

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MAREIK INC d/b/a NICOLE MILLER
PHILADELPHIA,

Plaintiff,

v.

STATE FARM FIRE AND CASUALTY
COMPANY,

Defendant.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, Mareik Inc. d/b/a Nicole Miller Philadelphia (hereinafter “Mareik” or “Plaintiff”), brings this Complaint alleging relief against Defendant, State Farm Fire and Casualty Company (“State Farm” or “Defendant”), and avers as follows:

NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiff’s contract of insurance with Defendant.
2. In light of the global coronavirus disease 2019 (“COVID-19”) pandemic and state and local government orders (“Civil Authority Orders”) mandating that all non-essential in-store businesses must shut down on March 16, 2020, Plaintiff’s fashion boutique has suffered business loss.
3. Plaintiff’s insurance policy provides coverage for all non-excluded business losses, and thus provides coverage here.
4. As a result, Plaintiff is entitled to declaratory relief that its business is covered for all business losses that have been incurred in an amount greater than \$150,000.00.

JURISDICTION

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and Defendant. Further, Plaintiff has suffered business losses in an amount greater than \$150,000.00. The amount in controversy necessary for diversity jurisdiction over a declaratory judgment action is measured by the value of those business losses. *Id.* at § 1332(a).

6. This Court has personal jurisdiction over Defendant, State Farm. At all relevant times Defendant has engaged in substantial business activities in the Commonwealth of Pennsylvania. At all relevant times Defendant transacted, solicited, and conducted business in Pennsylvania through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in Pennsylvania. Defendant purposefully availed itself of personal jurisdiction in Pennsylvania because it contracted to provide insurance to Plaintiff in Pennsylvania which is the subject of this case.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(c) because Defendant is a corporation that has substantial, systematic, and continuous contacts in Pennsylvania and within the Eastern District of Pennsylvania. Further, the insurance sold to Plaintiff which is the subject of this case was sold in the Eastern District of Pennsylvania.

PARTIES

8. Plaintiff Mareik is a fashion boutique which operates at 4249 Main Street, Philadelphia, PA 19127 (“Insured Property”).

9. Defendant State Farm is an insurance carrier that provides business interruption insurance to Plaintiff. State Farm is headquartered at 1 State Farm Plaza, Bloomington, IL 61710. State Farm is a citizen of Illinois.

10. At all relevant times, Defendant issued an insurance policy to Plaintiff Mareik (policy number 98-EL-P372-5) that includes coverage for business interruption losses incurred by Plaintiff from October 16, 2019 through October 16, 2020. *See* Declaration and Policy, attached hereto as Exhibit 1 (“Policy”).

11. The Policy is currently in full effect in providing, among other things, personal property, business income and extra expense, contamination, and additional coverage.

12. On or around March 21, 2020, Plaintiff submitted a claim for a date of loss pursuant to its policy, seeking coverage under its policy. Defendant rejected Plaintiff’s business loss and business interruption claims and other claims, contending, *inter alia*, that Plaintiff did not suffer physical damage to its property directly and stating other reasons why Plaintiff purportedly is not entitled to coverage for the losses and damages. Defendant also claimed the Policy does not cover losses due to the Virus Exclusion Clause.

FACTUAL BACKGROUND

I. Insurance Coverage

13. Plaintiff faithfully paid policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business interruption or closures by order of Civil Authority and for business loss for property damage.

14. The terms under the Policy explicitly provide for insurance coverage for actual loss of business income Plaintiff sustained, along with any actual, necessary and reasonable extra expenses incurred, when access to the Insured’s Property is specifically prohibited by order of civil authority.

15. The Policy is an all-risk policy, insofar as it provides for coverage in the broadest sense and thereby providing coverage, unless the loss sustained is specifically and unambiguously excluded or limited in the Policy.

16. The Policy also covers for damages resulting from business interruption when there is property damage. The exclusion for viruses does not apply to the Covid-19 Pandemic.

17. Based on information and belief, Defendant has accepted the policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown and property damage suffered by Plaintiff as a direct result of the Covid-19 Pandemic.

II. The COVID-19 Pandemic

18. The scientific community, and those personally affected by the Coronavirus Pandemic, recognize the Coronavirus as a cause of real physical loss and damage. It is clear that contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the retail business of Plaintiff.

19. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 9, 2020).

20. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

21. The global Coronavirus Pandemic¹ is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight (28) days.

¹ On March 11, 2020 the World Health Organization (“WHO”) made the assessment that COVID-19 shall be characterized as a pandemic. See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

22. A particular challenge with the novel coronavirus is that it is possible for a person to be infected with COVID-19 but be asymptomatic. Thus, seemingly healthy people unknowingly spread the virus via speaking, breathing, and touching objects.

23. While infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are physical objects which travel to other objects and cause harm. Habitable surfaces on which COVID-19 has been shown to survive include, but are not limited to, stainless steel, plastic, wood, paper, glass, ceramic, cardboard, and cloth.

24. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

III. Civil Authority for Philadelphia, Pennsylvania

25. On March 6, 2020, Pennsylvania Governor Tom Wolf issued a Proclamation of Disaster Emergency, the first formal recognition of an emergency situation in the Commonwealth of Pennsylvania as a result of COVID-19. *See* Proclamation of Disaster Emergency, attached hereto at Exhibit 2.

26. On March 16, 2020, the City of Philadelphia announced the closure of non-essential businesses including salons like the Plaintiff's. <https://www.phila.gov/2020-03-16-city-announces-new-restrictions-on-business-activity-in-philadelphia/> (Last visited June 2, 2020).

27. On March 19, 2020, Governor Wolf issued an Order requiring all non-life-sustaining businesses in Commonwealth to cease operations and close all physical locations. Businesses that were permitted to remain open were required to follow “social distancing practices and other mitigation measures defined by the Centers for Disease Control.”²

² *See* <https://www.governor.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/#:~:text=Governor%20Tom%20Wolf%20today%20ordered,begin%20at%2012%3A01%20a.m.> (last visited June 2, 2020).

28. On March 23, 2020, Governor Wolf issued a Stay-at-Home Order for residents of Philadelphia, Allegheny, Bucks, Chester, Delaware, Monroe, and Montgomery County.³ On that same date, the Pennsylvania Department of Health issued a similar Order, noting that “operation of non-life-sustaining businesses present the opportunity for unnecessary gatherings, personal contact and interaction that will increase the risk of transmission and the risk of community spread of COVID-19.”⁴

29. On April 1, 2020, Governor Wolf extended the March 23, 2020 Stay at Home Order to the entire Commonwealth of Pennsylvania.⁵

30. On June 5, 2020, Philadelphia entered a modified version of the state’s yellow phase allowing businesses, like Plaintiff’s to gradually reopen, provided they follow protocols to keep employees, customers, and others safe.⁶

31. The Pennsylvania Supreme Court recently clarified the Governor’s Orders and supported Plaintiff’s position that physical loss and damage exists in resulting in coverage here. *See Friends of DeVito, et al v. Wolf*, No. 68 MM 2020 (Pa. April 13, 2020).

32. Moreover, the United States District Court - Middle District of Pennsylvania also rejected a group of small business owners’ Motion for a Temporary Restraining Order, premised on due process and the First amendment, on May 21, 2020. The Court stated, “This pandemic has presented impossible choices to government officials and private citizens alike, and we are not unmoved by the hardships Petitioners currently face. [However,] Petitioners have failed to prove

³ See <https://www.governor.pa.gov/newsroom/governor-wolf-and-health-secretary-issue-stay-at-home-orders-to-7-counties-to-mitigate-spread-of-covid-19/> (last visited June 2, 2020).

⁴ See <https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-of-enforcement-monday-march-23-at-800-am/> (last visited June 2, 2020).

⁵ See <https://www.governor.pa.gov/newsroom/gov-wolf-sec-of-health-pennsylvania-on-statewide-stay-at-home-order-beginning-at-8-pm-tonight-most-prudent-option-to-stop-the-spread/> (last visited June 2, 2020).

⁶ See <https://www.phila.gov/2020-05-29-what-the-yellow-phase-means-for-philadelphia/> (last visited June 8, 2020).

that the Governor violated constitutional strictures in their issuance.” See *Benner v. Wolf*, 20-cv-775, attached hereto as Exhibit 3.

33. Further, on April 10, 2020 President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff.

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it’s something that we’ve already suggested, we’re talking to them. ***Business interruption insurance***, I’d like to see these insurance companies—you know you have people that have paid. When I was in private I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I’d have business where I had it, I didn’t always have it, sometimes I had it, sometimes, I had a lot of different companies. *But if I had it I’d expect to be paid*. You have people. I speak mostly to the restaurateurs, where they have a restaurant, they’ve been paying for 25, 30, 35 years, business interruption. They’ve never needed it. All of a sudden they need it. And I’m very good at reading language. I did very well in these subjects, OK. And I don’t see the word pandemic mentioned. Now in some cases it is, it’s an exclusion. But in a lot of cases I don’t see it. I don’t see it referenced. And they don’t want to pay up. I would like to see the insurance companies pay if they need to pay, if it’s fair. And they know what’s fair, and I know what’s fair, I can tell you very quickly. But business interruption insurance, that’s getting a lot money to a lot of people. And they’ve been paying for years, sometimes they just started paying, but you have people that have never asked for business interruption insurance, and they’ve been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says ‘we’re not going to give it.’ We can’t let that happen.

See <https://youtu.be/cMeG5C9TjU> (last visited on April 17, 2020) (emphasis added).

34. The President is articulating a few core points:
- a. Business interruption is a common type of insurance.

- b. Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.
- c. The COVID-19 pandemic should be covered unless there is a specific exclusion for pandemics.
- d. If insurers deny business loss coverage due to the COVID-19 pandemic, they would be acting in bad faith.

35. The Civil Authority Orders and proclamations referenced herein, as they relate to the closure of all “non-life- sustaining businesses,” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true for businesses such as Plaintiff’s, where customer or client interaction and personal contact results in a heightened risk of the property becoming contaminated.

IV. Impact on Plaintiff

36. As a result of the Orders referenced herein, Plaintiff shut its doors to customers on March 16, 2020 and has reopened, following the state’s stringent yellow phase guidelines.

37. Plaintiff’s business loss occurred when the Commonwealth of Pennsylvania Civil Authorities declared a State of Emergency on March 6, 2020. Plaintiff suffered further when the Pennsylvania Civil Authorities required all businesses to cease non-essential operations on March 16, 2020.

38. Prior to March 16, 2020, Plaintiff was opened to all customers.

39. Plaintiff’s business is not a closed environment, and because people – staff, customers, community members, and others – constantly cycle in and out of the boutique, there is an ever-present risk that the Insured Property is contaminated and would continue to be contaminated.

40. Businesses like the Plaintiff's are more susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on the Insured Property and remain viable for far longer as compared to a facility with open-air ventilation.

41. Plaintiff's business is also highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the service nature of the business places staff and customers in close proximity to the property and to one another.

42. As a retail boutique of women's clothing, Plaintiff's business, prior to the Pandemic, had frequent customers who would visit the store and use the fitting rooms to try on clothing.

43. The trying on of clothing necessarily involved customers touching many objects in Plaintiff's store.

44. Because of the nature of Covid-19 as described above, relating to its persistence in locations and the prospect of causing asymptomatic responses in some people, the risk of infection to persons is not only high, but could cause persons with asymptomatic responses to then come into contact with others who would not be so fortunate as to suffer merely an asymptomatic response, and instead suffer serious illness.

45. The Civil Authority Orders entered by the state and local government were in the exercise of authority to protect the public and minimize the risk of spread of disease.

46. Even with the entry of these Civil Authority Orders there remained physical impact not only in and within Plaintiff's business property but in and around the surrounding location of Plaintiff's business property in light of Covid-19 presence not being detectable other than through microscopic means, and occurrence of illness.

47. In and around the property location of Plaintiff, persons suffered Covid-19 illness, thereby confirming the presence of Covid-19 impacting property and locations in and around Plaintiff's property, supporting the validity of the entry of the Civil Authority Orders.

48. The virus is physically impacting Plaintiff. Any effort by Defendant to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger the Plaintiff and the public.

49. Plaintiff could not use its property for its intended purpose. Therefore, the novel coronavirus has caused "direct physical loss of or damage to" Plaintiff's property insured under the policy.

50. A declaratory judgment determining that the coverage provided under the Policy will prevent the Plaintiff from being left without vital coverage acquired to ensure the survival of the business due to the shutdown caused by the civil authorities' response is necessary. As a result of these Orders, Plaintiff has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

CAUSE OF ACTION

DECLARATORY RELIEF

51. Plaintiff re-alleges and incorporates by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

52. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in "a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

53. An actual controversy has arisen between Plaintiff and the Defendant as to the rights, duties, responsibilities and obligations of the parties under the terms of the Policy in that Plaintiff contends and, on information and belief, the Defendant disputes and denies, that:

- a. The Orders constitute a prohibition of access to Plaintiff's Insured Property;
- b. The prohibition of access by the Orders has specifically prohibited access as defined in the Policy;
- c. The Policy's Exclusion of Loss Due to Virus or Bacteria does not apply to the business losses incurred by Plaintiff here;
- d. The Policy's Exclusion of Loss Due to Virus or Bacteria does not apply to the situation of a global Pandemic as exists and as impacted Plaintiff and its business;
- e. The Orders trigger coverage;
- f. The Policy provides coverage to Plaintiff for any current and future civil authority closures of business in the Commonwealth of Pennsylvania due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters;
- g. The Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Insured Property;
- h. A pandemic triggers coverage under the Policy; and
- i. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

54. Resolution of the duties, responsibilities and obligations of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

55. Plaintiff seeks a Declaratory Judgment to determine whether the Orders constitute a prohibition of access to Plaintiff's Insured Property as Civil Authority as defined in the Policy.

56. Plaintiff further seeks a Declaratory Judgment to affirm that the Orders trigger coverage.

57. Plaintiff further seeks a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiff for any current and future civil authority closures of a non-essential businesses in Pennsylvania due to physical loss or damage from the Coronavirus and that the policy provides business income coverage in the event that the Coronavirus has caused a loss or damage at the Insured Property.

58. Plaintiff further seeks a Declaratory Judgment to affirm that the occurrence of a pandemic triggers coverage and that no exclusions in the Policy exclude coverage under the circumstances and occurrence of a pandemic.

59. Plaintiff does not seek any determination of whether the Coronavirus is physically in or at the Insured Property, an amount of damages, or any other remedy other than declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff herein pray as follows:

- a. For a declaration that the Civil Authority Orders constitute a prohibition of access to Plaintiff's Insured Property.
- b. For a declaration that the prohibition of access by the Orders is specifically prohibited access as defined in the Policy.
- c. For a declaration that the Orders trigger coverage under the Policy.
- d. For a declaration that the Policy provides coverage to Plaintiff for any current, future and continued civil authority closures of businesses in the Commonwealth of Pennsylvania due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters.
- e. For a declaration that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiff's Insured Property or the immediate area of the Plaintiff's Insured Property.
- f. That the occurrence of a pandemic is a circumstance that is not addressed in the Policy and therefore damages and losses sustained as a result of the occurrence of a pandemic is not excluded from coverage under an "All-Risks" policy as is the Policy of Plaintiff at issue here.

g. For such other relief as the Court may deem proper.

TRIAL BY JURY IS DEMANDED

Plaintiff hereby demand trial by jury.

Dated: June 10, 2020

Respectfully submitted,

/s/ Daniel C. Levin

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