief. The Third Circuit has made clear that, unlike *factual* allegations, the “conclusory” allegations in Plaintiffs’ complaint “are not entitled to assumptions of truth.” *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011) (citing *Twombly*, 550 U.S. at 557). Therefore, Plaintiff cannot rely on mere “labels and conclusions, and [its] formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

ARGUMENT

The Policy does not cover the business income Plaintiff claims to have lost when it “shut its doors” “[i]n light of the Coronavirus global pandemic and state orders mandating all non-life-sustaining businesses in the Commonwealth to close operations and stay at home.” For ease of reference, the pertinent policy provisions are set forth below in full, in context, and a copy of the Policy is attached hereto as Exhibit A.²

Section A(1) of the “Business Income (and Extra Expense) Coverage Form”, defines the scope and limits of coverage for loss of Business Income:

² A copy of the Policy is also attached to Plaintiff’s complaint as Exhibit 1.

A. Coverage

1. Business Income

. . . 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 . . . The loss or damage must be caused by or result from a Covered Cause of Loss.

Section A of the “Causes of Loss – Special Form”, defines “Covered Causes of Loss”:

A. Covered Causes of Loss

. . . Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

The “Civil Authority” provision, on which Plaintiff relies, is found on the “Business Income (and Extra Expense) Coverage Form, Section 1(5)(a):

a. Civil Authority

. . . When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than 1 mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Two exclusions from “Covered Causes of Loss” apply here. Section B(1)(a) of the “Causes of Loss – Special Form” excludes loss or damage caused directly or indirectly by

ordinance or law; and the “Exclusion of Loss Due to Virus or Bacteria” endorsement, Sections A and B, excludes loss or damage caused directly or indirectly by virus or bacteria.

Causes of Loss – Special Form, Section B(1)(a):

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance Or Law

The enforcement of or compliance with any ordinance or law.

(1) Regulating the construction, use or repair of any property; or

(2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

a) An ordinance or law that is enforced even if the property has not been damaged.

* * *

Exclusion of Loss Due to Virus or Bacteria endorsement:

A. The exclusion set forth in Paragraph B applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to all forms or endorsements that cover property damage to buildings or person property and forms or endorsements that cover business income, extra expense or action of civil authority

B. We will not pay for loss or damage cause by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

I. Plaintiff Fails to State a Claim Under the Civil Authority Provision of the Policy

According to the complaint, Plaintiff claims coverage under the Civil Authority provision of the Policy. However, Plaintiff's reliance on the Civil Authority provision of the policy is misplaced because Plaintiff does not – and cannot – plead facts that satisfy any of the requirements for coverage under the Civil Authority provision of the Policy. Section 1(5)(a) of the “Business Income (and Extra Expense) Coverage Form, provides in full:

a. Civil Authority

. . . When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than 1 mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

The allegations in Plaintiff's complaint demonstrate that Plaintiff cannot satisfy the following essential requirements for Civil Authority Coverage:

- (a) that the loss sustained is a “Covered Cause of Loss”, which is defined as “direct physical loss unless the loss is excluded or limited in this policy”;
- (b) that “damage” was sustained “to a property other than” Plaintiff's insured place of business;
- (c) that the civil authority prohibited access to Plaintiff's place of business in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage or to enable the civil authority to have unimpeded access to the damaged property.

All three requirements must be satisfied, but Plaintiff cannot satisfy any of them.

A. Plaintiff Cannot Satisfy the Requirement of a Covered Cause of Loss.

The Civil Authority provision of the policy, Section 1(5)(a) of the “Business Income (and Extra Expense) Coverage Form, begins with: “When a Covered Cause of Loss causes damage ...” Plaintiffs have no claim under the Policy because neither the Coronavirus pandemic nor the “state orders mandating all non-life-sustaining businesses in the Commonwealth to close operations and stay at home” can be a Covered Cause of Loss.

The phrase “Covered Causes of Loss” is defined in Section A of the “Causes of Loss – Special Form” as a “direct physical loss *unless the loss is excluded or limited in this policy.*” (emphasis added).

There are two exclusions that preclude coverage:

- “Exclusion of Loss Due to Virus or Bacteria” endorsement, Sections A and B, exclude loss or damage caused directly or indirectly by virus or bacteria.
- Section B(1)(a) of the “Causes of Loss – Special Form” excludes loss or damage caused directly or indirectly by ordinance or law.

Plaintiff pleads that it “shut its doors” “[i]n light of the Coronavirus global pandemic.” That unavoidable admission eliminates any plausible argument for a Covered Cause of Loss. While Plaintiff asserts the virus exclusion does not apply, that bare unsupported conclusion does not provide a basis to avoid dismissal under Rule 12(b)(6). *See Burtch*, 662 F.3d, at 225 (citing *Twombly*, 550 U.S. at 555-57) (finding that “conclusory” allegations in a complaint “are not entitled to assumptions of truth” and that the mere formulaic recitation of the elements of a cause of action are insufficient in terms of defeating a motion to dismiss).

Plaintiff’s claims are also contradicted by their allegation that they closed in light of “state orders mandating all non-life-sustaining businesses in the Commonwealth to close

operations and stay at home.” State orders which Plaintiff alleges have eliminated their ability to conduct business operations at their insured place of business are laws “regulating the . . . use” of Plaintiff’s property. *See Windowizards, Inc. v. Charter Oak Fire Insurance Company*, 2015 WL 1400726, at *5 (E.D.Pa. March 27, 2015) (finding that the policy language regarding coverage of “loss or damage caused by the enforcement of any ordinance or law” was triggered at the point in time when action taken by the insured became “necessary under the law”) (citing *Regents of Mercersburg College v. Republic Franklin Insurance Co.*, 458 F.3d 159 (3d. Cir. 2006) (holding that the policy language addressing coverage of “Covered Causes of Loss”, which were “caused by enforcement of building, zoning or land use ordinance or law” applied under circumstances in which action taken by the insured was mandated by the Americans with Disabilities Act, and the Pennsylvania Handicapped Act)); *see also Zion Hill Baptist Church of Philadelphia, Inc. & Robert P. Paskings, Esq., Custodian of the Assets of Zion Hill Baptist Church of Philadelphia, Inc. v. Ben Weinstein*, 1989 WL 817111 (Pa. Ct. Com. Pl. Jan. 6, 1989), (finding that the “major flaw” in the insured’s argument that coverage included the cost of installation of a sprinkler system in their church, which was mandated by a city ordinance, was the fact that the policy contained a specific exclusion for any loss “[o]ccasioned directly or indirectly by enforcement of any local or state ordinance or law regulating the construction, repair, or demolition of buildings and structures.”). Accordingly, the provision excluding loss or damage caused directly or indirectly by ordinance or law also precludes coverage here.

Plaintiff’s claims would not be covered even if the above exclusions were not in the Policy. Plaintiff does not allege a “direct *physical* loss of or damage to property.” Plaintiff does not allege that the virus was *actually present*; only that the societal need for social distancing required them to shut its doors. *Friends of DeVito, et. al v. Wolf*, 2020 WL 1847100 (Pa. April

13, 2020) (a copy of which is attached as Exhibit “C.”), cited by Plaintiff in support of its conclusory statement in paragraph 29 of the complaint that “physical loss and damage exists resulting in coverage here,” does not help. As discussed above, the issue in *Friends of DeVito* was whether Governor Wolf had the authority to order businesses to close. *Friends of DeVito* does not pertain in any way to insurance or interpretation of contracts (insurance or otherwise), or to the definition and scope of the phrase “direct physical loss of or damage to property.”

Motorists Mutual Insurance Co. v. Hardinger, 131 F. App’x. 823 (3d Cir. 2005), also cited by Plaintiff, is similarly inapplicable.³ In *Hardinger*, plaintiff’s residential well was alleged to have been *actually contaminated* with e-coli bacteria and that the contamination rendered plaintiff’s home inhabitable and totally precluded plaintiff’s use thereof. *Id.* at 824.

By contrast, as noted above, the Plaintiff here failed to plead that any relevant property was *actually contaminated* with COVID-19, but rather that it could not use its property because of executive orders and a viral pandemic. Even if *actual* COVID-19 contamination could, in theory, constitute direct physical loss or damage, the mere *risk* of such contamination would fail to qualify as such.

Plaintiff’s inability to plead a Covered Cause of Loss mandates dismissal of the complaint.

³ See *Hardinger*, 131 F. App’x at 828 (finding that there existed a genuine issue of material fact with respect to the issue of whether plaintiff’s home, having been rendered uninhabitable as a result of e-coli bacteria contamination of plaintiff’s well, constituted “direct physical loss”) and the New Jersey federal case on which it relied, *Port Authority of New York & New Jersey Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002) (applying New Jersey law and holding that “actual release” of asbestos fibers at the insured property which did not cause any physical damage to the structures but rendered the structures “useless or uninhabitable” constituted “physical loss or damage”).

B. Plaintiff Has Not Pleaded Damage to “Other Property”

For there to be coverage for acts of civil authority under Section 1(5)(a) of the “Business Income (and Extra Expense) Coverage Form, the damage caused by the Covered Cause of Loss must be to property *other than* Plaintiff’s insured property. Plaintiff’s complaint is devoid of any allegations of damage to a property other than its own. Rather, the allegations in Plaintiff’s complaint address only alleged damage to Plaintiff’s Insured Property. For this reason as well, Plaintiff’s complaint should be dismissed.

C. Plaintiff Has Not Pleaded That Access to Its Place of Business is Prohibited Because of Damage to Another Property or to Enable a Civil Authority to have Unimpeded Access to the Other Damaged Property.

Plaintiff fails to state a claim under the Civil Authority provision for the additional reason that it does not – and cannot – allege that access to its place of business has been prohibited by a civil authority because of physical damage which a Covered Cause of Loss has caused another property within a mile of its place of business or to enable a civil authority to have unimpeded access to the other damaged property. Section 1(5)(a) of the “Business Income (and Extra Expense) Coverage Form requires both of the following to be satisfied for there to be coverage for an act of a civil authority that prohibits access to the Plaintiff’s place of business:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than 1 mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Again, Plaintiff’s complaint is devoid of any allegations of damage or impeded access to any property other than its own. Rather, the allegations in Plaintiff’s complaint address only

alleged damage and impeded access to Plaintiff's Insured Property. For this reason as well, Plaintiff's complaint should be dismissed.

II. For the Same Reasons Plaintiff Fails to State a Claim Under the Civil Authority Provision of the Policy, It Cannot State a Claim Under the Loss of Business Income Provision of the Policy.

Plaintiff fares no better if it shifts its emphasis to the provision addressing coverage for loss of Business Income found in Section A(1) of the "Business Income (and Extra Expense) Coverage Form" because that section also requires a Covered Cause of Loss and direct physical loss of or damage to property, as follows:

A. Coverage

1. Business Income

. . . 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 . . . The loss or damage must be caused by or result from a Covered Cause of Loss.

First, the Policy mandates that loss of Business Income "must be caused by or result from a Covered Cause of Loss." Again, the phrase "Covered Causes of Loss" is defined in Section A of the "Causes of Loss – Special Form" as a "direct physical loss *unless the loss is excluded or limited in this policy.*" (emphasis added).

As discussed at length above, there are two exclusions that preclude coverage:

- "Exclusion of Loss Due to Virus or Bacteria" endorsement, Sections A and B, exclude loss or damage caused directly or indirectly by virus or bacteria.
- Section B(1)(a) of the "Causes of Loss – Special Form" excludes loss or damage caused directly or indirectly by ordinance or law.

Consequently, Plaintiff fails to sufficiently plead a "Covered Cause of Loss" under the loss of Business Income provision.

Further, the loss of Business Income provision is clear: the suspension of business operations “must be caused by direct physical loss of or damage to property”. The Policy contemplates that, when this specific type of damage is sustained, business is suspended so that the property can undergo “restoration”.

Here, Plaintiff has not alleged in the complaint that the loss of use of Plaintiff’s premises because of the Governor’s orders, or the mere threat of COVID-19 contamination required that Plaintiff’s premises be “restored” in any way, i.e., via repairs, demolition and reconstruction, etc. Accordingly, Plaintiff has failed to plead that it sustained a “direct physical loss of or damage to property”. Therefore, the type of loss allegedly sustained by Plaintiff is not covered by the loss of Business Income provision.

III. Plaintiff Fails to State a Claim for Loss of Business Income for the Additional Reason that it has Failed to Allege Loss of a Contract

According to its website, “C.A. Spalding Company provides hot formed titanium products and complex titanium assemblies to the world's largest military and commercial fixed wing and rotorcraft OEMs from our facility strategically located in the Southeastern Pennsylvania.” www.caspalding.com. C.A. Spalding’s clients include Boeing, Lockheed Martin and the U.S. Navy. www.caspalding.com/our-clients.⁴

⁴ Plaintiff cannot dispute the authenticity of its own website and the representations made thereon. Therefore, this Court may consider Plaintiff’s website in evaluating this motion to dismiss under Rule 12(b)(6). *Rivera v. Marriott International, Inc. & International Hospitality Enterprises, Inc.*, No. CV 19-1894 (GAG), 2020 WL 1933968, at *2 (D.P.R. Apr. 22, 2020) (finding that, “at the motion to dismiss stage”, a Court may consider evidence outside the pleadings if “the authenticity of [the evidence is] not disputed by the parties”). (citing *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993)).

It is undisputed that Plaintiff, C.A. Spalding Company, is not a “mom and pop” retail store which relies on sales generated by customer foot traffic. Unlike city sidewalk retail businesses, the income earned by a major heavy industry and defense contractor such as Plaintiff is not dependent upon its customers being *physically present* inside its walls. Cash does not flow from the customers’ hands to the clerks’ hands to the inside of a cash register. Cash flows into the Plaintiff’s coffers pursuant to the terms of *contracts* with its customers.

Plaintiff’s complaint is devoid of any allegations that, as a result of having to “shut its doors on March 23, 2020” due to “the Coronavirus global pandemic and state orders mandating all non-life-sustaining businesses in the Commonwealth to close operations and stay at home”, any existing contracts were cancelled, revoked or voided by a customer or that Plaintiff was prevented from entering into any new contracts. Therefore, Plaintiff has failed to allege any actual loss of income for which the Policy was designed to cover.

CONCLUSION

For the foregoing reasons, Selective respectfully requests that the Court dismiss Plaintiff's complaint for failure to state a claim on which relief can be granted.

Respectfully submitted,

/s/ David Smith

Dated: May 27, 2020

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Inc. and Selective Insurance Company of America*

CERTIFICATE OF SERVICE

I hereby certify that, on May 27, 2020, I caused a true and correct copy of the foregoing Motion to Dismiss to be served upon all parties via this Court's notice of electronic filing.

Respectfully submitted,

/s/ David Smith

Dated: May 27, 2020

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