

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Date Index No. Purchased: July 10, 2020

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BENNY'S FAMOUS PIZZA PLUS INC.,

Index No.

Plaintiff,

SUMMONS

-against-

Plaintiff designates Kings
County as the place of trial.

SECURITY NATIONAL INSURANCE COMPANY,

The basis of venue is Plaintiff's
principal place of business.

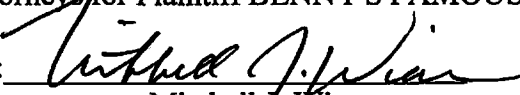
Defendant.

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TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: July 10, 2020
Garden City, New York

LAW OFFICE OF MITCHELL J. WINN, PLLC
Attorneys for Plaintiff BENNY'S FAMOUS PIZZA PLUS INC.,

By: 
Mitchell J. Winn

585 Stewart Avenue, Suite 544
Garden City, NY 11530
(516) 385-6300

To: SECURITY NATIONAL INSURANCE COMPANY
Defendant
4455 LBJ Freeway, Suite 700
Dallas, Texas 75244
and
c/o New York Superintendent of Insurance
New York State Department of Financial Services
1 Commerce Plaza
Albany, NY 12210

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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BENNY'S FAMOUS PIZZA PLUS INC.,

Index No.

Plaintiff,

VERIFIED COMPLAINT

-against-

SECURITY NATIONAL INSURANCE COMPANY,

Defendant.

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The Plaintiff BENNY'S FAMOUS PIZZA PLUS INC. (hereinafter "BENNY'S" or "Plaintiff"), by its attorneys The Law Office of Mitchell J. Winn, PLLC as and for its Verified Complaint to obtain a judgment against Defendant SECURITY NATIONAL INSURANCE COMPANY (hereinafter "SNIC" or "Defendant"), respectfully alleges, upon information and belief, as follows:

THE PARTIES

1. At all times hereinafter mentioned, Plaintiff BENNY'S was and is a domestic business corporation, organized and existing under the laws of the State of New York.
2. At all times hereinafter mentioned, BENNY'S maintained its principal place of business at or about 4514 13th Avenue, Brooklyn, City of New York, State of New York (hereinafter the "subject premises").
3. At all times hereinafter mentioned, BENNY'S did operate a restaurant business at or about the subject premises.
4. At all times hereinafter mentioned, BENNY'S was the owner(s) of, and/or did have an insurable interest in, the subject premises and the personal property located thereat.
5. Upon information and belief, at all times hereinafter mentioned, Defendant SNIC was and is an insurance company duly authorized and existing under the laws of State of Delaware.
6. Upon information and belief, at all times hereinafter mentioned, SNIC was and is an insurance carrier duly licensed and/or authorized to issue property insurance policies within the State of New York.

7. On or about August 23, 2019, SNIC did issue to Plaintiff, for good and valuable consideration, its policy of Commercial insurance, number SBP 153501602 (hereinafter the “policy”), effective from September 30, 2019 to and including September 30, 2020, insuring, *inter alia*, the subject premises, the property of Plaintiff located at or about the subject premises, and Plaintiff’s business income derived from the premises.

8. The policy did insure the subject premises, property and business income of Plaintiff against all risk of loss resulting from, *e.g.* action of civil authority and its effects.

FACTUAL BACKGROUND

9. COVID-19 is an infectious disease caused by a recently discovered novel coronavirus, formally known as SARS-CoV-2. The first instances of the disease spreading to humans were diagnosed in China in or around December 2019, and the first reported case in the United States was in January 2020.

10. The impact of the virus and the resulting pandemic on life and property has been staggering. Though testing has been severely limited, as of the filing date of this Complaint, more than 2,000,000 Americans have had confirmed cases of COVID-19, and more than 120,000 have died from it.

11. The virus is easily transmitted from person to person and from surface to person. According to the World Health Organization (the “WHO”), the virus can spread from person to person through small droplets from the nose or mouth that are spread when a person with COVID-19 coughs or exhales. These droplets land on objects and surfaces around the person. Other people then catch the virus by touching these objects or surfaces, then touching their eyes, noses, or mouths. People can also catch the virus if they breathe in droplets from a person infected with the virus who coughs or exhales droplets.¹

12. Infected individuals can be completely asymptomatic—and thus unaware that they may be spreading the virus through the mere touching of objects and surfaces. Indeed, studies have estimated that more than 40% of infected individuals may never develop any symptoms.² But even individuals who

¹ *Q&A on Coronaviruses (COVID-19)*, World Health Organization (April 17, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses>

² Erika Edwards, *Asymptomatic COVID-19 Cases May Be More Common Than Suspected* (May 27, 2020, 12:43 PM), <https://www.nbcnews.com/health/health-news/asymptomatic-covid-19-cases-may-be-more-common-suspected-n1215481>

appear healthy and present no identifiable symptoms of the disease might still spread the virus by breathing, speaking, or touching objects and surfaces.

13. According to a report in *The New York Times*, “[a]n infected person talking for five minutes in a poorly ventilated space can also produce as many viral droplets as one infectious cough.”³ And one human sneeze can expel droplets that can travel up to 27 feet at nearly a hundred miles an hour.⁴

14. Although these droplets are smaller than mold, rust, or paint chips, they are physical objects that travel and attach to other surfaces and cause harm.

15. Current evidence suggests that SARS-CoV-2 may remain viable for hours to days on surfaces made from a variety of materials.⁵ The virus can survive and remain virulent on stainless steel and plastic for 3 to 6 days, on glass and plastic for 3 to 6 days, on glass and banknotes for 3 days, and on wood and cloth for 24 hours.⁶ Testing of similar viruses suggests that SARS-CoV-2 can survive on ceramics, silicon, and paper for at least 5 days. And the Centers for Disease Control (the “CDC”) confirmed that the virus was identified on surfaces of the *Diamond Princess* cruise ship a full 17 days after the cabins were vacated.⁷

16. Without a vaccine to protect against COVID-19, effective control of the pandemic relies on measures designed to reduce human-to-human and surface-to-human exposure. The CDC have stated that the virus can spread when people are within 6 feet of each other or when a person comes in contact with a surface or object that has the virus on it.

³ See Yuliya Pashina-Kottas, et al., This 3-D Simulation Shows Why Social Distancing Is So Important, *The New York Times* (April 21, 2020), available at <https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-ar-ul.html>

⁴ Sarah Gibbens, “See how a sneeze can launch germs much farther than 6 feet,” *National Geographic* (April 17, 2020), available at www.nationalgeographic.com/science/2020/04/coronavirus-covid-sneeze-fluid-dynamics-in-photos/

⁵ National Institutes of Health “Study suggests new coronavirus may remain on surfaces for days” <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days>

⁶ Letter from Neeltje van Doremalen et al. to N. Eng. Journal of Med. (April 16, 2020), available at <https://www.nejm.org/doi/pdf/10.1056/NEJMc2004973>.

⁷ *Public Health Responses to COVID-19 Outbreaks on Cruise Ships—Worldwide, February–March 2020*, Centers for Disease Control and Prevention (March 27, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm>.

17. The nature of the virus has caused authorities to issue stay-in-place orders to protect persons and property. Indeed, authorities in each of the Teams' respective states have issued such orders, many of which observe the virus's threat to property.⁸
18. On March 18, 2020, the Governor Andrew Cuomo issued New York Executive Order No. 202.6, whereby the State of New York, which provided, *inter alia*, as follows: "Whereas, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue; . . . Each employer shall reduce the in-person workforce at any work locations by 50% no later than March 20 at 8 p.m."
19. On March 19, 2020, the Governor Andrew Cuomo issued New York Executive Order No. 202.7, whereby the State of New York, which provided, *inter alia*, that "Each employer shall reduce the in-person workforce at any work locations by 75% no later than March 21 at 8 p.m."
20. On March 20, 2020, the Governor Andrew Cuomo issued New York Executive Order No. 202.8, whereby the State of New York, which provided, *inter alia*, that "Each employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m."
21. By reason of the aforesaid Executive Orders, Plaintiff, along with all "non-essential" New York State businesses was compelled to reduce, and then cease, all in person business operations.

**AS AND FOR A FIRST CAUSE OF ACTION
FOR BREACH OF CONTRACT**

22. Plaintiff does repeat and reallege each and every allegation set forth in paragraphs "1" through "21," inclusive, as if each were again set forth herein in its respective entirety.
23. On or about March 18, 2020, said policy was in full force and effect.

⁸ City of New Orleans, *Mayoral Proclamation to Promulgate Emergency Orders During the State of Emergency Due to COVID-19 2* (2020), <http://nola.gov/mayor/executive-orders/emergency-declarations/03162020-mayoral-proclamation-to-promulgate-emergency-orders-during-the-state-of-emergency-due-to-col/>; City of N.Y., *Emergency Executive Order No. 103* (2020), <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-103.pdf>; State of Colo., *Executive Order D 2020 032* (2020), <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20032%20Extending%20D%202020%20003.pdf>; Broward Cty. Adm'r, *Emergency Order 20-03* (2020), <https://www.broward.org/CoronaVirus/Documents/BC-EmergencyOrder20-03.pdf>; Pinellas Cty Adm'r (2020), <http://www.pinellascounty.org/emergency/PDF/covid19/res20-20.pdf>.

24. The policy provides at Section I A (5) "Additional Coverages", at paragraph (i) thereof, at page 7 of form BP 00030106, "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 due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss."
25. The policy also provides at Section I B, paragraph "1" thereof, "Exclusions", at page 14 of form BP 00030106, that causes of loss listed therein are excluded from coverage under the policy "regardless of any other cause or event that contributes concurrently or in any sequence to the loss" (hereinafter "anti-concurrent causation clause").
26. The policy also contains an Endorsement entitled "NEW YORK - EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA", (hereinafter "Virus Endorsement") which provides, *inter alia*, that losses caused by virus are excluded from coverage. However, while the Virus Endorsement states that it "is 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", it does not state that it negates or excludes coverage under the additional coverage for action of civil authority, nor does it contain an anti-concurrent causation clause.
27. The action of civil authority in this matter was caused by a Covered Cause of Loss, since Virus is not excluded from coverage under the Exclusions clause of said policy, and since the Virus Endorsement by its terms does not apply when other causes of loss are applicable, *to wit*, action of civil authority. Accordingly, since the loss in this case was not caused by virus *per se*, but by the aforesaid action of the civil authority of State of New York, Plaintiff's loss of business income is covered under the policy.
24. By reason of the aforesaid Executive Orders, the Plaintiff did sustain loss of business income and extra expenses derived from the subject premises due to a peril covered under the policy, action of civil authority.

25. By reason of the aforesaid, and as otherwise provided in the policy and at law, Plaintiff did sustain loss of business income and extra expenses derived from the subject premises due to a peril covered under the policy.
26. Plaintiff has made due demand upon SNIC for the payment of said loss or damages.
27. SNIC has refused, and continues to refuse, to make payment for said loss or damages.
28. By reason of said failure and/or refusal, SNIC has breached its aforesaid policy and contract of insurance with Plaintiff.
29. By reason of said breach of contract, Plaintiff have been damaged in the sum of the amount of its loss of business income, in a sum thought to exceed THIRTY-EIGHT THOUSAND TWO HUNDRED NINETY-THREE DOLLARS and FORTY-SEVEN CENTS (\$38,293.47), plus extra expense in an amount yet to be determined, plus interest thereon from the (18th) day of March, 2020.
30. **WHEREFORE, Plaintiff BENNY'S demands Judgment against Defendant SNIC in the sum of at least THIRTY-EIGHT THOUSAND TWO HUNDRED NINETY-THREE DOLLARS and FORTY-SEVEN CENTS(\$38,293.47), plus extra expense in an amount yet to be determined, on the First Cause of Action set forth herein, all plus interest, attorney fees, costs, and such other, different and further relief as may be deemed by the Honorable Court to be just, proper and equitable.**

Dated: July 10, 2020
Garden City, New York

Yours, etc.,

LAW OFFICE OF MITCHELL J. WINN, PLLC

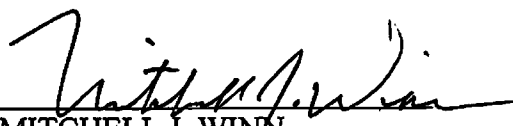
By: 

Mitchell J. Winn

Attorneys for Plaintiff BENNY'S FAMOUS PIZZA PLUS INC.
585 Stewart Avenue, Suite 544
Garden City, New York 11530
(516) 385-6300

VERIFICATION

MITCHELL J. WINN, an attorney duly admitted to practice before the Courts of the State of New York, hereby states and affirms, under the penalties of perjury and pursuant to CPLR 2106, that the foregoing COMPLAINT is true to the best of my knowledge, information and belief, and that the reason that this Verification is made by me is that I do not maintain an office in the County where Plaintiff maintains its principal place of business.


MITCHELL J. WINN

Dated: July 10, 2020
Garden City, New York