

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

ANTHONY E. TROMBLY d/b/a
TROMBLY CHIROPRACTIC,

Plaintiff,

Case No. 21-01051-CBB

HON. T.J. ACKERT

v

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

Plaintiff Trombly Chiropractic presents a case on its behalf and all similarly situated policyholders within Michigan for coverage of losses under a business insurance policy issued by Defendant Farm Bureau General Insurance Company of Michigan (“Farm Bureau”). While a policy claim is not novel, and resolution of the scope of coverage typically straightforward, the claim before the Court arises from the outbreak of a global pandemic caused by the SARS-CoV-2 coronavirus, which causes the disease known as COVID-19. To combat the spread of COVID-19 within the state, Governor Gretchen Whitmer issued numerous Executive Orders beginning in March of 2020 which, in relevant part, prohibited any person or entity from operating a business that required workers to leave their homes except for essential workers necessary to sustain or protect life or to conduct minimum basic operations. (Plaintiff’s Complaint, ¶ 24, referencing Executive Order 2020-21 effective March 24, 2020). Plaintiff alleges it was required to close its chiropractic office for “two and a half months” due to the Governor’s stay-at-home executive orders and now seeks coverage for the business interruption losses. (Plaintiff’s Complaint, ¶ 1).

Farm Bureau denied Plaintiff's claim because "the loss of business income was not caused by a direct physical loss or damage to the property." (Defendant's Motion for Summary Disposition, Ex. B, Coverage Position Letter, p. 4). Plaintiff contends that the Executive Orders barred the physical use of the insured property, and Plaintiff suffered "loss of use, loss of functionality, loss of value, and other forms of damage and/or loss." (Plaintiff's Complaint, ¶¶ 27, 34, and 35). It is not lost on this Court the significant disruption and loss of income the pandemic has caused business operations and individuals to suffer throughout the state, let alone illness and loss of life. But Farm Bureau's business insurance policy issued to Plaintiff does not cover the loss in question because there was not a direct physical loss or damage to Plaintiff's property. Accordingly, the Court will grant Farm Bureau's motion for summary disposition and dismiss the complaint.

Factual Background and Legal Analysis

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and the Court should only consider the pleadings in evaluating the motion. *See Maiden v Rozwood*, 461 Mich 109, 119-120 (1999). Such relief may be awarded "only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* A court must accept all the factual allegations supporting the claim as true for purposes of the motion. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994). A mere statement of conclusion, unsupported by allegations of fact, will not create a valid cause of action. *York v 50th District Court*, 212 Mich App 345, 347 (1995). A written instrument, such as the insurance policy, attached to the Complaint is considered part of the pleading. MCR 2.113(C)(2); *Laurel Wood Apartments v Roumayah*, 274 Mich App 631, 635 (2007).

Plaintiff owns and operates a chiropractic medicine practice and clinic located in Lowell, Michigan. (Plaintiff's Complaint, ¶ 9). Plaintiff purchased a property insurance policy from Farm Bureau. (*Id.*, ¶ 15, Exhibit 1; the "Policy"). The Policy was in effect from January 26, 2020 to January 26, 2021, and provided for Plaintiff to be reimbursed in the event of "physical loss to" or "damage" to all property used in Plaintiff's business as a result of any non-excluded risk. (*Id.* ¶¶ 15-16).

Plaintiff specifically seeks relief against Farm Bureau for coverage under the Policy

providing “Loss of Business Income” and “Civil Authority” coverage. (Plaintiff’s Complaint, ¶ 11). The Policy is a “named perils” policy that requires Farm Bureau to reimburse Plaintiff for covered losses in the event of “direct physical loss of” or “damage to covered property” on Plaintiff’s premises as a result of any non-excluded risk. (*Id.*, ¶¶ 2, 16). The Policy provides “Loss of Business Income” coverage which insures against “the actual loss of business income sustained and extra expense incurred by [Plaintiff] caused by the perils insured against damaging or destroying, during the policy period, building(s) or business personal property...at the premises described in the Declarations.” (*Id.*, ¶ 20).

Under the “Civil Authority” clause, Farm Bureau agreed to pay Plaintiff “for the actual loss of business income...sustain[ed] and necessary extra expense caused by action of civil authority that prohibits access to the premises...due to direct physical loss of or damage to property, other than the premises...caused by or resulting from a peril not otherwise excluded under [the] policy.” (*Id.*, ¶ 21). The parties acknowledge that the terms “direct physical loss” and “damage” are not defined under the Policy. However, “property damage” is defined as including “loss of use of tangible property which has not been physically injured or destroyed, provided such loss of use is caused by an occurrence during the policy period.” (*Id.*, ¶ 24).

Plaintiff asserts that Governor Whitmer’s Executive Orders and “the presence of the Coronavirus in Michigan” prevented the Plaintiff from “accessing the insured premises or operating its business at the insured premises” and “utilizing both its building and its business personal property at the premises in accordance with its pre-Order function and status.” (*Id.*, ¶ 27, 35, and 38). Plaintiff claims this amounts to direct physical loss of or damage to the buildings and business personal property on the premises. (*Id.*, ¶ 34). Plaintiff does not allege that COVID-19 was present on its premises. (See generally, Plaintiff’s Complaint, ¶¶ 3, 6, 27, 28, 29, 34, 35). Plaintiff provided notice of its loss of business income and expenses since March 24, 2020, and Farm Bureau denied coverage. (*Id.*, ¶¶ 39, 40). Plaintiff seeks to certify a class of similarly situated policy owners who claim loss of business income and expenses based on Farm Bureau’s breach of contract.

The Court must construe the Policy “in the same manner as any other species of contract, giving its terms their ‘ordinary and plain meaning if such would be apparent to a reader of the instrument.’” *DeFrain v State Farm Mut Auto Ins. Co.*, 491 Mich 359, 367 (2012) (citations

omitted). A court may not rewrite clear and unambiguous language in an insurance policy. *Group Ins Co of Mich v Czopek (After Remand)*, 440 Mich 590, 596-597 (1992). An insurance policy must be read as a whole to determine and effectuate the parties' intent. *Hunt v Drielick*, 496 Mich 366, 372-373 (2014) (citations omitted). The courts use a two-part analysis to determine the parties' intent. *Id.* First, it must be determined whether "the policy provides coverage to the insured, and, second, the court must ascertain whether that coverage is negated by an exclusion." *Id.* It is "the insured's burden to establish that the claim falls within the terms of the policy, although "the insurer should bear the burden of proving an absence of coverage." *Id.* (cleaned up). Additionally, "exclusionary clauses in insurance policies are strictly construed in favor of the insured." *Id.* "However, it is impossible to hold an insurance company liable for a risk it did not assume," therefore "clear and specific exclusions must be enforced...." *Id.*

Plaintiff claims the Executive Orders barred Plaintiff from the physical use of its property creating a "direct physical loss" resulting in loss of business income which Farm Bureau must reimburse under the named perils provisions and the Civil Authority coverage clause. Neither the Policy nor the law supports Plaintiff's claim.

This case is now controlled by *Gavrilides Management Company, LLC et al v Michigan Insurance Company*, __ Mich App __ (2022 WL 301555).¹ Like the Plaintiff here, the insureds in *Gavrilides* argued the operation of the Executive Orders precluded them from using their business, therefore they suffered a "direct physical loss of property" or "direct physical damage to property. *Gavrilides* rejected this argument stating the word "'physical' necessarily requires the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises." (citations omitted). The Court must apply the same meaning of these terms in this case because the Policy does not define "direct physical loss" or "damage."

Gavrilides is consistent with the decision in *St. Julian Wine Co., Inc. v The Cincinnati Insurance Company*, (2021 WL 1049875, W.D. Mich), denying the insured business coverage for loss of income resulting from the shutdown of operations following the Governor's Executive Orders. The Federal District court, applying Michigan law, stated: "The is no reasonable construction of 'physical loss' or 'physical damage' that encompasses the presence of a

¹ The Court acknowledges that this final opinion and order was delayed, in part, due to the Court waiting for the decision in *Gavrilides* to avoid the possibility of conflicting decisions. The Court appreciates the parties' patience and understanding.

contagious virus in the general population. In ordinary usage, ‘physical’ means something tangible and material. Applying Michigan law, the Court of Appeals for the Sixth Circuit has interpreted the phrase ‘physical loss or damage’ in an insurance policy to mean ‘tangible damage’ to property.” *Id.* (citations omitted). Plaintiff cannot meet its burden that the Policy covers its losses.²

Similarly, *Gavrilides* precludes Plaintiff’s reliance on the Civil Authority provision under the Policy to provide coverage of loss of business income. Farm Bureau would be required to pay losses “caused by action of civil authority that prohibits access to the premises...due to direct physical loss of or damage to property, other than the premises...caused by or resulting from a peril not otherwise excluded under [the] policy.” Again, however, the loss to the property near or surrounding Plaintiff’s business must actual damage. *Gavrilides*. Plaintiff has not alleged nor can Plaintiff allege any such damage occurred under the Executive Orders. Accordingly, Plaintiff cannot meet its burden that the Policy covers its losses.

Farm Bureau provided an array of cases published around the country that denied coverage for loss of business income arising from similar pandemic related executive orders. The cases were premised on the same legal analysis set forth in both *Gavrilides* and *St. Julian Wine Co., Inc.* While Plaintiff provided a limited number of decisions that reached different results, the analysis in the cases like *Gavrilides* and *St. Julian Wine Co., Inc* is better reasoned and this Court must follow.

Finally, Plaintiff has made clear that it “alleges that it suffered a loss of business stemming from the Executive Order and not from the presence of any virus on its own property.” (Plaintiff’s Response Brief, p. 17; Plaintiff’s Complaint, ¶¶ 34, 35). While Plaintiff has not requested the right to amend its complaint to conform with the evidence, the Court would not be able to justify amendment to the complaint because Plaintiff’s cause of action is based solely on the loss arising from the impact of the Executive Orders and not because there was any presence of COVID-19 on the premises. MCR 2.116(I)(5).

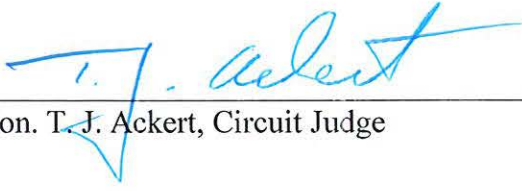
Based on the reasons stated, the Court orders the following:

² Understandably, Plaintiff relies on *Turek Enterprises, Inc v State Farm Mut Auto Ins Co*, 484 F Supp 3d 492, 494 (E.D. Mich 2021) for the proposition that policy language covering “direct physical loss of” rather than “direct physical loss to” creates a “more plausible” distinction warranting coverage. But this language is dicta, the policy language in this case is not substantively distinctive, and the proposition is negated by the “direct physical loss” analysis in *Gavrilides* and *St. Julian Wine Co., Inc.*

1. Defendant Farm Bureau's Motion for Summary Disposition on the entirety of Plaintiff's Complaint is granted under MCR 2.116(C)(8).
2. The Court shall dismiss Plaintiff's Complaint. Plaintiff cannot represent the class, nor can a class be certified, because there is no cause of action.

IT IS SO ORDERED.

April 29, 2022



Hon. T. J. Ackert, Circuit Judge