UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-62257-CIV-SINGHAL

RUNWAY 84, INC., & RUNWAY 84 REALTY, LLC d/b/a ANTHONY'S RUNWAY 84,

Plaintiffs,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO CERTIFICATE NUMBER ARP-75203-20,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendants' Certain Underwriters at Lloyd's London Subscribing to Certificate No. ARP-75203-20 ("Underwriters") Motion to Dismiss Complaint (DE [9]). The matter is fully briefed and the Court has heard argument of counsel.[1] For the reasons discussed below, the motion is granted.

I. BACKGROUND

Plaintiffs Runway 84, Inc. and Runway 84 Realty, LLC d/b/a Anthony's Runway 84 (hereinafter "Plaintiffs") own and run a well-known and popular restaurant in Fort Lauderdale, Florida. Underwriters issued a Certificate of Insurance (DE [1-1]) (hereinafter "Policy") that provided Commercial Property Coverage and Business Income (and Extra

[1] Plaintiffs previously filed a lawsuit seeking identical relief, but that case was dismissed without prejudice for failure to adequately allege diversity jurisdiction. *See Anthony's Runway 84, Inc. & Runway 84 Realty, LLC v. Certain Underwriters at Lloyd's London Subscribing to Certificate Number ARP-75203-20,* Case No. 20-61161-CIV-SINGHAL. The Court heard oral argument on the Motion to Dismiss filed in that case and takes judicial notice of the transcript of that oral argument. (DE [8]).

Expense) Coverage. (DE [1-1], p. 70). Covered Losses under the Policy "means direct physical loss unless the loss is excluded or limited" elsewhere in the Policy. (DE [1], ¶ 3; [1-1], p. 82).

In March 2020, the federal, state, and local governments declared an emergency due to the pandemic resulting from the SARS-CoV-2 virus (a/k/a "COVID-19") (DE [1] ¶¶ 17-22). On March 22, 2020, Broward County issued an emergency order requiring the closure of all nonessential retail and commercial businesses due to "the propensity of [COVID-19] to spread person to person and also because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time." (DE [1] ¶ 21). Plaintiffs' Complaint (DE [1]) alleges that COVID-19 is a human pathogen that can exist outside the human body in viral fluid particles and can live and/or remains capable of being transmitted and active on inert physical surfaces. (DE [1], ¶¶ 10-13). Plaintiffs allege that "[o]n or about March 13, 2020, the presence of COVID-19, as caused by the COVID-19 pandemic, caused direct physical loss and resultant/ensuing damages" to Plaintiffs' property. (*Id.* ¶ 23). Plaintiffs also allege damages and loss of income caused by Broward County's Emergency Order 20-01 (DE [1], ¶¶ 26-29).

Plaintiffs submitted a claim to Underwriters for direct physical loss and loss of income as a result of the presence of the virus on the restaurant's premises and for loss of business income caused by Emergency Order 20-01. Underwriters denied the claim and Plaintiffs filed this action seeking declaratory relief in the form of a judgment that the Policy covers the claimed losses and damages for breach of contract.

Underwriters moves to dismiss the Complaint for failure to state a claim upon which relief can be granted. First, Underwriters argues that Plaintiffs have failed to allege any

physical damage to either its property (as required for business income coverage) or to nearby property (as required for civil authority coverage). Second, Underwriters argues that even if there were physical property damage, Plaintiffs' claim would be excluded by the policy's pollution/contamination exclusions. And, finally, Underwriters argues that Plaintiffs fail to sufficiently allege any facts to support its cause of action for breach of contract.

II. LEGAL STANDARDS

To survive a motion to dismiss, "factual allegations must be enough to raise a right to relief above the speculative level" and must be sufficient "to state a claim for relief that is plausible on its face." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co*., 578 F.3d 1252, 1261 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

In considering a Rule 12(b)(6) motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc*., 555 F.3d 949, 959 (11th Cir. 2009) (quoting *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002)). The court must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). But "[c]onclusory allegations, unwarranted deductions of

facts or legal conclusions masquerading as facts will not prevent dismissal." *Jackson v. Bellsouth Telecommunications*, 372 F.3d 1250, 1262 (11th Cir. 2004) (citation omitted); *see also Iqbal*, 129 S. Ct. at 1949 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions").

Regarding insurance policies, under Florida law, "insurance contracts are construed according to their plain meaning," and "[a]mbiguities are construed against the insurer and in favor of coverage." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). "[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007) (quoting *Taurus Holdings*, 913 So. 2d at 532). If a term is undefined in a policy, a court "may consult references commonly relied upon to supply the accepted meanings of words." *See id.* at 291–92; *see also Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1188 (11th Cir. 2002) ("Because none of the terms in that provision are defined in the policy, we accord each its ordinary meaning." (citation omitted)). The court must "look at the policy as a whole and give every provision its full meaning and operative effect." *Hyman*, 304 F.3d at 1186 (citations omitted).

III. ANALYSIS

The Policy's insuring clause provides:

A. Coverage

> We will pay for direct physical loss of or damage to Covered Property at the Premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

(DE 1-1, Policy, Form CP 00 10 10 12, at p. 1 of 16). Covered Causes of Loss is defined in the Policy as "risks of direct physical loss unless the loss is … excluded … or … limited." (DE [1-1], Policy, Form CP 10 30 10 12, at p. 1 of 10).

The Policy also provides coverage for loss of business income that is caused by direct physical loss of or damage to the premises:

> **1. Business Income**
>
> * * *
>
> 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 premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

DE [1-1], Policy, Form CP 00 30 10 12, at p. 1 of 9). The Policy also provides extra expense coverage:

> **2. Extra Expense**
>
> **a.** Extra Expense means necessary expenses 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* caused by or resulting from a Covered Cause of Loss.

(DE [1-1], Policy, Form CP 00 30 10 12, at p. 1 of 9 (emphasis added).

Business Income and Extra Expense coverages are only provided during a "period of restoration" which is defined as follows:

> … the period of time that:
>
> a. Begins:
>
> (1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or

(2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

b. End on the earlier of:

(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

(DE [1-1], Policy, Form CP 00 30 10 12, at p. 9 of 19).[2]

Underwriters moves to dismiss the Complaint because Plaintiffs have failed to allege a direct physical loss or damage to the insured property. It argues that purely economic interruptions in business caused by COVID-19 do not satisfy the plain and ordinary meaning of "direct physical loss or damage" under Florida law and, therefore, no coverage exists. Underwriters also argues that coverage for damages caused by the presence of COVID-19 is excluded by the Policy's exclusions barring coverage for contamination and contaminants.

The Court disagrees with Plaintiffs' contention that Underwriters' arguments are more suitable for a motion for summary judgment and will, therefore, address the merits. *15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London Known as Syndicates AML 2001, WBC 5886, MMX 2010, & SKB 1897,* 2021 WL 896216, at *3 (S.D. Fla. Feb. 22, 2021) (citing *Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.,* 2020 WL 6392841, at *5 (S.D. Fla. Nov. 2, 2020) (collecting cases)).

[2] Although the Policy provides additional coverage for Civil Authority losses under certain circumstances, Plaintiffs' opposition memorandum states they are not seeking civil authority coverage. (DE [10], p. 8). The Civil Authority provisions of the Policy are, therefore, not recited in this Order.

Plaintiffs respond that the Policy is an "all risk" policy that covers all loss that is not otherwise excluded. Thus, Plaintiffs contend that the presence of COVID-19 and the resulting loss of income state a claim for coverage under the Policy. "However, as the Florida Supreme Court has noted, 'an "all-risk" policy is not an "all loss" policy, and thus does not extend coverage for every conceivable loss.'" *Mama Joe's Inc. v. Sparta Ins. Co.,* 823 Fed. Appx. 868, 878 (11th Cir. 2020) (quoting *Sebo v. Am. Home Assurance Co.,* 208 So. 3d 694, 696-97 (Fla. 2016)). To survive the Motion to Dismiss, Plaintiffs' Complaint must sufficiently allege that the purported losses are covered under the Policy. *15 Oz Fresh & Healthy Food LLC,* 2021 WL 896216, at *2 (quoting *Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 117898, at *2 (S.D. Fla. Jan. 11, 2021) (cleaned up)).

The Policy will pay for loss of business income "caused by direct physical loss or of damage to property." Because the Policy does not define "direct physical loss" or "damage to property", the court "may consult references commonly relied upon to supply the accepted meanings of words." *Id.* at *2 (citing *Hyman,* 304 F.3d at 1188. In *Mama Jo's, Inc.,* 823 Fed. Appx. 868, the Eleventh Circuit considered the meaning of "direct physical loss" under Florida law. The insured had sought payment for business losses and expenses caused by intrusion of dust debris from nearby roadwork. The lower court held the insured failed to establish that it suffered a direct physical loss that would trigger coverage and granted summary judgment for the insurer. The Eleventh Circuit affirmed, stating that the words "'[d]irect] and 'physical' modify loss and impose the requirement that the damage be actual." *Id.* at 879 (quoting *Homeowners Choice Prop. & Cas. v. Maspons,* 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017)). From there, the court stated that

"under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical'." *Id.* (citing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.,* 187 Cal. App. 4th 766, 779, 115 Cal. Rptr. 3d 127, 37 (2020) ("A direct physical loss contemplates an actual change in insured property.")).

Plaintiffs' Complaint alleges that the "presence of COVID-19, whether on a surface or in the air, or being carried by an infected host, renders physical and personal property unsafe and impairs the value, usefulness, or function of said property resulting in direct physical loss or damage to that property." (DE [1], ¶ 16). This is a conclusory statement that does not plausibly establish physical loss or damage as defined by Florida law. *15 Oz Fresh & Healthy Food LLC,* 2021 WL 896216, at *. There is no actual change in the insured property alleged; at most, the Complaint alleges that COVID-19 particles, not unlike the dust particles in *Mama Jo's,* have spread through the premises. Numerous courts, including this Court, have held that the presence of COVID-19 on premises does not constitute direct physical loss or damage. *Id.* at *5 (citing *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 268478, at *6 (M.D. Fla. Jan. 27, 2021); *Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 117898, at *3 (S.D. Fla. Jan. 11, 2021); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, 2021 WL 86777, at *7 (S.D. Fla. Jan. 11, 2021); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 2021 WL 22314, at *5–6 (M.D. Fla. Jan. 4, 2021); *Emerald Coast Rests., Inc. v. Aspen Specialty Ins. Co.*, 2020 WL 7889061, at *2 (N.D. Fla. Dec. 18, 2020); *Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.*, 2020 WL 7398646, at *6 (M.D. Fla. Dec. 17, 2020); *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 7251643, at *5 (S.D. Fla. Dec. 9, 2020); *El Novillo Rest. v. Certain Underwriters at Lloyd's, London*, 2020 WL 7251362, at *6 (S.D.

Fla. Dec. 7, 2020); *Raymond H Nahmad DDS PA*, 2020 WL 6392841, at *8. *But see Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020) (denying insurer's motion to dismiss and declining to "make a determination of coverage at this stage" because the entire policy was not provided to the court, and there was not yet "binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions")).

Plaintiffs cite to Broward County Emergency Order 2020-3 to support their claim that the property suffered direct physical loss or damage. The County explained its closure of all nonessential retail and commercial businesses[3] because COVID-19 has "the propensity … to spread person to person and also because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time." (DE [1], ¶ 21). This is not a statement of Florida insurance law, is not a judicial or administrative finding, and is not binding on this Court. Even if COVID-19 were present at the restaurant, this would not constitute physical damage sufficient to trigger coverage. *15 Oz Fresh & Healthy Food LLC,* 2021 WL 896216, at *6 (citing *Rococo Steak,* 2021 WL 268478, at *6 ("[N]either physical contamination by COVID-19 nor a decrease in business constitutes direct physical loss or damage.").

Plaintiffs' argument that the presence of COVID-19 made the property unsuitable for its intended purposes because it closed for business due to the pandemic does not establish the physical loss or damage required by the Policy. "[U]nder Florida law, loss of use of property for its intended purposes does not constitute 'direct physical loss.'" *Id.*

[3] The Court notes that in Emergency Order 2020-1, Broward County named restaurants and other facilities that prepare and serve food as essential businesses, but subject to the limitations and requirements of the Governor's executive orders (DE [9-3], p. 6).

at *5 (quoting *Café La Trova, LLC v. Aspen Specialty Ins. Co.,* 2021 WL 602585, at *8 (S.D. Fla. Feb. 16, 2021). "While Plaintiff argues that a loss of functionality of, access to, or intended use of the [property] constitutes physical loss or damage, it is not supported by the plain language of the Policy or Florida law." *Id.* (quoting *Atma Beauty, Inc. v. HDI Global Specialty SE,* 2020 WL 7770398 (S.D. Fla. Dec. 30, 2020).

Based on the discussion above, the Court concludes that Plaintiffs have failed to allege facts that would establish coverage under the Policy and, therefore, Plaintiffs fail to state a claim for declaratory relief (Count I) or breach of contract (Count II). Because Plaintiffs cannot establish coverage on the facts alleged, the Court need not determine whether the contamination exclusion applies. For these reasons, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (DE [9]) is **GRANTED.** This cause is **DISMISSED WITH PREJUDICE.** The Clerk of Court is directed to **CLOSE** this case and **DENY AS MOOT** any remaining pending motions.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 31st day of March 2021.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished counsel via CM/ECF