IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MAURICIO MARTINEZ, DMD, P.A.,
D/B/A GULF COAST SMILES,

Plaintiff(s), CASE NO.: 2:20-CV-00401-TPB-NPM

vs.

ALLIED INSURANCE COMPANY
OF AMERICA,

Defendant.
_____/

DEFENDANT ALLIED INSURANCE COMPANY OF AMERICA'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, ALLIED INSURANCE COMPANY OF AMERICA, (Defendant), by and through its undersigned counsel, and pursuant to Rule 12(b)(6), Fed. R. Civ. P., hereby moves to dismiss the complaint filed by Plaintiff, MAURICIO MARTINEZ, DMD, P.A., D/B/A GULF COAST SMILES ("Plaintiff"). In support of this motion, Defendant states as follows:

BACKGROUND

1. Defendant, ALLIED INSURANCE COMPANY OF AMERICA, issued a Premier Business Owners Policy, numbered ACP BPOL 3018931337 to the Plaintiff for the period September 28, 2019 to September 28, 2020, which provided coverage according to its terms, conditions and exclusions for the property located at 4905 Chiquita Boulevard, S., Suite 104, Cape Coral, Florida 33914. The subject Policy is incorporated by reference in Plaintiff's Complaint and attached to Plaintiff's Complaint. *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 6. *See also* **Exhibit "1"** Plaintiff's Complaint Exhibit "A".

2. On or around March 27, 2020, Plaintiff reported a claim to Defendant for loss of Business Income due to the recent COVID-19 pandemic. *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 22.

3. On April 1, 2020, after reviewing Plaintiff's claim, Defendant sent a denial letter to Plaintiff pursuant to the terms, conditions and exclusions contained within the subject Policy. *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 22. *See also* **Exhibit "1**," Plaintiff's Complaint, Exhibit "C."

4. Plaintiff now brings this action against Defendant alleging Breach of Contract (Count I) and Declaratory Judgment (Count II). *See* **Exhibit "1,"** Plaintiff's Complaint.

5. In particular, Plaintiff asserts that the Civil Authority provision of the policy provides coverage for a loss of business income due to the March 9, 2020, Executive Order 20-52 issued by Governor Ron DeSantis which declared a state of emergency for the entire State of Florida as a result of the COVID-19 pandemic. *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 15.

6. Because of the of the Executive Order, Plaintiff alleges that the dental office was damaged since airborne particles existed in the air and the risk of the COVID-19 pandemic outweighed continued operations and, thus, business operations were suspended. *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 18.

7. In addition, Plaintiff claims that due to the COVID-19 pandemic, it incurred costs of decontaminating the business office and office closure and that this physical damage resulted in loss of income to the business. *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 18.

8. Lastly, Plaintiff claims in its Declaratory Judgment action that, "[t]here exists a present ascertained set of facts, and/or present controversy concerning said facts, that requires this Court's declaration of the Parties' rights and obligations under the policies." More specifically, "Plaintiff seeks this Court's declaration that those damages at issue in the claim constitute a covered loss under the policies…" *See* **Exhibit "1,"** Plaintiff's Complaint ¶¶ 28 and 30.

9. Pursuant to the subject policy, coverage for loss of Business Income is provided as an Additional Coverage. This additional coverage provides that Defendant will pay for the actual loss of business income Plaintiff sustains due to the necessary suspension of its operations… However, the loss of damage must be caused by or result from a "Covered Cause of Loss." *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 10.

10. In addition, the Civil Authority provision of the subject policy provides Business Income loss when the action of civil authority **prohibits** access to the described premises. However, to establish coverage under the Civil Authority provision, the action of civil authority must be in response to damage caused by a "Covered Cause of Loss." *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 11.

11. The Executive Order by Governor Ron DeSantis was issued in response to the threat to the public health posed by the COVID-19 virus. Also, Plaintiff's alleged costs of decontaminating the business office which resulted in loss of income to the business was also a result of the COVID-19 virus.

12. Plaintiff admits that it remained open to perform emergency dental procedures. *See* **Exhibit "1,"** Plaintiff's Complaint ¶ 20.

13. COVID-19 is a virus that induces or is capable of inducing physical distress, illness or disease.

14. The subject policy specifically excludes loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease. *See* **Exhibit "1,"** Plaintiff's Complaint, Exhibit A, Insurance Policy, at form PB 00 02 11 14, Page 22 of 42.

15. Based solely on the allegations in Plaintiff's Complaint and the exclusions in the subject policy on which Plaintiff relies, Defendant requests that this Court grant Defendant's Motion to Dismiss and dismiss Plaintiff's Complaint for failure to state a cause of action upon which relief can be granted.

MEMORANDUM OF LAW

I. MOTION TO DISMISS STANDARD

Pursuant to Federal Rule of Civil Procedure 8(a)(2), "[a] pleading that states a claim for relief must contain… (2) a short and plain statement of the claim showing that the pleader is entitled to relief…"

"A complaint that does not contain sufficient factual matter, accepted as true, to state a claim plausible on its face is subject to dismissal." Houston Specialty Ins. Co. v. Vaughn, 8:15-CV-2165-T-17AAS, 2016 WL 7386957, at *3 (M.D. Fla. Aug. 4, 2016) (citing Am. Dental Ass'n v. Cigna Corp., 605 F. 3d 1283, 1289 (11th Cir. 2010). "Under Rule 12(b)(6), dismissal is proper if a complaint fails to allege 'enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007). "While 'detailed factual allegations' are not required, mere 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'

are not enough." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009). *See* Broad. Music, Inc. v. 845 N., Inc., 3:13-CV-1533-J-39JRK, 2014 WL 12618334, at *1 (M.D. Fla. May 12, 2014).

"When reviewing a motion to dismiss, a court must limit its consideration to the pleadings and exhibits attached to the pleadings and, as a general rule, must accept the plaintiff's allegations as true…" Gubanova v. Miami Beach Owner, LLC, 12-22319-CIV, 2013 WL 6229142, at *1 (S.D. Fla. Dec. 2, 2013). However, in order to survive a motion to dismiss under Rule 12(b)(6), "a complaint [cannot] rest on 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (citing Iqbal, 556 U.S. at 678).

"The interpretation of insurance policies, like the interpretation of all contracts, is generally a question of law." Goldberg v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA., 143 F.Supp.3d 1283, 1292 (S.D. Fla. 2015) (citing Lawyers Title Ins. Corp. v. JDC (Am.) Corp., 52 F.3d 1575, 1580 (11th Cir. 1995)). Florida law "provides that insurance contracts are construed in accordance with the plain language of the policies as barged for by the parties." Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000) (citing Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So. 2d 467, 470 (Fla. 1993)). "The scope and intent of insurance coverage is defined by the language and the terms of the insurance policy, and where the language of the policy is plan and unambiguous, the contract must be enforced as written." Fabricant v. Kemper Independence Ins. Co., 474 F.Supp.2d 1328, 1330 (S.D. Fla. 2007) (citing Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 372, 734–35 (Fla. 2002)).

II. LEGAL ARGUMENT

A. COUNT I FAILS TO STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT

To initiate a claim for breach of contract, Plaintiff must identify the three elements for a cause of action for breach of contract as: "(1) a valid contract, (2) a material breach, and (3) damages." American Color Graphics, Inc. v. Brooks Pharmacy, Inc., 80:5-CV-1512T27-TBM, 2006 WL 539543, at *3 (M.D. Fla. March 6, 2006).

In the instant case, Plaintiff's action for breach of contract asserts that the Business Income and Civil Authority provisions of the subject policy provide coverage for a loss of business income as the result of Executive Order No. 20-52 issued by the Governor, Ron DeSantis. Therefore, Plaintiff asserts that Defendant breached the policy when it denied Plaintiff's claim for policy benefits under the Business Income and Civil Authority provisions.

However, the facts admitted by Plaintiff in its Complaint and the plain language of the policy attached to Plaintiff's Complaint reveal that Defendant did not breach the terms and conditions of the Policy and therefore, Plaintiff's claim is invalid. Thus, Plaintiff cannot state a claim for policy benefits under the Business Income and Civil Authority provision. The policy provides, in pertinent part, as follows:

> 5. **ADDITIONAL COVERAGES**
>
> g. **Business Income**
>
> (1) **Business Income with Ordinary Payroll Limitation**
>
> (a) 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 the described

premises. The loss or damage must be caused by or result from a **Covered Cause of Loss**… (emphasis added).

* * *

(c) We will only pay for loss of "business income" that you sustain during the "period of restoration" and that occurs within the number of consecutive months shown in the Declarations for Business Income Actual Loss Sustained after the date of direct physical loss or damage. We will only pay for "ordinary payroll expenses" for the number of days shown in the Declarations for Ordinary Payroll Limit following the date of direct physical loss or damage.

* * *

j. **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 one 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. (emphasis added).

* * *

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. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

* * *

i. Virus Or Bacteria

(1) Any **virus**, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. (emphasis added).

* * *

Under the plain language of the policy, the threshold for coverage under the policy for the Civil Authority provision is that 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."[1] Similarly, pursuant to the terms of the policy, in order to afford coverage to Plaintiff under the Business Income provision, the loss or damage must be caused by or result from a "Covered Cause of Loss."

Plaintiff admits that the Executive Order issued by Governor Ron DeSantis was in response to the coronavirus (COVID-19) pandemic. Additionally, the Executive Order states that the Executive Order was issued "due to the outbreak of COVID-19 [virus]." *See* **Exhibit "1,"** Plaintiff's Complaint, Exhibit B. Additionally, Plaintiff's claim for damages associated with decontaminating the office building was also performed in response to the outbreak of the COVID-19 virus. Neither of Plaintiff's claims resulted from a direct physical loss to the insured property as defined by the policy".

However, regardless of whether there is physical damage to the insured property or not[2], the policy expressly excludes loss or damage caused by or resulting from any virus. Simply put, loss or damage caused directly or indirectly by the COVID-19 virus is explicitly excluded by the terms of the policy. As such, Plaintiff is not entitled to any "damages" caused directly or indirectly from the COVID-19 virus.[3]

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[1] The policy defines Covered Causes of Loss" as "direct physical loss".

[2] While arguing for the dismissal of Plaintiff's complaint based solely on the subject policy's virus exclusion, ALLIED does not concede that there was any direct physical loss to the insured's property as required by the terms of the policy. Moreover, it has also been found that the cleaning expenses referenced in Plaintiff's complaint do not satisfy the physical loss requirement since the building has not been rendered "uninhabitable of substantially unusable" and there was no "distinct, demonstrable, physical alteration of the property." *See* Mama Jo's. Inc. v. Sparta Ins. Co., 17-CV-23362-KMM, 2018 WL 3412974, at* 9 (S.D. Fla. June 11, 2018).

[3] ALLIED's motion is focused on the specific language of the virus exclusion. However, ALLIED reserves its right to raise additional provisions contained in the policy should subsequent arguments be necessary.

A number of courts have upheld policy exclusions for mold and bacteria that are analogous to the virus exclusion set forth in this instant case. *See* United Specialty Ins. Co. v. Davis, 2020 WL 1445484 at *3-5 (S.D. Fla. Feb. 19, 2020) (holding alleged "injuries are excluded from coverage under the Policy by the Mold Exclusion"); Rolyn Companies, Inc. v. R&J Sales of Texas, Inc., 671 F.Supp.2d 1314, 1332-1333 (S.D. Fla. Nov. 16, 2009) (enforcing mold exclusion); Boran Craig Barber Homes, Inc. v. Mid-Continent Casualty Co., 2009 WL 10670850 at *4-5 (M.D. Fla. Feb. 19, 2009) ("the mold exclusion clearly excludes coverage for any damage caused by or expenses incurred in remediating the mold")' Clarendon America Ins. Co. v. Taylor Ranch, Inc., 2009 WL 10671266 at *9 (M.D. Fla. Sept. 21, 2009) ("The Court has examined the Mold Exclusion . . . The plain language of the exclusion excludes coverage . . ."); Empire Indemnity Ins. Co. v. Winsett, 325 Fed. Appx. 849, 850-851 (11th Cir. 2009) (enforcing mold exclusion); *see also* Hathaway Development Co., Inc. v. Illinois Union Ins. Co., 274 Fed.Appx. 787, 792 (11th Cir. April 18, 2008) (enforcing mold/bacteria exclusion under Georgia law). "Moreover, 'if a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision.' Clarendon Am. Ins. Co. v. Taylor Ranch, Inc., 8:07-CV-2015-T-17EAJ, 2009 WL 10671266, at *6 (M.D. Fla. Sept. 21, 2009) (quoting Hagen v. Aetna Cas. & Sur. Co., 675 So.2d 963, 965 (Fla. 5th DCA 1996). The plain language of the virus exclusion expressly excludes coverage of Plaintiff's damages in the instant case.

Thus, based on the allegations claimed in Plaintiff's Complaint, supporting exhibits, and the plain language of the subject policy in which Plaintiff relies, there is no coverage afforded under the policy for Plaintiff's claim as the alleged loss or damage

was the result of the COVID-19 virus. Defendant's denial of the claim is not in breach of the Policy and Plaintiff's Breach of Contract claim should be dismissed for failure to state a cause of action upon which relief could be granted.

In addition, Plaintiff's Complaint also establishes that there is no coverage under the Civil Authority provision of the policy. The Civil Authority provision requires that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage". Executive Order 20-51 does not prohibit access to the Plaintiff's property. Additionally, while Plaintiff may have ceased non-essential dental services, Plaintiff admits that it remained open and performed emergency procedures. See Plaintiff's Complaint, ¶ 20). As such, Defendant's denial of the claim is not in breach of the Policy and Plaintiff's Breach of Contract claim should be dismissed for failure to state a cause of action upon which relief could be granted.

B. COUNT II FAILS TO STATE A CAUSE OF ACTION FOR DECLARATORY JUDGMENT

The sole basis for Count II of Plaintiff's Complaint is its assertion that the Court's interpretation of the policy could result in coverage under the Civil Authority and Business Income provisions for the loss claimed in Count I for breach of contract.

The Declaratory Judgment Act grants to the federal district courts the power to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.[4] "An essential element for every declaratory judgment action is the existence of an 'actual controversy' between the parties." Mt. Hawley Ins. Co. v. Tactic Sec. Enf't, Inc., 252 F.

[4] Declaratory Judgment actions that are removed to federal court are treated as though they had been filed under the federal Declaratory Judgment Act. Morales v. Bimbo Foods Bakeries Distr., LLC, 6:18-CV-1652-ORL-31TBS, 2019 WL 354876, at *2 (M.D. Fla. Jan. 29, 2019).

Supp. 3d 1307, 1309 (M.D. Fla. 2017) (citing Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 239–40, 57 S.Ct. 461, 81 L.Ed. 617 (1937). "An actual controversy exists when 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Mt. Hawley Ins. Co., 252 F. Supp. 3d at 1309 (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)). "Ordinarily, a controversy is not sufficiently immediate or real where the parties' dispute is only hypothetical and not yet ripe, has been rendered moot, or where the court's resolution of the matter would be purely academic." Mt. Hawley Ins. Co., 252 F. Supp. 3d at 1309.

In the instant matter, the threshold for coverage under the Civil Authority provision is an order that bars access to the Plaintiff's property issued in response to "damage" to property at the described premises by a "Covered Cause of Loss." Similarly, for coverage to be afforded to Plaintiff for loss in business income for decontaminating the office building, the loss or damage to the insured property must result from a "Covered Cause of Loss."

The undisputed facts as related in Plaintiff's Complaint establish that the Order issued by Governor Ron DeSantis No. 20–52 was not issued in response to damage to property by a Covered Cause of Loss. Instead the Order was issued in response to the state of emergency in Florida due to the threat of the COVID-19 virus which continued to pose a threat to the public health. In addition, Plaintiff's claim for loss associated with decontamination of the office building was, equally, in response to COVID-19 virus which continued to pose a threat to public health.

Pursuant to the terms of the subject Policy, loss or damage caused directly or indirectly by, or resulting from, a virus is specifically excluded. As a consequence, by Plaintiff's own admission, the basic requirement for orders by civil authorities giving rise to coverage under the Civil Authority provision has not been met. In addition, Plaintiff's damages and loss of business income claimed for decontaminating the office building (due to the virus) is also excluded.

Absent a colorable cause of action for breach of contract under the Civil Authority and Business Income provisions, Plaintiff's action for declaratory judgment on the application of exclusions is without basis and Count II of Plaintiff's Complaint should be dismissed.

C. COUNT II (DECLARATORY JUDGMENT IS DUPLICATIVE OF COUNT I (BREACH OF CONTRACT)

Plaintiff's declaratory-relief claim should be dismissed because it is duplicative of the breach-of-contract claim. Declaratory-judgment claims may properly coexist with breach-of-contract claims when they provide the plaintiff a form of relief unavailable under the breach-of-contract claim. See Kenneth F. Hackett & Assoc., Inc. v. GE Capital Info. Tech. Solutions, Inc., 744 F. Supp. 2d 1305, 1311 (S.D. Fla. 2010) (Altonaga, J.) (finding plaintiff's declaratory-judgment claim could affect future payments or rate increases under the existing contract and so sought different relief than the plaintiff's breach-of-contract claim). But even so, claims for declaratory judgment must look forward, rather than backward, as any retrospective declaratory judgment would be equally solved by resolution of the breach-of-contract claim. Id.

In the current situation the Plaintiff's breach-of-contract claim involves the same factual dispute as the declaratory-judgment claim. In this situation the "Plaintiff will be

able to secure full, adequate and complete relief through the breach of contract claim" and consequently "the declaratory action must be dismissed." Berkower v. USAA Cas. Ins. Co., No. 15-23947-Civ, 2016 WL 4574919, at *5 (S.D. Fla. Sep. 1, 2016) (Goodman, Mag. J.) (quoting Fernando Grinberg Trust Success Int'l Props., LLC v. Scottsdale Ins. Co., No. 10-20448-Civ, 2010 WL 2510662, at *1–2 (S.D. Fla. June 21, 2010)) (Cooke, J.). "[T]wo concerns dominate decisions to dismiss a declaratory-relief claim pleaded with a breach of contract claim: the completeness of the relief afforded to a party when it prevails on its breach of contract claim and judicial economy." Kenneth F. Hackett & Associates, Inc. v. GE Capital Info. Tech. Solutions, Inc., No. 10-20715-CIV, 2010 WL 3981761, at *5 (S.D. Fla. Oct. 8, 2010) (Altonaga, J.); see also Diaz Fritz Group, Inc. v. Westfield Insurance Company, No 8:20-cv-785-T-33AAS 2020 WL 2735332 (M.D. Fla May 26, 2020 (Hernandez Covington, V), Ali v. Centre Life Insurance Company, No. 6:17-cv-996-Orl-41TBS, 2018 WL 3822007 (M.D. Fla March 8, 2018) (Mendoza, C), and Salazar v. American Security Insurance Company, No. 8:13–cv–02002–EAK–TBM, 2014 WL 978405 (M.D. Fla. March 12, 2014) (Kovachevich, E.).

Count II fails to identify the policy provisions or terms of the insurance policy that are ambiguous that Plaintiff requests the Court interpret. Count one of Plaintiff's complaint, alleging breach-of-contract, requests damages related to the COVID-19 claim to the extent that Allied did not cover the loss. (Pl.'s Compl., page 5). In count two, Plaintiff seeks a declaration of rights to determine whether the loss resulting from COVID-19 is covered by the insurance policy issued by Allied. (Id. at pages 6–7). The determination of Plaintiff's breach-of-contract claim involves the same factual dispute as the declaratory-judgment claim: specifically, to what extent the COVID-19 is covered by

the insurance policy. Plaintiff will be able to secure full, adequate, and complete relief through the breach-of-contract claim and Count II should be dismissed.

WHEREFORE, Defendant ALLIED INSURANCE COMPANY OF AMERICA, respectfully prays for judgment in his favor and that Plaintiff's Complaint be dismissed, for costs of this action, and such other relief as the Court deems appropriate under the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020, the foregoing was filed with the Clerk of the Court via the CM/ECF system. I further certify that a true and correct copy of the foregoing has been furnished this day via Electronic Mail to:

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