IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

MCKINLEY DEVELOPMENT LEASING COMPANY LTD., ET AL	)	**CASE NO. 2020 CV 00815**
PLAINTIFF	)	**JUDGE FRANK FORCHIONE**
VS.	)	**JUDGMENT ENTRY**
WESTFIELD INSURANCE COMPANY	)	
DEFENDANT	)	

Now comes the Court in consideration of Defendant Westfield Insurance Company's (Westfield) Motion to Dismiss Complaint, or in the Alternative, for a Stay filed on August 27, 2020; Plaintiff McKinley Development Leasing Company Ltd.'s (McKinley) Response filed on or about October 21, 2020; and Westfield's Reply Brief filed on October 28, 2020. Westfield has filed a Notice of Supplemental Authority on November 23, 2020, and a second Notice of Supplemental Authority on January 27, 2021. McKinley filed their Notice of Supplemental Authority on November 5, 2020; and Second Notice of Supplemental Authority on January 28, 2021. Each side filed Additional Supplemental Authority on February 4, 2021. An oral hearing was requested in this matter by both parties and was scheduled for February 4, 2021. On February 3, 2021 the parties contacted the Court's Magistrate and agreed that the Court could make its decision on the Briefs.

Facts

McKinley filed a complaint for Declaratory Judgment, Breach of Contract and Bad Faith on May 21, 2020. McKinley is a local real estate development and leasing company owned by developers Robert J. DeHoff and William J. Lemmon. McKinley owns several commercial properties located in North Canton, Ohio which have been a long and continuous home to multiple successful small and larger businesses, including but not limited to, a daycare center, restaurants, medical offices, clothing outlets, beauty and self-care stores and other mixed use office spaces.

McKinley is insured by Westfield under a commercial business policy No. CWP4697218, effective February 16, 2020 to February 16, 2021. The policy includes coverage for loss of business income and extra expense caused by direct physical loss of or damage to its property. The policy also provides coverage for some lost business income and extra expense caused by damage to a nearby property that causes a civil authority to issue an order preventing access to the insurer's property. There is no dispute that McKinley faithfully paid tens of thousands of dollars in insurance premiums for the coverage outlined in the policy.

The Ohio Governor and Department of Health Orders

In late 2019 or early 2020 the world began to experience an outbreak of COVID-19. To slow the spread of COVID-19, the Governor of Ohio and the Ohio Director of Health issued several executive orders in the Spring of 2020. Throughout the country, businesses that were deemed "non-essential" were, and in some cases, still are, forced to curtail their business activity or have been completely shut down due to these orders. The initial order required all Ohioans to stay home and required all non-essential businesses to "cease all activities within the state except minimum base operations..." Due to these orders some businesses in Ohio, including Stark County, which included businesses that made up McKinley's tenants, were negatively impacted, including being closed down. McKinley alleges that the government shut downs resulted in their tenants suffering substantial economic damages via sharply reduced or, in some cases, totally eliminated revenues. This in turn lead to the same tenants being unable to pay rent owed to McKinley, and McKinley itself suffering substantial business income losses.

Suit Over Coverage

While the policy has been in force, McKinley claims that it has sustained and continues to sustain business interruption losses and impairment of its property and businesses. Accordingly, McKinley filed a claim with Westfield for payment to cover the losses. Westfield concluded McKinley does not have coverage for its significant losses. McKinley seeks damages for Breach of Contract because Westfield

purportedly breached the policy by denying coverage. McKinley also seeks damages for Westfield's alleged bad faith and breach of covenant of good faith and failed dealing.

Standard of Review

Westfield has filed a Motion to Dismiss pursuant to Civ.R. 12(b)(6). The Ohio Supreme Court has stated:

> "In order for a court to dismiss a complaint for a failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143.
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> In considering the motions to dismiss, a court must assume that all the factual allegations in the complaint are true and must make all reasonable inferences in favor of the opposing party to the motion. *Mitchell v. Lawson Milk Company*, 40 Ohio St.3d 190. The Ohio Supreme Court has also stated that "A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Wilson v. Riverside Hosp.*, 18 Ohio St.3d 8.

From reviewing all the briefs, it appears that Westfield's request for a 12(b)(6) dismissal is based on the following: 1) McKinley cannot establish that they had a "direct physical loss"; 2) there was no direct physical loss to a nearby property to permit Civil Authority Coverage; and, 3) the policy's virus coverage plainly bars any coverage.

Analysis

In preparing for oral argument, this Court spent over 20 hours reviewing all the cases that have been submitted to the Court, in addition to conducting its own research on this unique issue. During its assessment, the Court feels it's appropriate to analyze the language that's provided in five of the more pertinent policies, upon which each side is basing its arguments.

Westfield Policy

> "We will pay for the actual loss of business income you sustain due tothenecessary "suspension" of your "operations" during the period of

"restoration". The "suspension" must be caused by **the direct physical loss of damage to property** at premises."

Zurich Policy

"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 a "premises."

Mastellone Policy

"Only if that loss is a physical loss to the property."

Diesel Barbershop

"Accidental direct physical loss" to "direct physical loss to property"."

Universal

"Direct physical loss or damage to building or personal property"."

What is "A Direct Physical Loss"?

In their argument, Westfield relies heavily on the case of *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d, which was a homeowner's insurance claim for mold in which they were challenging a jury verdict award for exterior damage. The Mastellone policy did not provide business income coverage. The Mastellone policy provided coverage for direct loss to property "only if that loss is a physical loss to the property." The *Mastellone* court reviewed the full policy and determined that under Ohio law, a "physical" loss is "a harm to...property that adversely affects the structural integrity of property." *Mastellone* at 61. *Mastellone* held that the mold on the exterior siding did not constitute direct physical injury because it did not adversely affect the building's structural integrity. Westfield also strongly focuses on *Diesel Barbershop LLC v. State Farm Lloyds*, W.D. Tex, No. 5:20-CV-461-DAE, 220 U.S. Dist. Lexis 147276 (W.D. Tex. Aug. 13, 2020), where they argue that Texas law mirrors Ohio law in that an insured must show a "distinct, demonstrable, physical alteration of the property." See also

Universal Image Prods., Inc. v. Fed. Ins. Co., 475 F.App'x 569, 573 (6th Cir. 2012) for the propositions that Ohio law requires "tangible, physical losses", not mere "economic losses".

However, after conducting an extensive review of the cases submitted by Westfield, one distinguishing point lingers, in that the language in the *Mastellone*, *Diesel Barbershop* and *Universal* policies are not the same language as used in the Westfield policy (see descriptions previously provided in this Entry). This Court is forced to determine whether Westfield's policy language is ambiguous. Thus the Court must first decide whether the policy language is reasonably susceptible to more than one interpretation. Ohio law provides that if a policy is reasonably susceptible of more than one interpretation, it must be construed strictly against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St.3d at 208. The insurer, being the one who selects the language in the contract, must be specific in its use; and exclusion from liability must be clear and exact in order to be given effect. *American Financial Corp. v. Fireman's Fund Ins. Co.*, 15 Ohio St.2d 171.

At first glance, it is clear to this Court that the Westfield policy does not define the terms "direct", "physical", "loss" or "damage". A court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines "direct", when used as an adjective, as "characterized by close logical, casual, or consequential relationship", as "stemming immediately from a source", or "as proceeding from one point to another in time or space without deviation or interruption". Direct, Merriam-Webster (Online ed. 2020). Merriam-Webster defines "physical" as relating to "material things" that are "perceptible, especially through the senses". Physical, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body; "of or relating to the body". *Id.* Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary". Physical, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "of, relating to, or involving material things; pertaining to real, tangible objects". Physical, Black's Law Dictionary (11th Ed. 2019). Finally, "loss" is defined as "the act of losing possession", "the harm of privation resulting from loss or separation", or the "failure to gain, win, obtain or utilize". Loss, Merriam-Webster (Online ed. 2020). The term "damage" is defined as

loss or harm resulting from injury to person, property or reputation. Damage, Merriam-Webster (Online ed. 2020). Applying these definitions to the Westfield policy reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in real, material, or bodily world, resulting from a given cause without the intervention of the other conditions." (See *North State Deli LLC v. Cincinnati Ins. Co.* No. 20 CVS 02569, 2020 N.C. Super Lexus 38 (N.C. Super. Ct., Oct. 7, 2020).

The bottom line is simply this. Both sides provided reasonable interpretations of the policy language. Westfield argues that the physical loss means some type of tangible, physical damage must alter the structural integrity. McKinley counters that it has plead sufficient facts that would entitle it to recovery and that the terms drafted by Westfield in their policy are ambiguous and susceptible to more than one interpretation. There is no question that the Court has been bombarded with cases falling on both sides of the aisle. However, Westfield had the benefit of writing the policy with the ability to consider consequences in this ever-changing world. They had an obligation to use terminology easily understood by laypersons. *Preferred Risk Group v. Beachy*, 1990 WL 177435 (1990). That is not the case here. The Court can only surmise that with these differing opinions, that the policy is ambiguous.

On a final note, in *Henderson Road Restaurant v. Zurich American Ins. Co.*, N.D. Ohio No. 1:20 CV 1239, 2021, WL168422 (January 19, 2021), the policy contains almost the same policy language as drafted in Westfield, where in analyzing *Mastellone*, Judge Polster noted:

> "Here, *Zurich*'s policy does not expressly limit coverage to physical loss to property; it extends coverage to direct physical loss of property as well. There is no reason to believe that the Ohio Court of Appeals would have interpreted the *Zurich* policy language as it did the homeowner's policy in *Mastellone*. The distinct policies use different language and were applied to different facts. Thus, the *Mastellone* decision offers little guidance in interpreting the *Zurich* policy."

Furthermore, in his review of *Universal Images*, he states:

> "Like the *Mastellone* decision, the *Universal Image* decision did not interpret the same policy language as in the *Zurich* policy. Moreover, the Sixth Circuit's reference to *Mastellone* is only dicta and was directly related to mold contamination to a property. Consequently, the *Universal*

Image decision provides very little guidance to the court when interpreting *Zurich's* policy of language."

Upon review, the Court finds McKinley has adequately stated a claim for direct physical loss under Civ.R. 12(b)(6).

Civil Authority Coverage

Westfield argues that McKinley has not shown that COVID-19 caused any direct physical loss to the property. Once again Westfield relies on the *Mastellone* interpretation of "direct physical loss." In construing the Civil Authority provision, Westfield agreed to pay for loss of income caused when they covered causes lost to other properties within one mile of McKinley's properties that results in an order by civil authority that prohibits access to McKinley's properties:

> "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 the area but are not more than one mile from the **damaged property**;
> 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 impeded access to the damaged property.

Westfield goes on and argues that McKinley does not point to any particular property within one mile that suffered direct physical loss or damage that motivated the State of Ohio to issue a civil authority order. Instead, they claim "Ohio issued its civil authority order to **prevent** the spread of the virus to other Ohioans."

In contrast, McKinley explains that the policy's Civil Authority coverage provides coverage for civil authority closures of commercial buildings due to physical loss of or damage to property from COVID-19. McKinley has plead that Governor DeWine's orders declaring a state of emergency due to

the physical presence of COVID-19 and the pandemic, along with the orders restricting dine-in seating at restaurants and stay at home orders in March of 2020 by the Ohio Department of Health all constitute civil authority orders. In addition, access to the area immediately surrounding the property was prohibited by the orders, as these orders essentially prohibited access to any and all public or business locations throughout Ohio. The goal of these orders was not only to curb the pandemic, but to also protect employees and customers from the pandemic. They also point out that both the threat of and the actual presence of COVID-19 and the pandemic are a dangerous physical condition that damages the property surrounding McKinley.

At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the Civil Authority coverage. The Court is mindful that the requirement of access under the policy does not specify "all access" or "any access". The Court finds McKinley has adequately stated a claim under Civil Authority coverage under Civ.R. 12(b)(6).

Policy's Virus Coverage Plainly Bars Coverage

Even if McKinley could somehow demonstrate a direct physical loss, Westfield argues that the Virus Exclusion applies and bars any type of recovery. The Virus Exclusion "applies to all coverage under all forms and endorsements that compromise this coverage part or policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority." Specifically, the exclusion bars coverage for "loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is incapable of inducing physical distress, illness or disease." See also *Sentinel Ins. Co. v. Monarch Med. Spa Inc.*, 105 F.Supp.3d 464; *Koegler v. Liberty Mut. Ins. Co.*, 623 F.Supp.2d 481. McKinley responds that based on the policy language, "what is **clearly** intended to be excluded is loss or damage **caused by or resulting from any virus**, bacterium or other microorganism that **induces or is capable of inducing physical distress, illness or disease**." As a result, McKinley claims that the damages they have suffered are the result of a pandemic that has fundamentally changed

society and orders by the Governor of Ohio and health authorities rather than a virus. In the Court's eyes, it appears that Westfield is viewing both the virus and the pandemic in tandem, whereas McKinley argues that their losses are the result of the pandemic that are distinct from those caused by the virus itself.

Once again, the Court looks to whether the policy language is reasonably susceptible to more than one interpretation. It is black letter law that an undefined policy term is to be given its "ordinary meaning." In deciding whether the language is plain or ambiguous, the test is what a reasonable person in the positon of the insured would have understood it to mean and not what the insurer intended." *Accardi v. Hartford Underwriters Ins. Co.*, 826 S.E.2d 721. The Court therefore is looking to the ordinary meaning of these critical terms. Merriam-Webster defines "virus" as "a disease-causing agent that is too tiny to be seen by the ordinary microscope, that may be a living organism or may be a very special kind of protein molecule, and that can only multiply when inside the cell of an organism." *Virus*, Merriam-Webster (Online ed. 2020). This is essentially the same definition provided by WebMD (Online ed. 2020). Merriam-Webster defines "pandemic" as "occurring over a wide geographic area (such as multiple countries or continents) and typically affecting a significant proportion of the population". *Pandemic*, Merriam-Webster (Online ed. 2020). WebMD defines pandemic as "a disease outbreak that spreads across countries or continents. It affects more people and takes more lives than an epidemic..." WebMD (Online ed. 2020). It is obvious to this Court that a virus is not the same as a pandemic. The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect. *Lane v. Grange Mut. Cos.*, 45 Ohio St.3d at 65. More importantly, this Court questions if Westfield intended for a "pandemic" to be excluded from coverage, why didn't it explicitly exclude it? After all, Westfield had control and wrote the policy. At this early stage, McKinley's argument is more convincing because the language is reasonably susceptible of more than one interpretation. This reasoning was also followed by Judge Polster in *Zurich*, where he stated:

> "Here, the plaintiff's argument prevails because the microorganism exclusion does not clearly exclude loss of property caused by a government closure. Plaintiff's restaurants were not

> closed because there was an outbreak of COVID-19 at their property; they were closed as a result of government orders..."

Therefore, McKinley has met the standard to override Westfield's Civ.R. 12(b)(6) claim regarding virus coverage.

Inability to Demonstrate Bad Faith

Ohio recognizes a common law claim for bad faith against a first party insurer. See *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 554. An insurer acts in bad faith when it refuses to pay a claim without "reasonable justification." An insurer lacks reasonable justification when it acts in an "arbitrary or capricious manner" with respect to an insured's claim. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272. Westfield argues that there is reasonable justification for denying the claim, pointing out prevailing Ohio legal precedent, such as in *Mastellone,* that requires a change to the structural integrity of the property in order to establish coverage under the Business Income and Extra Expense provisions. McKinley alleges it is entitled to bad faith damages because Westfield did not property investigate, adjust, handle or process its claim. At this stage of the proceeding and after reviewing a voluminous amount of cases spread throughout the United States, it would appear that there is sufficient case law to support Westfield's reasonable justification for denying coverage. On the other hand, it is this Court's position in the spirit of fairness that McKinley should have its opportunity to get in the batter's box and take its swings. McKinley should have the opportunity to conduct discovery to discern whether there is credible evidence to support their claim. Therefore, Westfield's Civ.R. 12(b)(6) motion is denied and may be more properly presented through a motion for summary judgment after discovery has been completed.

Staying of This Action

Westfield argues since it was named in a putative class action by a commercial property management company – Acuity Planning Corp. – and a case seeking business income loss and civil authority coverage due to COVID-19 based on allegations and claims that are nearly identical to this case pending in the Northern District of Ohio, that this matter should be stayed. However, the Supreme Court

of Ohio has stated that a stay of proceedings will be granted only in the rare case. *State v. Hochhausler*, 76 Ohio St.3d 455 (1996). From this Court's view, many local realtors, developers, landlords, and businesses are hanging on a thread as a result of government orders, shutdowns and pandemic protocols. In balancing the effects of delayed justice against the principles of judicial economy, it would appear to this court that this matter tips in McKinley's favor. In addition, Westfield has not established a hardship or an equity that would overcome the need of McKinley's right to address its claims through the courts. Wherefore, Westfield's motion is denied and the case shall further proceed.

Conclusion

For the foregoing reasons and explanations, and after extensive examination of the case law, the Court reiterates that motions to dismiss are disfavored and rarely granted. The Court does find portions of the policy language to be ambiguous and reasonably susceptible to more than one interpretation. Furthermore, the Court points out that at the beginning, the case law relied on by Westfield did not contain similar policy language as presented in their policy. Construing the policy liberally in McKinley's favor, the Court must overrule Westfield's Motion to Dismiss under Civ.R. 12(b)(6), or in the Alternative, for a Stay.

IT IS SO ORDERED.

JUDGE FRANK G. FORCHIONE

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