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STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
CIVIL COURT DIVISION

Life Time, Inc.; LTF Club Operations Company, Inc.; LTF Operations Holdings, Inc.; LTF Club Management, LLC; Bloomingdale LIFE TIME Fitness, LLC; and LTF Construction Company, LLC,

Plaintiffs,

v.

Zurich American Insurance Company,

Defendant.

ORDER ON MOTION TO DISMISS

Court File No. 27-CV-20-10599
Judge Kristin A. Siegesmind

The above-entitled matter came before the Honorable Kristin A. Siegesmund, Judge of District Court, for a hearing on the Defendant's Motion to Dismiss on June 8, 2021.

Rikke Diersen-Morice and David Suchar, Maslon, LLP, appeared on behalf of the Lifetime entities ("Lifetime"). Erik Lindseth, Chris Ryan, and Leslie Sawatzke, counsel at Lifetime, also appeared. Dan Millea and Akira Cespedes-Perez, Zelle, LLP appeared on behalf of Zurich American Insurance Company ("Zurich"), as well as Eileen Bower and Matthew Dostal, Clyde & Co US, pro hac vice, on behalf of Zurich.

With this motion, Zurich seeks to dismiss Counts II, IV, and VI of Plaintiff's Complaint all of which relate to coverage under a Builder's Risk policy issued by Zurich.

After the hearing, the parties submitted supplemental legal authority; after receipt of the last supplemental submission on July 10, the Court took the matter under advisement. Based on the submissions of the parties and the arguments made at the hearing, the Court now makes the following:

ORDER

1. The Defendant's Motion to Dismiss Counts II, IV, and VI is DENIED.

2. The following Memorandum is incorporated into this Order.

DATED:_____

BY THE COURT:

Siegesmund, Kristin
2021.10.07 12:48:00
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The Honorable Kristin A. Siegesmund
Judge of District Court

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MEMORANDUM

Background

1. During all relevant times in this case, Life Time had two insurance policies issued by Zurich. The first was an "EDGE Global" policy issued for the period of December 15, 2019 to December 15, 2020. This policy included coverage for "Interruption by Communicable Disease." The coverage of that policy is disputed by the parties but it not the subject matter of this motion.

2. The second insurance policy, which is the subject of the current motion, was Builder's Risk ("BR") Coverage policy for December 15, 2019 to December 20, 2019. Amended Complaint, Ex. E. The policy has a limit of $100 million per occurrence for each project covered by the policy.[1]

3. Specifically, the BR policy provides that the Company (Zurich) will pay for "direct physical loss of or damage to 'builders risk property'[2] caused by a 'covered cause of loss'" while such property is at the project site, in transit, or at a temporary location.[3] In turn, a "covered cause of loss" is defined in the policy as "direct physical loss or damage."[4]

4. The BR Policy covers certain excess Contractor Expenses.

> In the event of covered loss or damage to "builders risk property" caused by a "covered cause of loss", the Company will pay for reasonable and necessary expense incurred by the Insured for: "Contractor's Extra Expense"; "Expediting expense"; or "General conditions expense", in excess of the total expense that would normally have been incurred during the same period of time had no loss or damage occurred for the purpose of continuing the scheduled progress of undamaged work and only to the extent such expenses are necessary to continue as nearly as practicable the normal operation of the work in progress.[5]

5. The policy also covers certain damages due to Prevention of Access-Ingress or Egress

> In the event of direct physical loss of or damage to property:
> a. Not insured under this Policy;
> b. Located within one mile from the "project site"; and
> c. Caused by a "covered cause of loss",
>
> the Company will pay for actual and reasonable "contractor's extra expense" and "general conditions expense" incurred by the Insured:

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[1] As cited in paragraphs 2 through 7 of this Order, the relevant terms of the policy are laid out in ¶¶ 86-92 of the Complaint, and Ex. E to the Complaint beginning at p. 19. The facts of the Complaint are assumed to be true for the purposes of this motion. These same coverage provisions are cited by Zurich in their Memorandum in support of the motion.

[2] "Builder's risk property" is defined in the policy as property under construction. See Amended Complaint Para 92. J.1.

[3] Amended Complaint Para 92. A..1. Coverage

[4] Amended Complaint Para. 92 J.7. Definition "covered cause of loss"

[5] Amended Complaint Para 92. E. 5 Contractor Expenses

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(1) When ingress or egress to the "project site" by suppliers, contractors or employees is physically obstructed for a period of time greater than 72 hours from the date of direct physical loss of or damage to property; and
(2) In excess of the total expense that would normally have been incurred during the same period of time had no loss or damage occurred for the purpose of continuing the scheduled progress of undamaged work and only to the extent such expenses are necessary to continue as nearly as practicable the normal operation of the work in progress.

The Company will pay for "contractor's extra expense" and "general conditions expense" incurred after 72 hours from the direct physical loss or damage to property, for up to 30 days in any one "occurrence". The Company will not pay more than the Limit Of Liability shown on the Declarations for Prevention of Access – Ingress or Egress.

No Deductible applies to this Coverage Extension.[6]

6. The BR policy included an additional endorsement specifically addressing Delay in Completion.

The following Coverages are added to Section A., Coverage in the Zurich Master Builders Risk Coverage Form.

1. Gross Earnings

The Company will pay for the actual loss of "gross earnings" sustained by the Named Insured shown in the "reporting form" due to the delay in completion of the applicable "insured project" during the "period of indemnity". This delay in completion must be caused by direct physical loss of or damage to Covered Property at the "project site", in transit, or at a "temporary offsite location". The loss or damage must be caused by a "covered cause of loss". The most the Company will pay for a loss of "gross earnings" arising from a "delay" in an "insured project" is the Limit Of Liability shown in the "reporting form" for Gross Earnings.

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3. Soft Costs

The Company will pay for the actual and necessary "soft costs" incurred by the Named Insured shown in the "reporting form" due to the delay in completion of the applicable "insured project" during the "period of indemnity". This delay in completion must be caused by direct physical loss of or damage to Covered Property at the "project site". The loss or damage must be caused by a "covered cause of loss". The most the Company will pay for "soft costs" incurred arising from a "delay" in an "insured project" is the Limit Of Liability shown in the "reporting form" for Soft Costs.

4. Additional Interest And Financing Expenses

[6] Amended Complaint Para 92.15 Prevention of Access-Ingress or Egress

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> The Company will pay for the actual and necessary "additional interest and financing expenses" incurred by the Named Insured shown in the "reporting form" due to the delay in completion of the applicable "insured project" during the "period of indemnity". This delay in completion must be caused by direct physical loss of or damage to Covered Property at the "project site". The loss or damage must be caused by a "covered cause of loss". The most the Company will pay for "additional interest and financing expenses" incurred arising from a "delay" in an "insured project" is the Limit Of Liability shown in the "reporting form" for Additional Interest And Financing Expenses.[7]

7. The Delay in Completion Endorsement also had coverage extensions, including coverage for certain orders from civil authorities prohibiting access to the property.

> The following are Coverage Extensions to coverage set forth in this endorsement. The Policy exclusions, terms and conditions will apply to each Coverage Extension, except to the extent that coverage is provided under the applicable Coverage Extension. Limits Of Liability for these Coverage Extensions are included in, and not in addition to, the Delay Aggregate Limit Of Liability shown in the Schedule above.
>
> 1. Civil Authority
> The Company will pay for the actual loss of "gross earnings" or "rental income" sustained, and the actual and necessary "soft costs" and "additional interest and financing expenses" incurred, by the Named Insured for up to the number of days shown in the Schedule above due to a delay in completion of the "insured project" when an order of civil authority prohibits access to the "project site". That order must result from the civil authority's response to direct physical loss of or damage to property not insured under this Policy located within one mile from the "project site". The loss or damage must be directly caused by a "covered cause of loss".[8]

8. In March 2020, the start of the time for which Life Time seeks insurance coverage, Life Time had at least 19 separate construction projects underway in various parts of the country, including at a club in St. Louis Park, in Hennepin County.[9]

9. Both sides contend that the coverages addressed by the Builder's Risk Policy, that is, the excess expenses, prevention of access coverage, delay in completion coverage, and the civil authority coverage, all depend upon the interpretation of a key phrase "direct physical loss of or damage to" Covered Property.

10. In the amended complaint Life Time has alleged that the infiltration of the Covid virus into Life Time's construction sites, and the related government shut down orders, have forced Life Time to cease construction work multiple times which delayed completion of the projects. They allege

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[7] Amended Complaint para 92. Delay in Completion Endorsement C. Coverage.
[8] Amended Complaint para 92 Delay in Completion Endorsement F. Coverage Extensions.
[9] Details of the construction interruptions at various sites are detail in ¶¶ 94-125 of the Complaint, and are not necessary for determining the issue of law in this motion.

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that they suffered direct physical loss or damage to property and are entitled to coverage under the BR policies.[10]

11. Zurich has brought a motion to dismiss on the pleadings counts II, IV, and VI, all of which pertain to the BR policy. Zurich argues that Lifetime cannot establish direct physical loss of or damage to property because Covid is temporary, can be easily washed away, and does not injure the property or the structure. Zurich argues that Lifetime is seeking damages for loss of use and that loss of function is not a basis for finding coverage. Lifetime argues that under Minnesota law direct physical loss can exist without destruction of property or structural damage. Impairment of function, Life Time argues, can support a finding of direct physical loss of property.

Analysis

12. Standard of Review

Pursuant to the Minnesota Rules of Civil Procedure, the Court may dismiss a complaint upon motion by a defendant if the complaint fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). To survive, a complaint must include "a short and plain statement . . . showing that the pleader is entitled to relief." Minn. R. Civ. P. 8.01.

In assessing whether a complaint is sufficient, the Court accepts the facts alleged in the complaint as true and construes "all reasonable inferences in favor of the nonmoving party." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). It does not matter whether or not a plaintiff can prove the facts alleged in the complaint, rather a court looks to whether "it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Martens v. Minnesota Min. & Mfg. Co.,* 616 N.W.2d 732, 739-40 (Minn. 2000).

A failure to establish any element of a claim defeats the entire claim. *In re Individual 35W Bridge Litigation*, 786 N.W.2d 890, 895 (Minn.App. 2010), citing *Noske v. Friedberg,* 670 N.W.2d 740, 742, 743 (Minn.2003). And while Rule 8 allows "the pleading of broad general statements that may be conclusory," *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997), the statements must not be so conclusory as to fail to "give fair notice to the adverse party of the incident giving rise to the suit," or to fail "to disclose the pleader's theory upon which [the] claim for relief is based." *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963).

13. The court notes that there are numerous cases around the country that have interpreted whether businesses who were forced to close because of executive orders during the Covid pandemic are covered by their property insurance. Zurich correctly notes that the large majority of cases have denied coverage. And Life Time correctly notes that many of these cases are distinguishable because they had exclusions for viruses or because they had different policy language. Most importantly almost all these other decisions are interpreting other states' laws, not Minnesota. Since the interpretation of an insurance contract is one of state law the court is not bound by these other court decisions but must look to Minnesota law.

[10] Amended Complaint Para 126. Plaintiff alleges that they are entitled to coverage under both the Contractors Expense, the Egress and Egress coverage and the delay in completion coverage.

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14. The meaning of this phrase "direct physical loss of or damage to" property in the context of Covid shutdowns is one of first impression. Although there is one federal court decision interpreting Minnesota law, there are no Minnesota cases directly on point. There are, however, Minnesota cases from which the court draws guidance.

15. If the language is unambiguous then, construction of an insurance contract is a question of law. *General Mills, Inc. v Gold Medal Insurance Co.* 620 N.W.2d 147 (Minn. App. 2001.) Insurance policies are contracts interpreted in accordance with general contract principles. *Progressive Specialty Ins. Co v. Widness ex rel Widness*, 635 N.W.2d 516, 518 (Minn. 2001). When interpreting insurance contracts, the court must ascertain and give effect to the intent of the parties. *Nathe Bros. v Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000); *Minnesota Min. & Mfg. Co v Travelers Indem. Co*, 457 N.W.2d 175, 179 (Minn. 1990). If possible, every term within an insurance contract must be given effect. "We will not adopt a 'construction of an insurance policy which entirely neutralizes one provision ... if the contract is susceptible of another construction which gives effect to all its provisions and is consistent with the general intent.'" *Engineering & Const. Innovations, Inc. v. L.H. Bolduc Co., Inc.*, 825 N.W.2d 695, 705 (Minn. 2013), quoting *Wyatt v. Wyatt*, 239 Minn. 434, 437, 58 N.W.2d 873, 875 (1953). Moreover, when examining policy language, the "insurance contract must be construed as a whole, with unambiguous language given its plain and ordinary meaning." *Indep. Sch. Dist. No. 697, Eveleth v St. Paul Fire and Marine Ins. Co.*, 515 N.W.2d 576, 579 (Minn. 1994) If there is ambiguity then an insurance policy is construed against the insurer. *General Mills.*

16. Key Minnesota Precedents

The debate between the two parties focuses on whether the language at issue requires some level of alteration to the property or whether the mere presence of covid resulting in the inability to access the property is sufficient. Although many courts in other states have required some structural change, that is clearly not the law in Minnesota, as will be discussed. The law here is more nuanced. There are three key Minnesota cases that both sides refer to.

17. The first is *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997). There the policy insured "all risks of direct physical loss to buildings". The building was contaminated with asbestos and the owners sought recovery for the cost of abatement. The court held that that direct physical loss required that a covered property be injured, not destroyed. But it also held that there could be direct physical loss in the absence of structural damage.

> Direct physical loss also may exist in the absence of structural damage to the insured property. *See, e.g., Western Fire Ins. Co. v. First Presbyterian Church,* 165 Colo. 34, 437 P.2d 52, 55 (1968) (concluding plaintiff suffered direct physical loss to insured building when gasoline infiltrated soil surrounding basement, contaminating foundation and rooms and rendering use of building dangerous); *Hughes v. Potomac Ins. Co.,* 199 Cal.App.2d 239, 18 Cal.Rptr. 650, 655 (1962) (holding house, which was structurally undamaged but perched at edge of cliff due to landslide, suffered direct, physical loss).

Sentinel, 563 N.W.2d 296, 300. The court concluded that the contamination by asbestos may constitute direct physical loss to property.

17. The second is *Gen. Mills, Inc. v. Gold Medal Ins. Co.,* 622 N.W.2d 147 (Minn. Ct. App. 2001).

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In that case a grain contractor used an unapproved pesticide on the grain and the FDA would not allow General Mills to sell the grain in food products although there was no evidence that the pesticide posed a health hazard. Defendant argued that there was no direct physical loss of insured property because it was government regulation that caused the loss, but for that, the oats could be consumed. The court disagreed. Referring to *Sentinel Mgmt Co.*, the Court held that "direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way." *Id.* at 152. The court specifically recognized that the loss of function could support a claim for damages.

> In *Sentinel,* we noted that the function of a residential apartment building, to provide safe housing, was seriously impaired or destroyed by the presence of asbestos fibers, although the building itself did not suffer a "tangible injury." *Id.* Likewise, the function of the food products produced by General Mills is not only to be sold, but to be sold with an assurance that they meet certain regulatory standards. When General Mills is unable to lawfully distribute its products because of FDA regulations, that function is seriously impaired.

Gen. Mills, Inc., 622 N.W.2d at 152. The court also cited to *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 256 Minn. 404, 409, 98 N.W.2d 280, 285 (1959), which upheld coverage for fire damage although the product itself was not damaged. The court concluded that General Mills was unable to sell or use its contaminated oats because of legal regulations and that "the loss of the function of the insured property, General Mills' ability to sell products for consumption within the regulatory framework calculated to guarantee safe consumption, is sufficient to prove a direct physical loss under the policy language. *Id.* at 155.

The third case, referred to by *General Mills*, is *Marshall Produce,* 256 Minn. 404, 98 N.W.2d 280. The plaintiff, who produced dried eggs to sell to the government, had purchased fire insurance insuring against 'all loss or damage by fire . . .'" *Id.* at 285. The government had a sanitation rule that was part of the contract that required that the plant be free of smoke. A fire broke out next door and smoke did get into the facility. The dried eggs were in cannisters. Although there was no evidence that the product was tainted, the government officials assumed that the contents were likely contaminated with a bad taste or smell and would not accept the product. The Minnesota Supreme court overturned the trial court's finding that the egg powder was not damaged by fire and held that when merchandise lost its market value "loss or damage" has occurred and would be damaged by fire if the "soiling, discoloration or odor" has been caused by fire. *Id.*

These three cases are instructive in the present situation because none of them require structural damage to property. All of them found coverage when there had been contamination that resulted in a loss of function or value. In the case of *General Mills* and *Marshall Produce* the products may not have been unusable but because of their contamination, and government regulation, were not able to be used as planned and therefore lost value. The Amended Complaint pleads a very similar situation. Covid contaminated the work sites and government orders then closed the sites. The court finds that Life Time has stated facts in its complaint, which if proved, could support a finding of direct physical loss or harm to property that could trigger coverage under the BR Policy.

In this regard, the court is not suggesting that anytime a business is unable to operate for any reason, coverage under the language of this policy would be triggered. This case is distinguishable from two federal cases cited by Zurich, *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.,* 400 F.3d 613 (8th Cir. 2005), and *Source Food Technology, Inc. v U.S. Fidelity and Guaranty Co.*, 485 F.3d 834 (8th Cir.

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2006), neither of which involved contamination of the product. In *Pentair,* the plaintiff argued that its Taiwanese factories suffered "direct physical loss or damage" when a power outage prevented the factories from performing their function. The *Pentair* court distinguished *General Mills* and *Sentinel* because those cases involved contamination from pesticides and asbestos, which did not exist in *Pentair*. Similarly, in *Source Food,* a beef product could not be transported to the United States because the Canadian border was closed, not because of any contamination or problem with the beef. The court held that inability to transport beef did not meet the policy definition of "direct physical loss to property."[11] The court does not find the ruling in those cases relevant or persuasive since those cases did not deal with an allegation of contamination which led to the inability to operate, as is the situation here.

Zurich urges the court to follow the majority of cases in the country which have denied coverage in Covid shutdowns. However, those courts were applying law of other states which, at least in some instances, has a narrow view of what direct physical loss or damage is, in some cases requiring structural damage. Minnesota cases are more expansive and allow the claim as pled to proceed.

Nor is the court persuaded that the reasoning in the recent Eighth Circuit ruling in *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021) supports granting Zurich's motion in this case. In *Oral Surgeons*, the plaintiff suspended non-emergency procedures at its clinic because of the Covid pandemic and government-imposed restrictions. But the complaint apparently did not plead any contamination. The Eighth Circuit, in applying Iowa law to a contract provision that required physical loss or physical damage, held that "there must be some physicality to the loss or damage of property—*e.g.*, a physical alteration, physical contamination, or physical destruction." *Id.* at 1144. Here, however, Life Time has alleged contamination. To the extent that Zurich is suggesting that *Oral Surgeons* means that there must be physical alteration to the property, more than contamination, this court does not agree that the Minnesota precedents discussed above require a significant change to the property. Indeed, in *General Mills* the contamination was benign. In *General Mills* there was contamination that led the government to reject the oats, and that led to loss of function. In Minnesota that is enough to find direct physical loss.

Life Time urges that court to consider the recent ruling from the Minnesota Federal District Court in *Seifert v. IMT Ins. Co.,* No. CV 20-1102 2021 WL 2228158, at *1 (D. Minn. June 2, 2021), in which the court considered a claim for lost business income because of Covid shutdowns. The court there was examining a similar contract provision "direct physical loss of or damage to".[12] Interestingly the court months earlier had dismissed Plaintiff's claim because he had not alleged any contamination. The court found that government shut down orders alone did not constitute direct physical loss. However, after Plaintiff amended their complaint, even though they still did not allege

[11] *Source Food*, 465 F.3d at 838. The court noted in passing that there might be a different outcome if the policy had used the word "of" rather than "to". "Moreover, the policy's use of the word "to" in the policy language "direct physical loss *to* property" is significant. Source Food's argument might be stronger if the policy's language included the word "of" rather than "to," as in "direct physical loss *of* property" or even "direct loss *of* property." The policy at issue in the case before this court does use the word "of" as well as "to".

[12] "The policies at issue contain a business income provision, which protects against the actual loss of business income sustained due to a "suspension of your 'operations' during the 'period of restoration' ... caused by direct physical loss of or damage to property ... caused by or result[ing] from a Covered Cause of Loss." *Seifert II,* at *3.

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the presence of Covid virus at their salons[13], because plaintiff presented a more nuanced theory of their claim, the court found that the case should not be dismissed.

The court in *Siefert II* engages in a careful analysis of the policy language. As in this case, the policy contained no definition of "direct physical loss of or damage to" property. Judge Tunheim concludes that "loss of" must mean something different than "damage to" because, as discussed above, all contract language must be given meaning and the court should not assume that words are redundant. Looking at the dictionary, the court concluded that "to" indicates an action towards a thing whereas "of" is a proposition indicating belonging or a possessive relationship. The court concluded that severing an owner's possession would be a "direct physical loss of." The court looked at *General Mills*, *Marshall*, and *Sentinel,* and noted that they do not require a tangible injury, and that a qualifying loss could arise from impairment of function and value. Concluding that Minnesota courts would only require some injury to an owner's right to occupy and control their property, the court reasoned that absolute or permanent dispossession was not required. Judge Tunheim did not find that any order that caused a shutdown would trigger coverage. However, the court held that a "plaintiff would plausibly demonstrate direct physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use."

Life Time urges the court to follow the reasoning in *Siefert II* to declare that a government shutdown order because a property is deemed dangerous is sufficient to trigger coverage even if there is no contamination on the property. The court declines to make such a decision at this time. At this stage of the proceeding, the question is whether Life Time has pled a cause of action under the BR policy. In pleading contamination and closure because of the contamination, under Minnesota law they have pled facts that the "insured property is injured in some way"[14] which, if proved, could support a direct physical loss claim under the BR policy. Zurich's motion is denied.

KAS

[13] The policy in *Siefert* had a virus exclusion.
[14] See *General Mills,* 622 N.W.2d at 152.