Ruling

Judge Theresa M. Traber, Department 47

HEARING DATE: **March 18, 2021** TRIAL DATE: April 25, 2022

CASE: **Boardwalk Ventures CA, LLC v. Century-National Insurance Company, et al.**

CASE NO.: **20STCV27359**

MOTION FOR JUDGMENT ON THE PLEADINGS

MOVING PARTY: Defendant Century-National Insurance Company

RESPONDING PARTY(S): Plaintiff Boardwalk Ventures CA, LLC

CASE HISTORY:

- 07/21/20: Complaint filed.

STATEMENT OF MATERIAL FACTS AND/OR PROCEEDINGS:

Plaintiff operates a restaurant in Hermosa Beach and is insured by a commercial policy issued by Defendant. Plaintiff alleges that it has made a covered claim for losses due to the "necessary suspension" of its operations due to Covid-19 and that Defendant has refused to pay the claim.

Defendant moves for judgment on the pleadings.

RULING:

Defendant's motion for judgment on the pleadings is DENIED.

DISCUSSION:

Motion for Judgment on the Pleadings

Defendant invokes CCP § 438 as a basis for its motion, and therefore the requirements for a statutory motion for judgment on the pleadings apply.

Meet and Confer

The Declaration of Attorney Karen E. Adelman demonstrates that Defendant engaged in the meet-and-confer process required for a statutory motion for judgment on the pleadings. (CCP § 439.)

Time to File a Motion for Judgment on the Pleadings

When a defendant files a motion for judgment on the pleadings, the following timing applies:

> The motion provided for in this section may be made only after one of the following conditions has occurred:
>
> (2) If the moving party is a defendant, and the defendant has already filed his or her answer to the complaint and the time for the defendant to demur to the complaint has expired.

(CCP § 438(f)(2).)

Here, Defendant filed its answer to the complaint on August 24, 2020. The time to demur to the complaint, which was filed on July 21, 2020, has also expired. Thus, this motion is timely.

Defendant's Request for Judicial Notice

Defendant requests that the Court take judicial notice of (1) Exhibit 1 to Plaintiff's complaint in this action; (2) Executive Order N-33-20 issued by California Governor Gavin Newsom on March 19, 2020; and (3) Public Order Under City of Los Angeles Emergency Authority issued by Los Angeles Mayor Eric Garcetti on March 19, 2020.

Request No. 1 is GRANTED per Evidence Code § 452(d) (court records). Request Nos. 2 and 3 are GRANTED per Evidence Code § 452(c) (official act of executive department).

Plaintiff's Request for Judicial Notice

Plaintiff requests that the Court take judicial notice of (1) an "ISO" (Insurance Services Office, Inc.) circular dated July 6, 2006 on "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria"; and (2) a minute order in an unrelated Orange County case.

Request No. 1 is DENIED. Plaintiff has offered no explanation of any basis to take judicial notice of this document.

Request No. 2 is also DENIED. Requesting judicial notice of an unpublished opinion of a California court "circumvents the rule" that unpublished California court

opinions are not to be cited or relied upon by the Court or a party, with certain recently added exceptions not applicable here. (*People v. Webster* (1991) 54 Cal.3d 411, 428 n.4 [citing former appellate rule CRC 977(a), (b), now codified as CRC 8.1115].) Although Plaintiff is correct that this Orange County Superior Court decision does not strictly fall within the purview of CRC 8.1115, as it is not an appellate opinion or an opinion of the appellate division, there is nevertheless no justifiable reason to take judicial notice of this opinion, for the reasons discussed in connection with Plaintiff's Supplemental Request for Judicial Notice.

Plaintiff's Supplemental Opposition and Supplemental Request for Judicial Notice

Without seeking leave to do so, Plaintiff filed a supplemental opposition and a supplemental request for judicial notice, less than nine days before the hearing date, and after Plaintiff already filed its opposition. These papers have not been considered.

Moreover, even if the Court considered this supplemental opposition – which is merely a vehicle to get an unpublished federal district court order in front of the Court – and the accompanying supplemental request for judicial notice of that unpublished order, it would be DENIED. The fact that an unpublished federal district court order supports Plaintiff's reasoning is not relevant to this Court's decision, and there is no reason to take judicial notice of irrelevant matter. (*Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 ["[J]udicial notice . . . is always confined to those matters which are relevant to the issue at hand."].) If Plaintiff's reasoning is sound and consistent with binding precedent, an unpublished federal district court decision that is also consistent with binding precedent adds little to the persuasiveness of Plaintiff's reasoning. Likewise, if Plaintiff's reasoning is unsound and inconsistent with binding precedent, no unpublished federal decision will make it more sound. (The same is true, of course, of the numerous unpublished federal district court decisions relied upon by Defendant. Those cases, unlike California cases, may properly be cited and relied upon for their persuasive value in this Court, but they have little persuasive value, if any, beyond their reliance on – and correct interpretation of – actual binding *California* precedent.)

Analysis

The showing required for a judgment on the pleadings to be granted is as follows:

> (1) The motion provided for in this section may only be made on one of the following grounds:
>
> > (B) If the moving party is a defendant, that either of the following conditions exist:
> >
> > (i) The court has no jurisdiction of the subject of the cause of action alleged in the complaint.

> (ii) The complaint does not state facts sufficient to constitute a cause of action against that defendant.

(CCP § 438(c)(1)(B).)

Plaintiff alleges two causes of action against this Defendant: (1) declaratory relief; and (2) appraisal. Defendant argues that both of these causes of action fail to state facts sufficient to constitute a cause of action against it. (CCP § 438(c)(1)(B)(ii).

The rules applicable to demurrers also apply to motions for judgment on the pleadings. (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 32.)

> A motion for judgment on the pleadings is properly granted when the "complaint does not state facts sufficient to constitute a cause of action against that defendant." (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) The grounds for the motion must appear on the face of the challenged pleading or from matters that may be judicially noticed. (Code Civ. Proc., § 438, subd. (d).) The trial court must accept as true all material facts properly pleaded, but does not consider conclusions of law or fact, opinions, speculation, or allegations contrary to law or facts that are judicially noticed.

(*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1219-1220.)

Plaintiff's Coverage Under Defendant's Policy

In the complaint, Plaintiff seeks a declaration that it is entitled to coverage under Defendant's policy. (Complaint ¶ 41.) If it prevails in seeking this declaration, Plaintiff then seeks an order compelling an appraisal of its losses. (¶ 45.)

Defendant argues that, as a matter of law, Plaintiff cannot allege the "direct physical loss of or damage to property" required for coverage under the policy.

Plaintiff alleges such physical losses or damage based on COVID-19, as follows:

> 23. COVD-19 is a disease caused by the SARS-CoV-2 Virus ("Virus"). The Virus can be present outside the human body in viral fluid particles, and can be transmitted and active on inert physical surfaces for a period of time. The Virus can and does remain capable of being transmitted and active on floors, walls, furniture, desks, tables, chairs, countertops, computer keyboards, touchscreens, cardboard packages, food items, surgical and medical equipment, faucets, refrigerators, freezers, and other items of property for a period of time.

24. The Virus can be transmitted by way of human contact with surfaces and items of physical property on which the Virus particles are physically present. It can further be transmitted by human to human contact and interaction, and through airborne particles emitted into the air.

25. Specifically, the Virus can be transmitted through airborne particles emitted into the air at the Subject Property, and can be transmitted from human to human contact or the lack of physical distancing at the Subject Property.

26. The presence of the Virus particles renders items of physical property unsafe, and impairs its value, usefulness and normal function.

27. The presence of any of the Virus particles causes direct physical harm to property, direct physical loss to property, and direct physical damage to property. As such, the presence of any of the virus particles renders any premises unsafe, including the Subject Property, thereby rendering [sic] the property's value, usefulness and/or normal function.

28. The presence of people infected with the Virus particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to that property, including the Subject Property.

Defendant argues that these allegations are insufficient as a matter of law. What is clear from both parties' briefs (and Plaintiff's requests for judicial notice), however, is that no California court has issued any opinion that is binding on this Court interpreting the policy language at issue in the context of losses due to COVID-19. Defendant, for example, cites a litany of unpublished federal district court cases in support of the proposition that courts applying California law have "uniformly dismissed lawsuits like the instant action, holding that neither the virus that causes COVID-19 nor the government's response to the pandemic causes a 'direct physical loss of or damage to property' within the scope of a policy's Business Income or Extra Expense coverage." (Motion, at p. 9.) These courts' interpretations of binding California case law as applied to the policy language at issue, however, is not binding on this Court.

In the procedural context of a judgment on the pleadings, as in the context of a demurrer, Plaintiff's allegations must be accepted as true, and the grounds for the motion for judgment on the pleadings must appear on the face of the complaint or matters that are judicially noticeable. (CCP § 438(d); *Hightower v. Farmers Ins. Exchange* (1995) 38 Cal.App.4th 853, 858.) In the insurance context, this means that the insurer "must establish conclusively that [the policy] language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1127.)

Here, Defendant has not shown that its interpretation unambiguously negates Plaintiff's alleged construction of the policy. As noted above, Plaintiff alleges physical losses and damage to the property based on the ability of the virus to be "transmitted and active on floors, walls, furniture, desks, tables, chairs, countertops, computer keyboards, touchscreens, cardboard packages, food items, . . . faucets, refrigerators, freezers, and other items of property for a period of time." (¶ 23; *see also* ¶¶ 26-28 [discussed above].) Defendant has cited no binding authority that has determined, as a matter of law, that these allegations are insufficient. To determine that these allegations were insufficient, the Court would have to go beyond the four corners of the complaint and matters judicially noticeable to conclude that the physical losses alleged in the complaint do not qualify as losses under the policy. This cannot be accomplished without disregarding the allegations that the Court must accept as true at this stage.

In terms of the authority that is binding on this Court, Defendant's primarily argument is based on the general principle that the phrase "direct physical loss of or damage to property" requires a "distinct, demonstrable, physical alteration of the property." (*MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.* (2010) 187 Cal.App.4th 766, 778-779.) The application of this principle to the novel question of "physical loss" due to the virus that causes COVID-19, however, is not as straightforward as Defendant suggests. For example, in *MRI Healthcare*, the court reasoned that the MRI machine at issue failed to satisfactorily "ramp up" following a rainstorm due to the "inherent nature of the machine itself rather than actual physical 'damage.'" (*Id.* at 780.) The court also reasoned that, "[f]or there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property . . . ." (*Ibid.*, emphasis in original.) The MRI machine at issue merely required a "different combination" of wires to operate, and therefore the insured had not shown any physical loss to the machine. (*Ibid.*) The application of this reasoning to Plaintiff's allegations is not clear cut. Nor is the application straightforward when considering a case in which a database did not suffer "physical loss" because a database – unlike a restaurant location – cannot "be said to have a material existence, be formed out of tangible matter, or be perceptible to the sense of touch." (*Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.* (2003) 114 Cal.App.4th 548, 556.) Likewise, the insured in *Doyle v. Fireman's Fund Ins. Co.* (2018) 21 Cal.App.5th 33 did not allege any harm whatsoever to the property at issue (counterfeit wine), in contrast to the Plaintiff's allegations of loss here.

Ultimately, Defendant's litany of cases has not convinced the Court that, when accepting Plaintiff's allegations as true and giving them the necessary liberal construction, Plaintiff has failed to allege valid causes of action for declaratory relief and appraisal.

Defendant also argues that other provisions of the policy, such as the civil authority provision, do not provide coverage as a matter of law. (Motion, at p. 14.) However, to the extent that Plaintiff's causes of action are based on multiple policy provisions, they cannot be challenged by way of demurrer, or a motion for judgment on the pleadings, if any portion of these causes of action states a valid claim. (*Adelman v.*

Associated Int'l Ins. Co. (2001) 90 Cal.App.4th 352, 359.) As discussed above, the Court has determined that Plaintiff's allegations are sufficient to state a cause of action for declaratory relief and the accompanying cause of action for appraisal.

Accordingly, the motion for judgment on the pleadings is DENIED.

Moving party to give notice, unless waived.

IT IS SO ORDERED.

Dated: March 18, 2021

Theresa M. Traber
Judge of the Superior Court

Any party may submit on the tentative ruling by contacting the courtroom via email at Smcdept47@lacourt.org by no later than 4:00 p.m. the day before the hearing. All interested parties must be copied on the email. It should be noted that if you submit on a tentative ruling the court will still conduct a hearing if any party appears. By submitting on the tentative you have, in essence, waived your right to be present at the hearing, and you should be aware that the court may not adopt the tentative, and may issue an order which modifies the tentative ruling in whole or in part.