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Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION—CIVIL ACTIONS BRANCH

PROPER VENTURES, LLC	*	
	*	
Plaintiff,	*	Civil Case No. 2020 CA 002194 B
	*	Civil II, Calendar I
v.	*	Judge Kelly A. Higashi
	*	
SENECA INSURANCE COMPANY, INC.	*	
	*	
	*	
Defendant.		

ORDER DENYING PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff's Partial Motion for Summary Judgment ("Plaintiff's Motion") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Motion"). While the Court is sympathetic to the plight of Plaintiff, it grants summary judgment to Defendant as a matter of law.

I. FACTS

Plaintiff owns and operates a sports bar in the District of Columbia. Plaintiff's Statement of Undisputed Material Facts ("PSMF") ¶1. Plaintiff purchased an insurance policy from Defendant. PSMF ¶6. Among many other provisions, the policy states: "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 premises which are described in the declarations…The loss or damage must be caused by or result from a Covered Cause of Loss." PSMF ¶10 (emphasis added). The term "Covered Cause of Loss" is defined under the policy as "*direct physical loss* unless the loss is excluded or limited in this policy." PSMF ¶13 (emphasis added).

This case comes before the Court in the midst of the historic COVID-19 pandemic. On March 16, 2020, Mayor Muriel Bowser issued an order that prohibited table seating at any restaurant or bar in the District of Columbia. PSMF ¶3. Several subsequent orders continued these restrictions. PSMF ¶5. On March 24, 2020, Mayor Bowser ordered the closure of all non-essential businesses, and on March 30, 2020 she ordered all residents of the District of Columbia to remain indoors except for essential reasons. PSMF ¶6. As a result, Plaintiff was forced to close its sports bar and furlough its employees. PSMF ¶8.

To cover the losses sustained as a result of the closure, Plaintiff filed a claim with Defendant pursuant to the aforementioned insurance policy. PSMF ¶24. This lawsuit ensued when Defendant denied the claim. Both Plaintiff and Defendant now move for summary judgment on the question of whether the closure of Plaintiff's business was an insurable event under the policy.

II. SUMMARY JUDGMENT STANDARD

D.C. Superior Court Rule of Civil Procedure 56 allows a court to grant summary judgment to a party when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a); *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016). In considering a motion for summary judgment, the court must view the evidence "in the light most favorable to the nonmoving party, who is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." *Phelan v. City of Mt. Rainier*, 805 A.2d 930, 936 (D.C. 2002) (internal quotation marks omitted). The Court "may not resolve issues of fact or weigh evidence at the summary judgment stage." *Fry v. Diamond Construction, Inc.*, 659 A.2d 241, 245 (D.C. 1995) (internal quotation marks

omitted). Even if no material dispute of fact exists, the moving party must still establish that it is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a).

III. ANALYSIS

Under District of Columbia law, "[c]ontract principles are applicable to the interpretation of an insurance policy." *Carlyle Inv. Mgmt. LLC v. Ace Am. Ins. Co.*, 131 A.3d 886, 894 (D.C. 2016). "The proper interpretation" of an insurance contract, "including whether [the] contract is ambiguous, is a legal question." *Id.* (internal quotation mark omitted) (quoting *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)). "[A]n insurance policy is to be . . . enforced in accordance with the real intent of the parties as expressed in the language employed in the policy." *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1205 (D.C. 1999) (internal quotation marks omitted) (quoting *Peerless Ins. Co. v. Gonzalez*, 697 A.2d 680, 682 (Conn. 1997)). A court must "give the words used in an insurance contract their common, ordinary, and . . . popular meaning," *Id.* (omission in original) (internal quotation marks omitted) (quoting *Quadrangle Dev. Corp. v. Hartford Ins. Co.*, 645 A.2d 1074, 1075 (D.C. 1994)), and must interpret the contract "as a whole, giving reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made," *Carlyle Inv. Mgmt.*, 131 A.3d at 895 (internal quotation mark omitted) (quoting *Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009)).

"[I]f the provisions of the contract are ambiguous, the correct interpretation becomes a question for a factfinder." *Carlyle Inv. Mgmt.*, 131 A.3d 886 at 895 (internal quotation marks omitted) (quoting *Debnam*, 976 A.2d at 197-98). "Where," however, "insurance contract language is not ambiguous, summary judgment is appropriate because a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic

evidence." *Fogg v. Fidelity Nat. Title Ins. Co.*, 89 A.3d 510, 514 (D.C. 2014) (internal quotation marks omitted) (quoting *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 66 (D.C. 2002)). Indeed, the Court "should not seek out ambiguity where none exists." *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1172 (D.C. Cir. 2003) (citing *Medical Serv. of Dist. of Columbia v. Llewellyn*, 208 A.2d 734, 736 (D.C. 1965)).

At the most basic level, the parties dispute whether the closure of the restaurants due to Mayor Bowser's orders constituted a "direct physical loss of…the property" under the policy. Plaintiff starts with dictionary definitions to support its case. For example, it cites the American Heritage Dictionary definition of "direct" as "[w]ithout intervening persons, conditions, or agencies; immediate." Plaintiff's Motion at 10-11. Plaintiff also cites the same dictionary's definition of "physical" as pertaining to things "[o]f or relating to material things." *Id.* at 11 (also citing 10A COUCH ON INSURANCE §148:46: "the requirement that the loss be 'physical,' given the ordinary definition of that term[,] is widely held to exclude alleged losses that are intangible or incorporeal.") Finally, Plaintiff cites the same dictionary's definition of "loss," in the context of "loss of property," as "one that is lost" and "the condition of being deprived." *Id.*

Plaintiff uses these definitions as well as the overall structure of the insurance policy to make several arguments. First, it argues that the loss of use of its restaurant property was "direct" because the closures were the direct result of the mayor's orders without intervening action. Plaintiff's Motion at 11. But those orders were governmental edicts that commanded individuals and businesses to take certain actions. Standing alone and absent intervening actions by individuals and businesses, the orders did not effect any direct changes to the property.

Second, Plaintiff argues that its losses were "physical" simply because the sports bar is a literal physical space. Plaintiff's Motion at 11. But Plaintiff offers no evidence of actual physical changes to the *property* that were caused by the Mayor's orders.

Third, Plaintiff argues that by specifically covering both "loss of…property" and "damage to property," the term "loss" cannot be co-extensive with "damage." Plaintiff's Motion at 11-12. The Court agrees. A natural reading of the term "loss of property" connotes the total destruction or permanent immobilization of a property as opposed to partial "damage." However, a temporary "loss of use" caused by a governmental order does not cause the permanent "loss of property." Plaintiff does not allege any damage or destruction to the sports bar's physical property. Indeed, many restaurants continued to operate in their properties throughout the duration of the emergency orders by providing takeout and delivery. And essential businesses, such as supermarkets and pharmacies, remained fully operational in their properties.

Plaintiff raises two objections to this analysis. First, it points to several provisions in the insurance contract that reference the terms "destruction" or "destroy" as signifying that the term "loss" cannot be co-extensive with "destruction." Plaintiff's Motion at 12-13. However, the referenced provisions concern electronic data and computer systems, a subject area where the terms "loss" and "destroy" can have different meanings than with regard to physical property. Second, Plaintiff points to a provision providing coverage for loss of business income resulting from a "direct physical loss of or damage to" property providing water, electricity, internet, and other services to the insured property. Plaintiff argues that this provision shows that "direct physical loss" must cover not only loss of physical property but also loss of use. Plaintiff's Motion at 13-14. But it is not clear to the Court why this must be so. A natural reading of the

provision suggests it provides coverage for the same types of events covered by the provision at issue in this case, except for different property. Finally, Plaintiff argues that the inclusion of a separate provision in the policy covering the direct costs of property loss or damage implies that the relevant provision in this case must cover loss of business income caused by a governmental order. Plaintiff's Motion at 14. But again, it is not clear to the Court why this must be so. A natural reading of the two provisions suggests that one covers direct losses from property loss or damage and the other covers subsequent loss of business income as a result of property loss or damage.

In addition, the cases cited by Plaintiff for support can all be readily distinguished. In *US Airways, Inc. v. Commonwealth Ins. Co.*, a Virginia state court denied an insurer's motion for summary judgment in a matter concerning whether an airline could recover business interruption insurance due to post-9/11 flight restrictions. 64 Va. Cir. 408, 412-15 (Va. Cir. Ct. 2004), *rev'd on other grounds*, *PMA Capital Ins. Co. v. US Airways, Inc.*, 626 S.E.2d 369 (Va. 2006). However, that case concerned a specific provision, not at issue in this case, that provided for business interruption coverage in the event that access to real or personal property is prohibited by order of civil or military authority. *Id.* at 409. In *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.,* the court found that a ransomware attack on a business's computer system caused a "direct physical loss," both in terms of the loss of data and software in the computer system, and the loss of functionality to the computer system itself. 435 F. Supp. 3d 679, 682 (D. Md. 2020). However, the policy at issue in that case included language describing "data" and "software" as covered property, and, unlike in this case, the computer system was damaged by a direct physical intrusion. In *Murray v. State Farm Fire & Casualty Co.*, the West Virginia Supreme Court of Appeals held that a landslide rendering homes uninhabitable, due to either

actual physical damage or palpable future risk of physical damage from a follow-on landslide, constituted a "direct physical loss" even in the absence of direct structural damage to a home. 509 S.E.2d 1, 16-17 (W.Va. 1998). But in that case, the homes were rendered *permanently* uninhabitable (in the absence of structural changes on neighboring land) due to the likelihood of future landslides—in other words, a permanent "loss of property." In this case, Plaintiff experienced a temporary "loss of use" of the property with no underlying threats to the property's physical integrity.

Other cases cited by Plaintiff involved direct physical changes to the insured property. In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, the court found that the release of ammonia into a juice cup packaging factory was a "direct physical loss" because it constituted "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event *directly upon the property* causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." 2014 U.S. Dist. LEXIS 165232 at *13-19 (D.N.J. Nov. 25, 2014) (quoting *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 319-20 (Ga. Ct. App. 2003)) (internal quotation marks omitted) (emphasis added). Similarly, in *Western Fire Insurance Co. v. First Presbyterian Church*, the Colorado Supreme Court found a "direct physical loss" when gasoline fumes from an unknown source entered an insured church and the fire department ordered the church's closure. 437 P.2d 52, 55 (Colo. 1968). The court based its reasoning on the fact that the church "became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous." *Id.* At the same time, the Court noted that "[i]t is perhaps quite true" that the fire department's closure order, "*standing alone*, does not in and of itself constitute a 'direct physical loss.'" *Id.* (emphasis added). Other cases follow similar reasoning. *See Port Authority v. Affiliated FM Insurance Co.*, 311 F.3d 226,

236 (3d Cir. 2002) (presence of asbestos in building was not "physical loss" because building owner could not show real or imminent "contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable"); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826-27 (3d Cir. 2005) (presence of bacterium on property could constitute "direct physical loss" if it "reduced the use of the property to a substantial degree"); *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010), *aff'd* 504 F. Appx. 251 (4th Cir. 2013) (home rendered uninhabitable by toxic gases released by defective drywall constituted "direct physical loss"); *Mellin v. Northern Security Insurance Company, Inc.*, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor from neighboring apartment may constitute "direct physical loss" if plaintiff could show "distinct and demonstrable alteration to the unit"); *Sentinel Management Co. v. New Hampshire Insurance Co.*, 563 N.W.2d 296, 300-01 (Minn. Ct. App. 1997) (asbestos contamination in building was "direct physical loss" when "property rendered useless").

In contrast, courts have typically rejected coverage when a business's closure was not caused by physical changes to the property or new risks to the property's physical integrity. In *Roundabout Theatre Co. v. Continental Casualty Co.*, the City of New York ordered the closure of a theater after a portion of a neighboring building under construction collapsed onto the street and adjacent buildings. 302 A.D.2d 1, 2-3 (N.Y. App. Div. 2002). The theater itself sustained minor damage that was repaired in one day. *Id.* at 3. Nonetheless, the court found that the theater did not suffer a "direct physical loss" as a result of the city-mandated closure. *Id.* at 7. It found that "[t]he plain meaning of the words 'direct' and 'physical'" narrowed the scope of coverage and mandated "the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* Similarly, in *Newman Myers Kreines Gross,*

P.C. v. Great Northern Insurance Co., a federal district court found that a law firm did not suffer a "direct physical loss" when an electric utility preemptively shut off power in advance of Hurricane Sandy. 17 F. Supp. 3d 323 (S.D.N.Y. 2014). The court distinguished the cases cited by the law firm (several of which were also cited by Plaintiff in this case) as either "involv[ing] the closure of a building due to either a physical change for the worse in the premises … or a newly discovered risk to its physical integrity." *Id.* at 330. Citing *Roundabout*, the Court reasoned:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.

Id. at 331; *see also United Airlines, Inc. v. Insurance Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' . . . supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth. v. Federal Insurance Co.*, 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005) (noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property . . . which must be caused by a 'covered cause of loss'").

While the Court can find no published cases in this jurisdiction analyzing the exact term "direct physical loss," cases addressing similar issues do not help Plaintiff. Most relevantly, in *Bros., Inc. v. Liberty Mutual Fire Insurance Co.*, the District of Columbia Court of Appeals considered whether a restaurant could recover on its claim after it lost business due to a curfew

imposed by the D.C. government as a result of the riots following the assassination of Dr. Martin Luther King, Jr. in 1968. 268 A.2d 611 (D.C. 1970). The insurance contract included this relevant language:

> In consideration of the premium for this coverage shown on the first page of this policy [Building and Contents] . . . the coverage of this policy is extended to include direct loss by . . . Riot . . . [and] Civil Commotion . . . .
>
> When this Endorsement is attached to a policy covering Business Interruption, . . . the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, *resulting from direct loss to described property from perils insured against*; . . . .

Id. at 613 (emphasis in original).[1] The Court of Appeals interpreted the term "direct loss" in the contract to mean "a loss proximately resulting from physical damage to the property or contents caused by a riot or civil commotion." *Id.* Under that definition, the Court found that the restaurant was unable to recover, since, "at the most," the restaurant's lost business due to the curfew "was an indirect, if not remote, loss resulting from riots" and there was no "physical damage to the property." *Id.* Accordingly, while the Court agrees with Plaintiff that *Bros., Inc.* is not directly on point, the case does support the proposition that, in the context of business interruption property insurance, the term "direct loss" implies some form of direct physical change to the insured property.

For these reasons, the Court agrees with Defendant that the unambiguous language in the insurance agreement prevents recovery by Plaintiff.[2] At the same time, the Court is aware that a minority of trial courts in other jurisdictions have ruled for policyholders in similar cases. While

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[1] This Court notes that the phrase at issue in the *Bros., Inc.* contract was "direct loss," as opposed to "direct physical loss," at issue in the present case, and that in the *Bros., Inc.* case, there was an issue as to whether the "Building and Contents" Form, which was mistakenly attached to the policy at the time of signing, or the "Business Interruption" Form, which the insurance company later substituted, was construed by the trial court. However, the Court of Appeals found it "unnecessary to ascertain which of the two forms was construed by the trial court," 268 A.2d at 612, as the Court found that the insurance company prevailed under both forms.

[2] Because the Court finds that Defendant is entitled to summary judgment for the reasons given in this order, the Court need not consider Defendant's argument that Plaintiff's claim is barred by separate exclusions in the policy.

the Court believes its analysis is sound, it looks forward to further guidance from the Court of Appeals on this important and challenging issue.

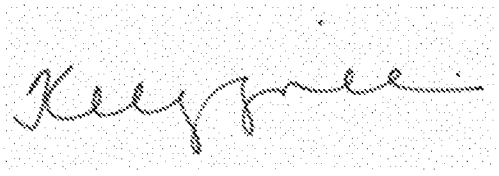
Accordingly, it is this **18th** day of **February, 2021**, hereby

ORDERED that Plaintiff's Partial Motion for Summary Judgment is **DENIED**; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that judgment is **ENTERED** in favor of Defendant Seneca Insurance Company, Inc. and against Plaintiff Proper Ventures, LLC; and it is further

ORDERED that the initial scheduling conference scheduled for February 19, 2021 is **VACATED**.



Kelly A. Higashi
Associate Judge
(Signed in Chambers)

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