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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SOUTHERN DENTAL BIRMINGHAM LLC,	)	
Plaintiff,	)	
v.	)	**Case No.: 2:20-cv-681-AMM**
THE CINCINNATI INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

This case is before the court on a motion to dismiss by Defendant The Cincinnati Insurance Company ("Cincinnati"). Doc. 29. For the reasons stated below, the motion is **DENIED**.

I. BACKGROUND

In relevant part, viewed in the light most favorable to Plaintiff Southern Dental Birmingham LLC ("Southern Dental"), the First Amended Complaint ("the complaint"), Doc. 27, alleges as follows:

Southern Dental operates a dental practice located at a building on Valleydale Road in Birmingham, Alabama ("the Covered Property"). *Id*. ¶¶ 1, 16. Southern Dental purchased an insurance policy ("the Policy") from Cincinnati relating to the

Covered Property. *Id*. ¶ 16; *see* Doc. 27-1.[1] As relevant here, the Policy provides that Cincinnati "will pay for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." FM 101 05 16, page 3 of 40. The Policy further provides that "Covered Causes of Loss means direct 'loss' unless the 'loss' is excluded or limited" by the exclusions expressly provided. *Id*. at 5. "Loss" is defined as "accidental physical loss or accidental physical damage." *Id*. at 38. The Policy specifically excludes some causes of "loss" such as radioactive contamination, mold, pollutants, and volcanic ash. *See id*. at 5-11.

The Policy also provides that Cincinnati "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 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss." *Id*. at 18. The Policy also provides: "When a Covered Cause of Loss causes damage to property other than Covered Property at a 'premises', [Cincinnati] will pay for the actual loss of 'Business Income' and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the 'premises'," provided that certain conditions are met. *Id*. at 19 ("the Civil Authority Provision").

[1] The Policy is attached to the complaint. Doc. 27-1. The portion of the Policy relevant to Cincinnati's motion is stamped "FM 101 05 16" at the bottom left corner of the page, and "Page [] of 40" at the bottom right corner. This portion of the Policy appears at Doc. 27-1 at 3-42. Because the pagination of the .pdf of the Policy differs from the pagination of the Policy, this order cites to FM 101 05 16, page [] of 40.

On March 13, 2020, the Governor of Alabama "declared the COVID-19 pandemic a public health state of emergency." Doc. 27 ¶ 30. COVID-19 is a potentially lethal disease caused by the virus SARS-CoV-2 ("the coronavirus"). *See id*. ¶¶ 8, 34. The coronavirus spreads rapidly through interaction between people and property, "lives on surfaces and is emitted into the air" through respiratory droplets, and "remains stable and transmittable in aerosols for up to three hours . . . and up to two to three days on plastic and stainless steel." *Id*. ¶¶ 32, 49, 50, 57, 63. The coronavirus renders property "unsafe or unusable." *Id*. ¶ 56.

"[N]umerous employees and patients of Plaintiff have been tested for and were confirmed positive for COVID-19, meaning the virus was physically present at the Covered Property." *Id*. ¶ 58. The Covered Property and the dental services Southern Dental performs there—services which ordinarily are not emergency procedures—make the property "highly susceptible to rapid person-to-property transmission of the virus," and "there is an ever-present risk that COVID-19 is present at Covered Property and would continue to be present if the business remained open to the public." *Id*. ¶¶ 55, 62, 64. Because of the "presence of COVID-19" at the Covered Property, and the "heighten[ed] . . risk of COVID-19 transmission" that is posed by Southern Dental's business, which "require[s] [its patients and employees] to interact in close proximity to the property and to one another" in "an enclosed building," Southern Dental had to suspend operations at

the Covered Property. *Id*. ¶¶ 61, 63, 64, 66. Likewise, the virus "was physically present on property surfaces throughout Alabama, including Birmingham," and "rendered these property unsafe, uninhabitable, or unfit for occupancy." *Id*. ¶¶ 57, 59.

On March 19, 2020, the State Health Officer for Alabama issued a statewide order closing certain classes of businesses and stating (among other things) that "all elective dental and medical procedures shall be delayed." Doc. 27-3 at 4. On March 27, 2020, the State Health Officer issued an order stating among other things that "all dental, medical, or surgical procedures shall be postponed until further notice, subject to the following exceptions: a. Dental, medical, or surgical procedures necessary to treat an emergency medical condition. . . . b. Dental, medical, or surgical procedures necessary to avoid serious harm from an underlying condition or disease, or necessary as part of a patient's ongoing and active treatment." Doc. 27-5 at 5.

These orders "prohibited access to the Covered Property by requiring Plaintiff to completely cease its on-premises business operations and by prohibiting Plaintiff from using the Covered Property to operate its business." Doc. 27 ¶ 54. The State Health Officer issued an order permitting dental services to resume on April 30, 2020 with some restrictions. Doc. 27-6 at 7.

These events caused Southern Dental to lose business income and incur extra expenses. Doc. 27 ¶¶ 38, 70, 73. Southern Dental submitted a claim to Cincinnati to

recover under the Policy. *Id*. ¶ 74. On April 29, 2020, Cincinnati sent Southern Dental a letter communicating that it was investigating the claim under a reservation of rights, and that "there must be direct physical loss or damage to Covered Property caused by a covered cause of loss in order for the claim to be covered," and that "the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises." Doc. 27-9 at 2-3.

Southern Dental filed this action on May 14, 2020. Doc. 1. The complaint includes a single count seeking a declaratory judgment that the losses Southern Dental incurred are covered under the Policy. Doc. 27 at 18-20. Cincinnati moved to dismiss, Doc. 29, and filed several notices of supplemental authority following briefing, Docs. 35, 36, 38, 39.

II. STANDARD OF REVIEW

A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint need not make "detailed factual allegations"; its purpose is only to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). To survive a motion to dismiss, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id*. To test

the complaint, the court discards any "conclusory allegations," takes the facts alleged as true, *McCullough v. Finley*, 907 F.3d 1324, 1333 (11th Cir. 2018), and "draw[s] all reasonable inferences in the plaintiff's favor," *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010). These facts and inferences must amount to a "plausible" claim for relief, a standard that "requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

III. ANALYSIS

Cincinnati advances two arguments in support of its motion to dismiss: (1) that Southern Dental does not adequately plead a Covered Cause of Loss; and (2) that Southern Dental does not adequately plead prohibition of access to the Property for purposes of its claim under the Civil Authority Provision. *See* Doc. 29 at 9, 13-16, 20-23. The court addresses each argument in turn.

A. Cincinnati has not established that, viewing the allegations in the light most favorable to Southern Dental, Southern Dental failed to plead a Covered Cause of Loss.

Cincinnati asserts that Southern Dental does not allege "facts showing any direct physical loss to the Property," which Cincinnati also characterizes as facts alleging: "physical injury to, or alteration of, the Property"; "that the structural integrity of the Property has been impacted"; and "that there has been physical damage . . . of the Property[] as opposed to health risks caused by the presence of Coronavirus in the environment." Doc. 29 at 9, 13, 14 (emphasis omitted).

Cincinnati asserts that Southern Dental's business interruption and loss of use of the Property is not physical loss or damage; and that Southern Dental failed to "allege that Coronavirus was found to be present on any surface at the Property." *Id*. at 13-15. In support of this last assertion, Cincinnati characterizes "the true genesis" of Southern Dental's claim as the "**threat** of Coronavirus" and "health risks caused by the presence of Coronavirus in the environment," and asserts that Southern Dental "tries to bootstrap its reduced business operations into an allegation of physical 'damage.'" *Id*. at 14 (emphasis in original).

Cincinnati's argument starts from an erroneous premise. Southern Dental has alleged the actual "presence of COVID-19" at the Property. Doc. 27 ¶ 61; *see also id*. ¶ 58 ("the virus was physically present at the Covered Property"). That Southern Dental also acknowledges that the coronavirus was "present throughout Alabama," *id*. ¶ 56, and that the pandemic posed health risks, does not diminish these allegations.

Further, Southern Dental alleges that its patients and employees tested positive for the coronavirus; construed in the light most favorable to Southern Dental, this allegation supplements its allegation that the coronavirus was present at the Property. *Id*. ¶ 58. Cincinnati argues that this specific allegation "is insufficient by itself to conclude that the virus" was physically present at the Covered Property, Doc. 29 at 15, but there is no legal requirement that a single factual allegation be

sufficient to support an entire complaint, and a complaint is not required to demonstrate conclusive proof of any fact alleged. Rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true," *Twombly*, 550 U.S. at 555, and the allegation that Southern Dental's patients and employees tested positive should be considered together with the other allegations in the complaint in determining whether this standard is satisfied.

Cincinnati urges the court to dismiss Southern Dental's complaint because it did not allege that the coronavirus "was found to be present **on a**[] **surface** at the Property," Doc. 29 at 15 (emphasis added), but the law does not require that level of detail in a pleading, and it would be error for the court to impose such a requirement, particularly in the light of Southern Dental's allegations the court has already recited. *Twombly*, 550 U.S. at 555 (observing that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").

Cincinnati's core argument is that the court should dismiss the case because the kind of loss Southern Dental alleges is not "physical damage" or "physical loss" within the meaning of the Policy. Doc. 29 at 9-17. Put differently, Cincinnati argues, "even assuming *arguendo* that Coronavirus was present at the Property, it would not have caused damage." *Id.* at 15. Cincinnati asserts that the modifier "physical" in the phrase "physical damage to property" means that the damage must undermine "the

structural integrity of the Property" and must be unable to be remediated by cleaning. *Id*. at 13-18. Cincinnati cites numerous cases applying law from other jurisdictions to support its argument. *Id*. at 16-17 & n.7 (citing, among others, *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020) (applying Florida law); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008); *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005)).

Southern Dental responds that it has adequately pleaded "direct physical loss" under the ordinary meaning of those words as they are defined in a dictionary. Doc. 31 at 14-21. Southern Dental also asserts that even if it were required also to plead physical damage, it has done so because "the plain meaning of the . . . term 'damage'" is that a property's "usefulness" has been impaired, *id*. at 13-14, and when a physical condition of the property "renders [it] unsuitable for its intended use," the property is physically damaged regardless whether its structural integrity also is undermined, *id*. at 18-19.

Cincinnati's argument is an insufficient basis for dismissal for two reasons. *First*, no controlling caselaw or doctrine requires dismissal on the ground Cincinnati urges. Because the court's jurisdiction is based on diversity jurisdiction, Doc. 27 ¶ 12, Alabama law governs construction of the Policy. *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 412 F.3d 1224, 1227 (11th Cir. 2005). Cincinnati relies almost exclusively on caselaw from other jurisdictions to define "physical

damage": none of the cases that Cincinnati cites is a decision by the Alabama Supreme Court or Court of Civil Appeals, or a decision on a question of Alabama law by the Eleventh Circuit or the United States Supreme Court. *See* Doc. 29 at 9-17. Cincinnati does not engage the fundamental rule of contract interpretation under Alabama law, which is that "'[w]hen analyzing an insurance policy, a court gives words used in the policy their common, everyday meaning and interprets them as a reasonable person in the insured's position would have understood them.'" *State Farm Mut. Auto. Ins. Co. v. Brown*, 26 So. 3d 1167, 1169 (Ala. 2009) (quoting *B.D.B. v. State Farm Mut. Auto. Ins. Co.*, 814 So. 2d 877, 879-880 (Ala. Civ. App. 2001)). A common, everyday meaning does not rely on "technical or legal terms," *Safeway Ins. Co. of Ala. v. Herrera*, 912 So. 2d 1140, 1143 (Ala. 2005), and a reasonable person in the insured's position is "not a lawyer," *St. Paul Fire & Marine Ins. Co. v. Edge Mem'l Hosp.*, 584 So. 2d 1316, 1322 (Ala. 1991). "In determining the common meaning of the terms of an insurance policy," courts in Alabama have "looked to dictionary definitions," *B.D.B.*, 814 So. 2d at 880, as well as "to the writing as a whole and to its nature, purpose, and subject matter," *Blue Cross & Blue Shield of Alabama v. Beck*, 523 So. 2d 121, 124 (Ala. Civ. App. 1988). Moreover, if a term is "reasonably susceptible to more than one meaning," *Blue Cross & Blue Shield of Alabama*, 523 So. 2d at 124, one of which favors an insured, then the term

must be given the meaning that favors the insured, *State Farm Mut. Auto. Ins. Co.*, 26 So. 3d at 1169-70.

Although Cincinnati interprets the phrase "physical damage" to mean something like "uncleanable compromised structural integrity," the Policy does not define the words "physical" or "damage." *See* Doc. 29 at 13-16; Doc. 27-1. (The Policy defines "loss," but autologically: "accidental physical loss or accidental physical damage." Doc. 27-1, FM 101 05 16, page 38 of 40.) Cincinnati does not identify dictionary definitions that would support its interpretation of the phrase, let alone demonstrate that when the dictionary and the Policy as a whole (including its nature, purpose, and subject matter) are consulted, the only ordinary meaning of "physical damage" is one that favors Cincinnati. In the absence of a robust analysis establishing that the only ordinary meaning of "accidental physical loss or accidental physical damage" forecloses Southern Dental's claims as a matter of Alabama law, the court will not dismiss those claims.

Second, Cincinnati's argument fails because Cincinnati does not identify any binding precedent that forecloses an interpretation of "accidental physical loss or accidental physical damage" that asks whether a physical condition of the property "renders [it] unsuitable for its intended use." Doc. 31 at 18. Indeed, the only Eleventh Circuit case Cincinnati cites, *Mama Jo's Inc. v. Sparta Insurance Co.*, 823 F. App'x

868 (11th Cir. 2020),[2] leaves this door open. There, "dust and debris generated by" road construction migrated into the plaintiff's restaurant. *Id*. at 871. Restaurant employees cleaned up the dust "using . . . normal cleaning methods," allowing the restaurant to remain open for ordinary operations every day. *Id*. In the coverage litigation that followed, the Eleventh Circuit rejected the restaurant's argument that the district court erred when it held that "'direct physical loss' . . . requires a showing that the property be rendered uninhabitable or unusable." *Id*. at 875. The Eleventh Circuit held that "the district court correctly granted summary judgment on [the restaurant's] cleaning claim because, 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.* at 879 (citing applicable Florida precedents addressing definition of "direct physical loss" and considering dictionary definitions). This holding was based on the fact that the restaurant remained open for ordinary operations in spite of the dust and debris, suggesting that the dust and debris did not damage the facility because it remained useful for ordinary operations. In contrast, Southern Dental has alleged that it had to close its facility because the presence of the coronavirus and the ongoing risk the virus presented made the facility unusable.

On reply, for the first time, Cincinnati turns its focus to "loss" (as distinct from "damage") and insists that Southern Dental's loss of use of the property is not direct

[2] A petition for certiorari to the Supreme Court was recently filed in *Mama Jo's*.

physical loss or direct physical damage because the Policy covers "loss **to** property," not loss "of" property. Doc. 33 at 8-9 (emphasis in Cincinnati's brief). The court ordinarily does not consider arguments made for the first time on reply. In any event, again Cincinnati did not support its position with an analysis of Alabama cases and applicable Alabama rules of construction. Accordingly, Cincinnati's new argument on reply is not a basis for the dismissal of Southern Dental's claim.

In Cincinnati's first and third notices of supplemental authority, Docs. 35, 38, Cincinnati cites two district court decisions applying Alabama law, but those cases are unlike this one. In *Hillcrest Optical, Inc. v. Continental Casualty Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020), the plaintiff did "not allege COVID-19 was present on its premises." *Id*. at *2. In deciding "whether a temporary inability to use property due to governmental intervention constituted a direct physical loss of property," the court considered numerous Alabama precedents and a request to certify that question to the Alabama Supreme Court. *Id*. at *4-6. In holding that such loss of use was not physical loss or damage, the court distinguished cases alleging "physical contamination of premises that were rendered unusable." *Id*. at *5.

In *Drama Camp Productions, Inc. v. Mt. Hawley Insurance Co.*, No. 1:20-CV-266-JB-MU, 2020 WL 8018579 (S.D. Ala. Dec. 30, 2020), the plaintiffs alleged that "they suffered a substantial loss of business income because of" a statewide

order, not because of "an unsound and or unhealthy condition of the property itself." *Id*. at *2, *6. The court distinguished cases in which plaintiffs pleaded "physical contamination of premises," and held that the plaintiffs had "failed to allege a direct physical loss of or damage to their respective properties." *Id.* at *5. Accordingly, these supplemental authorities do not alter the result of the court's analysis of Cincinnati's motion.

Because Southern Dental alleges that the coronavirus was present on the Property and impaired the Property's ordinary use, and because Cincinnati has not established under controlling precedent or doctrine that, construed in the light most favorable to Southern Dental, this allegation is necessarily insufficient to plead a Covered Cause of Loss, the court denies Cincinnati's motion to dismiss on the ground that Southern Dental failed to plead that its facility suffered "loss" within the meaning of the Policy.

B. Cincinnati has failed to establish that, viewing the allegations in the light most favorable to Southern Dental, Southern Dental failed to plead prohibition of access for purposes of the Civil Authority Provision.

Southern Dental also asserts that its losses are covered under the Civil Authority Provision of the Policy. Doc. 27 at 18-20. In connection with this claim, Southern Dental alleges that business properties other than Southern Dental's were contaminated with the coronavirus, rendering those properties unsafe, *id*. ¶¶ 57, 59; that in response, civil authorities issued an order acknowledging "conditions

prejudicial to health in public places," warning that a novel virus had "epidemic potential," and directing certain businesses to close to the public except in cases of emergency, *id*. ¶¶ 41-55, 59; Doc. 27-3 at 2; and that Southern Dental's practice consisted almost entirely of elective dental procedures, not emergency ones, Doc. 27 ¶ 55, so it complied with the order by "completely ceas[ing] its on-premises business operations," *id.* ¶ 54.

> Recall that the Civil Authority Provision of the Policy provides:
>
> > When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
> >
> > (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
> >
> > (b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage . . . .
>
> Doc. 27-1, FM 101 05 16, page 19 of 40.

Cincinnati moves to dismiss Southern Dental's claim under this provision on two grounds. *First*, Cincinnati asserts that "just as the Coronavirus is not causing direct physical loss to [Southern Dental's Property], it is also not causing direct physical loss to other property." Doc. 29 at 21. This argument fails for the reasons discussed in Part A, *supra,* and because Southern Dental pleaded that property other than its Property was damaged:

> [T]he COVID-19 pandemic and the resultant Civil Authority Orders caused numerous businesses' properties throughout Birmingham, Alabama (including the area surrounding Plaintiff's business) to lose their intended uses and rendered these properties unsafe, uninhabitable, or unfit for occupancy. Due to the COVID-19 pandemic and the resultant Civil Authority Orders, the physical spaces of these other properties were unable to function in the manners in which they had functioned prior to the COVID-19 pandemic. As such, the COVID-19 pandemic caused direct physical loss or damage to property other than Plaintiff's.

Doc. 27 ¶¶ 59, 60.

Second, Cincinnati asserts that Southern Dental did not sufficiently plead a prohibition of access to its premises because the civil authority orders referenced in the complaint were not actually prohibitions—they were more like "curfew orders" or "shelter in place" orders that "keep[] people confined to their homes," but do not expressly prohibit all access to a premises. Doc. 29 at 22. Cincinnati asserts that "the question is solely whether any individuals were legally permitted to enter the Property," *id*. at 23, and points to Southern Dental's acknowledgment that the civil authority "orders allowed for necessary and emergency dental procedures," Doc. 31 at 32. *See* Doc. 33 at 10. But Cincinnati cites no Alabama law and engages no applicable Alabama legal doctrine to support its position. Cincinnati asserts in a single sentence that "access to premises must be prohibited, not just limited," and cites summary judgment orders from state and federal trial courts in other jurisdictions, but offers no analysis about why those cases require dismissal of Southern Dental's complaint under Alabama law at the pleading stage. Doc. 29 at 22.

Further, Cincinnati's argument that Southern Dental has equated a "decreased level of business" with a "prohibition of access," Doc. 29 at 23, fails to account for Southern Dental's allegation that it complied with the civil authority order by "completely ceas[ing] its on-premises business operations," Doc. 27 ¶ 54. Accordingly, Cincinnati's motion to dismiss on this ground fails.

IV. CONCLUSION

For the foregoing reasons, Cincinnati's motion to dismiss, Doc. 29, is **DENIED**.

DONE and **ORDERED** this 19th day of March, 2021.

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE