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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL

CLASSIC DESIGN FINE ART, INC., : October Term 2020  
Plaintiff, :  
v. : No. 1493  
LITITZ MUTUAL INSURANCE COMPANY, :  
Defendant. : Commerce Program  
: Control Number 21064534

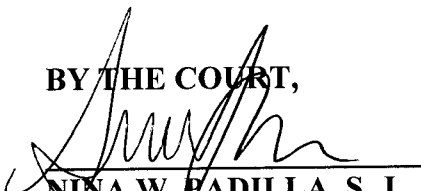
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DEC 15 2021

R. POSTELL  
COMMERCE PROGRAM

ORDER

AND NOW, this 14<sup>th</sup> day of December, 2021, upon consideration of Defendant Lititz Mutual Insurance Company's (Defendant) Motion for Judgment on the Pleadings, Plaintiff Classic Design Fine Art, Inc.'s (Plaintiff) response in opposition, Defendant's Reply and the attached Opinion, it hereby is **ORDERED** that the Motion for Judgment on the Pleadings is **Granted**. Judgment is entered in favor of Defendant Lititz Mutual Insurance Company and against Plaintiff Classic Design Fine Art, Inc.

BY THE COURT,  
  
NINA W. PADILLA, S. J.

201001493-Classic Designs Fine Art, Inc. Vs Lititz Mutual I



20100149300049

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
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Plaintiff,	:	
v.	:	No. 1493
LITITZ MUTUAL INSURANCE COMPANY,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Number 21064534

**OPINION**

This is an action for insurance coverage. Plaintiff Classic Design Fine Art, Inc. (“Plaintiff”) filed this action alleging breach of contract against defendant Lititz Mutual Insurance Company (“Defendant”), its insurance carrier, for denying a claim for lost business income related to COVID-19 business closures and other restrictions. Presently before the court is defendant’s motion for judgment on the pleadings. For the reasons discussed below, the motion for judgment on the pleadings is granted.

**I. Factual Background**

**a. Plaintiff’s business**

Plaintiff, a division of Hunter Enterprises, engages in the retail sale of merchandise, primarily custom hats and shirts.<sup>1</sup> Plaintiff sells its products in part inside hospitals and other healthcare facilities where it sets up displays and sells its products to business invitees, staff and others in hospitals and healthcare facilities.<sup>2</sup> Additionally, from January 1, 2020 through

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<sup>1</sup> Plaintiff’s Amended Reply to New Matter ¶ 24.

<sup>2</sup> Plaintiff’s Complaint ¶¶ 6, 7.

January 15, 2021, plaintiff maintained the website <https://hunterenterprises.info>, which included an online store where individuals could order or purchase plaintiff's merchandise.<sup>3</sup>

#### **b. Effects of COVID-19 and Government Orders**

In or about March 2020, plaintiff alleges it suffered loss of business income as a result of COVID-19 business closures and other restrictions which prevented plaintiff from selling products in hospitals and/or other healthcare facilities.<sup>4</sup> Additionally, plaintiff alleges that as a result of COVID-19 and related restrictions and closures, the online selling of merchandise from the website was completely shut down from approximately March 2020 through January 15, 2021.<sup>5</sup> Plaintiff was unable to have custom graphics made as the graphics manufacturer was closed.<sup>6</sup> Plaintiff alleges it solely kept the phone lines open in order to speak to customers for questions and that no phone orders were taken.<sup>7</sup>

#### **c. The Insurance Policy**

Defendant issued a policy of insurance to plaintiff which provides coverage for the loss of "Business Income" sustained due to the "necessary suspension" of its operations. The policy provides in pertinent part as follows:

#### **SECTION I-PROPERTY**

##### **A. Coverage**

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<sup>3</sup> Plaintiff's Amended Reply to New Matter ¶ 25.

<sup>4</sup> Plaintiff's complaint ¶¶ 5, 8, 9.

<sup>5</sup> Plaintiff's Amended Reply to New Matter ¶ 25.

<sup>6</sup> Id.

<sup>7</sup> Id.

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations [<sup>8</sup>] caused by or resulting from any Covered Cause of Loss.<sup>9</sup>

### **3. Covered Causes of Loss**

Risks of direct physical loss unless the loss is

- a. Excluded in Section B., Exclusions in Section I; or
- b. Limited in Paragraph 4. Limitations in Section I.

### **5. Additional Coverages**

#### **f. Business Income**

##### **(1) Business Income**

(a) We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

(b) We will only pay for loss of Business Income that you sustain during the “period of restoration” and that occurs within 12 consecutive months after the date of direct physical loss or damage. (Exhibit “2” form BP00010106)

....

##### **(2) Extended Business Income**

(a) If the necessary suspension of your “operations” produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period.

(b) Loss of Business Income must be caused by direct physical loss or damage at the descry bed premises caused by or resulting from any Covered Cause of Loss.

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<sup>8</sup> The location of the described premises is 420 S York Rd Apt 40 Hatboro Montgomery County PA 19040-3974. See, Business Owners Policy pg 1 attached as Exhibit “B” to the Defendant’s Motion for Judgment on the Pleadings.

<sup>9</sup> Defendant’s Policy of Insurance attached to Defendant’s Motion for Judgment on the Pleadings as Exhibit “B”

The policy also provides coverage for Extra Expenses the insured incurs during the “period of restoration” that it would not have incurred if “there had been no direct physical loss of or damage to property.” The provision states:

**g. Extra Expense**

(1) We will pay necessary Extra Expense you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage to property must be caused by or result from a Covered Cause of Loss.

The policy also extends coverage under the “Civil Authority” and provides as follows:

**i. Civil Authority**

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 in 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.

This policy also contains exclusions. Defendant relies upon the “consequential losses” caused by “Delay, loss of use or loss of market” and “acts of decisions” of any person, group, organization or governmental body to exclude coverage for plaintiff’s losses

**d. The Claim**

Plaintiff submitted a claim to defendant seeking coverage for its business losses.<sup>10</sup> At the time the claim was submitted no individual or qualified testing facility confirmed the presence of COVID-19 at plaintiff’s principal place of business in Hatboro, PA during the period of January 1, 2020 through January 15, 2021. On July 1, 2020, defendant denied the claim because there was no direct physical loss of or damage to the covered property caused by or resulting from a covered loss.

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<sup>10</sup> Plaintiff’s complaint ¶¶ 11-12.

## II. Procedural History

On October 20, 2020, plaintiff commenced this action against defendant by filing a writ of summons. On January 15, 2021, plaintiff filed its complaint alleging breach of contract and bad faith. The count for bad faith was subsequently dismissed. On January 29, 2021, defendant filed its answer to the complaint with new matter. On May 19, 2021, plaintiff filed a reply to new matter and on July 28, 2021, plaintiff filed an amended reply to new matter.<sup>11</sup> Defendant has now filed a motion for judgment on the pleadings which is ripe for decision.<sup>12</sup>

## DISCUSSION

### I. Plaintiff is not entitled to coverage under the Business Income and Extra Expense provisions of Defendant's Policy as a matter of law as there has not been a "direct physical loss of or damage to property".

Insurance policies are contracts between an insurer and a policyholder. The goal in construing and applying the language of an insurance contract is to effectuate the intent of the parties as manifested by the language of the specific policy.<sup>13</sup> When the language of

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<sup>11</sup> The Amended Reply to New Matter was filed after the filing of defendant's motion for judgment on the pleadings and without the consent of defendant nor leave of court as required by Pa. R. Civ. P. 1033. Notwithstanding the foregoing and in accordance with the Pa. R. Civ. P. 126 (...The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.."), the court did take into consideration the allegations set forth within plaintiff's amended new matter.

<sup>12</sup> Entry of judgment on the pleadings is permitted under Pennsylvania Rule of Civil Procedure 1034, which provides that "after the pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings." *Erie Insurance Exchange v. King*, 246 A.3d 332, 336 (Pa. Super. 2021) quoting Pa. R. Civ. P. 1034(a). A motion for judgment on the pleadings is similar to a *demurrer*. It may be entered when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. *Id.* A trial court must confine its consideration to the pleadings and relevant documents. The court must accept as true all well pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed, considering only those facts which were specifically admitted. *Id.*

<sup>13</sup> *Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 14, 630 Pa. 1, 23–24 (Pa. 2014), citing *401 Fourth St. Inc. v. Investors Ins. Grp.*, 583 Pa. 445, 879 A.2d 166, 171 (2005); *Lititz Mut. Ins. Co. v. Steely*, 567 Pa. 98, 785 A.2d 975, 978 (2001).

an insurance policy is plain and unambiguous, a court is bound by that language.<sup>14</sup> Alternatively, if an insurance policy contains an ambiguous term, “the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification against the insurer, as the insurer drafts the policy, and controls coverage.”<sup>15</sup>

Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning. However, a contract provision is not ambiguous simply because the parties do not agree on the construction of the provision.<sup>16</sup> The initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy, but if the insured is able to make this showing the insurer then has the burden to demonstrate that there is an applicable policy exclusion which denies coverage.<sup>17</sup>

Here, plaintiff seeks coverage for its business losses under the Business Income and Extra Expense coverage sections of the policy. These sections respectively require “direct physical loss of or damage to property” for coverage to be triggered. Plaintiff urges this court to interpret the language “direct physical loss of or damage to property” as “loss of use” of property.<sup>18</sup> This court rejects plaintiff’s interpretation. The policy language at issue is plain and unambiguous and requires a physical alteration of the property in order for coverage to exist.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Weisman v. Green Tree Ins. Co.*, 447 Pa. Super. 549, 670 A.2d 160, 161 (Pa. Super. 1996).

<sup>17</sup> *State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009).

<sup>18</sup> Plaintiff relies upon *Ungarean v. CNA*, 2021 WL 1164836 (Pa. Com. Pl. (Allegheny County) March 25, 2021) as authority for its interpretation.

In *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.*<sup>19</sup>, the Third Circuit explained that damage by sources unnoticeable to the naked eye must “meet a higher threshold” than “typical examples of physical damage from an outside source that may demonstrably alter the components of a building.”<sup>20</sup> The *Port Authority* court determined that asbestos causes physical damage if it is present in such large quantities that it makes the structure “uninhabitable and unusable”, but if the building continues to function and remains usable then the building owner has not suffered a loss.<sup>21</sup> The *Port Authority* court concluded that “the mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first party insurance coverage.”<sup>22</sup> A panel of the Third Circuit has explained that this test is consistent with Pennsylvania law.<sup>23</sup> Additionally, *Port Authority* has been affirmatively cited by numerous courts in Pennsylvania as instructive on whether the threat of COVID-19 and or the resultant government shut down orders to prevent the spread of COVID-19 constitute “direct physical loss of or direct physical damage to property.”<sup>24</sup>

After reviewing the parties’ submissions, the policy language and the existing body of case law, this court agrees with those courts that have found that “loss of use” of the property alone, as argued by plaintiff here, is not enough to trigger coverage. There must be some issue with the *physical* premises which precludes or impedes the business operations of the premises

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<sup>19</sup> 311 F.3d 226 (3rd. Cir. 2002).

<sup>20</sup> *Id.* at 235.

<sup>21</sup> *Id.* at 311 F.3d 226, 235 (3d Cir. 2002).

<sup>22</sup> *Id.*

<sup>23</sup> See *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005).

<sup>24</sup> Pennsylvania courts are permitted to turn to federal authorities for persuasive authority. *Bochetto v. Piper Aircraft Co.*, 94 A.3d 1044, 1050 (Pa.Super. 2014).



as intended for coverage to be triggered.<sup>25</sup> Even if the COVID -19 virus was present at the subject property plaintiff's claim for coverage would still fail because the virus did not create a "distinct, demonstrable, physical alteration" of the plaintiff's property.<sup>26</sup>

Applying *Port Authority* and its progeny to facts here, it is clear that plaintiff is not entitled to coverage. The economic loss resulting from plaintiff's inability to sell its merchandise directly at the hospital and hospital facilities, or indirectly online must have some direct nexus to the physical condition of the covered premises, the York Road apartment, for coverage to apply. There is no allegation that plaintiff's property sustained a physical loss.<sup>27</sup> As such, in the absence of "direct physical loss of or damage to the property" as described by *Port Authority*, coverage is not triggered under the Business Income and Extra Expense Coverage of defendant's policy.<sup>28</sup>

## **II. Plaintiff is not entitled to coverage under the Civil Authority provision of the policy.**

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<sup>25</sup> See, *4431, Inc. v. Cincinnati Insurance Companies*, 504 F. Supp. 3d 386 (E.D. Pa. 2020).

<sup>26</sup> *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3rd. Cir. 2002).

<sup>27</sup> Plaintiff alleges that "...Plaintiff was prevented from selling its products in hospitals and/or other healthcare facilities due to the existence of the COVID-19 infection inside the hospitals and/or other healthcare facilities premises." (Complaint ¶ 8). However, there is no allegation in the complaint nor its amended reply to new matter that the virus was present at the demised premises covered under defendant's policy.

<sup>28</sup> Plaintiff's reliance upon the "reasonable expectations of the insured" to support its interpretation of "direct physical loss of or damage to property" is misplaced. The expectations of an insured cannot directly contradict and invalidate the clear, express, language of the Policy. See *Guttman Oil Co. v. Pennsylvania Ins. Guar. Ass'n*, 429 Pa. Super. 523, 528, 632 A.2d 1345, 1347-48 (1993) ("while reasonable expectations of the insured are the focal points in interpreting the contract language of insurance policies, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous.").

In the alternative, plaintiff argues that it is entitled to coverage under the Civil Authority provision of the policy. Coverage under the Civil Authority provision of the policy exists when a civil authority issues an order prohibiting access to the insured's property in response to a dangerous physical condition caused by damage to another's property. So, in order for coverage to exist, there must be (1) action by a civil authority that prohibits access to the insured's premises, (2) because of direct physical loss of or damage to property, other than the insured's, and (3) the physical loss of or damage was caused by or results from a covered cause of loss.

Here, plaintiff relies heavily upon the executive orders issued by the Governor and Mayor to impose restrictions on nonessential businesses to satisfy the first requirement- action by civil authority that prohibited access to its property. While the orders did impose restrictions on nonessential businesses, the orders were issued in response to the COVID-19 health crisis and not because of damage to another property.<sup>29</sup> This court has already found that the presence or threat of COVID -19 does not constitute “physical loss of or damage to property”, a specific requirement to trigger coverage under the Civil Authority provision of the policy. Furthermore, plaintiff's complaint fails to allege that the executive orders denied plaintiff access to its property or any other property because of damage to another property. Plaintiff solely alleges that it was prevented from selling its products in hospital facilities by the hospital and its website was “shut

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<sup>29</sup> See, e.g., “Proclamation of Disaster Emergency,” Governor Wolf, Commonwealth of Pennsylvania (March 6, 2020) (stating that it is critical “to implement measures to mitigate the spread of COVID-19”); “Emergency Order Temporarily Prohibiting Operation of Non-Essential Businesses and Congregation of Persons to Prevent the Spread of 2019 Novel Coronavirus (COVID-19): Order No. 2,” Office of the Mayor: Department of Public Health, City of Philadelphia (March 22, 2020) (“[I]n order to limit the spread of COVID-19, it is immediately necessary to forbid the operations of businesses that do not provide essential services to the public and activities that endanger public health”); Philadelphia Order (stating that certain business closures were required “to reduce the spread of the COVID-19 novel coronavirus in Philadelphia”); Pennsylvania Order (“All restaurants and bars previously have been ordered to close their dine-in facilities to help stop the spread of COVID-19”).

down” because plaintiff was unable to receive custom graphics from its manufacturer who was closed due to the restrictions and closures.<sup>30</sup> Since, plaintiff did not allege that it was unable to access its property because of damage to a nearby premise or because of some dangerous condition at a nearby premise as a result of a “direct physical loss of or damage property”, coverage does not exist under the Civil Authority provision of the policy. <sup>31</sup>

### **III. The Exclusions bar Coverage**

Notwithstanding the foregoing, defendant raises two exclusions that bar plaintiff’s alleged claim for economic losses. One concerns loss or damage caused by the “acts or decisions” of others: “We will not pay for loss or damage caused by or resulting from ... [a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.”<sup>32</sup> The other excludes “consequential losses” and states “We will not pay for loss or damage caused by or resulting from ... Delay, loss of use or loss of market.”<sup>33</sup>

The unequivocal language of these exclusions make clear that defendant will not pay for any loss or damage caused by acts or decisions of others, nor will it pay for any loss or damage caused by a loss of use or loss of market. Here, the decision of the hospital and hospital facilities which prevented plaintiff from selling its merchandise in the hospital and the decision of the graphic manufacturer to close its shop, implicates the “Acts or Decision” exclusion and therefore plaintiff’s alleged claim for economic losses are excluded.

Additionally, plaintiff’s claim is also excluded by the consequential losses exclusion since plaintiff’s claim arises from a loss of use and/loss of market. First, this exclusion undercuts

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<sup>30</sup> Plaintiff’s complaint ¶ 9; Plaintiff’s amended reply to new matter ¶¶25, 30.

<sup>31</sup> See, *Toppers*, 503 F.Supp.3d 251, 257 (E.D. Pa. Nov. 30, 2020).

<sup>32</sup> Exhibit “B” to Defendant’s Motion for Judgment on the Pleadings p 19 of 47.

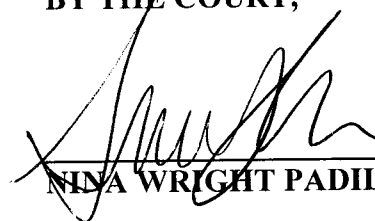
<sup>33</sup> *Id.* at page 17 of 47.

plaintiff's argument in this case that coverage exists since plaintiff suffered a loss of use. Hence, even if the court found plaintiff's interpretation to be reasonable and accepted plaintiff's interpretation, plaintiff's claim for economic losses arising from its loss of use is barred by the consequential loss exclusion. Moreover, the complaint alleges plaintiff suffered losses directly when the hospital and hospital facilities prevented it from selling its merchandise in their facilities and indirectly when the graphic merchandiser closed. The losses associated with these acts constitute a "loss of market" which is also excluded under the consequential losses exclusion. Consequently, plaintiff's claim is excluded by the consequential loss exclusion.<sup>34</sup>

### CONCLUSION

For the foregoing reasons, defendant's motion for judgment on the pleadings is granted and the judgment is entered in favor of the defendant and against the plaintiff.

BY THE COURT,



NINA WRIGHT PADILLA, S.J.

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<sup>34</sup> *Visconti Bus Service, LLC v Utica National Insurance Group*, No. EF005750-2020, 71 Misc. 3d 516, 537, 142 N.Y.S.3d 903, 918, 2021 N.Y. Slip Op. 21027, 2021 WL 609851 (Sup Ct, Feb. 12, 2021)