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H.J. Russell & Company, Order Granting with Prejudice Defendants' Join Motion to Dismiss

Wesley B. Tailor

Fulton County Superior Court, Metro Business Case Division

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

H.J. RUSSELL & COMPANY,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 2022CV361819
)	
LANDMARK AMERICAN INSURANCE)	
COMPANY, STEADFAST INSURANCE)	
COMPANY, WESTCHESTER SURPLUS LINES)	
INSURANCE COMPANY, and HISCOX)	
INSURANCE COMPANY INC.,)	
)	
Defendants.)	

**ORDER GRANTING WITH PREJUDICE
DEFENDANTS' JOINT MOTION TO DISMISS**

This matter is before the Court on: (1) Defendants' Joint Motion to Dismiss filed on May 26, 2022, and (2) Defendant Landmark American Insurance Company's Supplement to the Joint Motion to Dismiss filed on May 26, 2022. On November 1, 2022, the Court heard oral argument on these motions. Having read and considered the parties' briefs, and having heard and considered the parties' oral arguments, this Court finds the following:

Plaintiff filed suit on March 9, 2022, alleging counts for breach of contract and declaratory judgment. Plaintiff alleges that the various Defendants wrongfully refused to provide insurance coverage for Plaintiff's substantial losses resulting from the COVID-19 pandemic and from civil authority orders issued by federal, state, and local governments. Plaintiff filed its First Amended Complaint against Defendants on April 27, 2022.

On May 26, 2022, Defendants filed their Joint Motion to Dismiss, contending that Plaintiff's First Amended Complaint fails as a matter of law. Defendants contend that the subject insurance policies cover losses only if those losses are due to "direct physical loss of or damage

to” covered property caused by a covered cause of loss. Defendants further contend that the novel coronavirus does not and cannot cause physical loss of or damage to property. Defendant Landmark American Insurance Company further filed a Supplement to the Joint Motion to Dismiss, based on the applicability of the Landmark policy’s pathogenic biological material exclusion. Plaintiff opposes the Motion to Dismiss.

The standard for granting a motion to dismiss in Georgia is a stringent one. As our Supreme Court notes:

[A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.... In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party’s favor.

Scouten v. Amerisave Mortg. Corp., 283 Ga. 72, 73 (2008) (citations and punctuation omitted).

All of the insurance coverage provisions under which the Plaintiff seeks coverage require “direct physical loss of or damage to” property. The Georgia Court of Appeals has analyzed the meaning of “direct physical loss of or damage to” property contained in an all-risk property insurance policy. The Court of Appeals determined that this phrase contemplates “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.” *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 308 (2003).

Here, Plaintiff alleges that the suspected, but not actual, presence of the novel coronavirus and Governor Brian Kemp's "shutdown" order caused a direct physical loss of Plaintiff's property, rendering it unsatisfactory for its intended use. Here, however, there was no "actual change in the insured property." The Court finds the insurance policies at issue to be clear, unambiguous, and susceptible to only one reasonable interpretation. Under the plain language of Defendants' insurance policies, there is no set of conceivable facts that could result in a finding of coverage under the insurance policies at issue. Neither the suspected presence of the novel coronavirus nor any governmental orders can cause an actual change in the insured properties to trigger coverage.

Plaintiff's claims under the insurance policies' Civil or Military Authority and Protection and Preservation of Property coverages likewise fail as a matter of law. The Civil or Military Authority coverage requires a civil or military order prohibiting access to the covered location in response to physical loss of or damage to separate, non-covered property within one mile of the covered property. Likewise, the Protection and Preservation of Property coverage requires actual or imminent physical loss of or damage to a covered property. Because the coronavirus cannot cause physical loss of or damage to property, Plaintiff can provide no set of facts within the framework of the First Amended Complaint sufficient to show that there is coverage under either of these policy provisions. Therefore, any further amendment to the complaint would be futile.

Based upon the foregoing, this Court does not deem it necessary to consider Landmark's additional argument in its supplement to the joint motion to dismiss and supporting brief.

For the foregoing reasons, based upon due consideration of the briefs of the parties, the argument before the Court, as well as all matters of record, it is hereby **ORDERED**: Defendants' Joint Motion to Dismiss is **GRANTED**, and Plaintiff's claims against all Defendants are hereby **DISMISSED WITH PREJUDICE**.

SO ORDERED this 14th day of November, 2022.

/s/ Wesley B. Tailor

WESLEY B. TAILOR, JUDGE
SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION

Prepared by:

FIELDS HOWELL LLP

665 8th Street NW
Atlanta, Georgia 30318
Phone: 404-214-1250
Facsimile: 404-214-1251
pfields@fieldshowell.com
akirk@fieldshowell.com
tkadar@fieldshowell.com

Paul L. Fields, Jr.
Georgia Bar No. 003420
Ann T. Kirk
Georgia Bar No. 101047
Taryn M. Kadar
Georgia Bar No. 708106
*Counsel for Defendant Certain Underwriters
at Lloyd's London Subscribing to Policy No.
HNYPRP19757135, Syndicate Numbers 33
and 1886, as Administered by Hiscox, Inc.*

CLYDE & CO US LLP

271 17th Street NW, Suite 1720
Atlanta, Georgia 30363
Phone: 404-410-3150
Facsimile: 404-410-3151
Robert.Fisher@clydeco.us
Taylor.Davis@clydeco.us
Jocelyn.DeMars@clydeco.us

Robert W. Fisher
Georgia Bar No. 261951
Taylor L. Davis
Georgia Bar No. 804288
Jocelyn C. DeMars
Georgia Bar No. 623458
*Counsel for Defendant Westchester Surplus
Lines Insurance Company*

AKERMAN LLP

999 Peachtree Street, NE, Suite 1700
Atlanta, GA 30309
Telephone: (404) 733-9800
Facsimile: (404) 733-9898
anthony.morris@akerman.com
jeremy.burnette@akerman.com

Anthony W. Morris
Georgia Bar No. 523495
Jeremy P. Burnette
Georgia Bar No. 142467

Counsel for Defendant Steadfast Insurance Company

MOZLEY, FINLAYSON & LOGGINS LLP

1050 Crown Pointe Parkway, Suite 1500
Atlanta, GA 30338 16
Phone: 404-845-1944
Facsimile: 404-250-9355
wtaylor@mflaw.com
alandrum@mflaw.com

Wayne D. Taylor
Georgia Bar No. 701275
Anne M. Landrum
Georgia Bar No. 433990
Counsel for Defendant Landmark American Insurance Company