

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KENNETH SEIFERT d/b/a THE HAIR PLACE
and HARMAR BARBERS, INC., *individually
and on behalf of all others similarly
situated,*

Civil No. 20-1102 (JRT/DTS)

Plaintiffs,

v.

IMT INSURANCE COMPANY,

Defendant.

**MEMORANDUM OPINION AND ORDER
DENYING IN PART AND GRANTING IN
PART DEFENDANT'S MOTION TO
DISMISS**

Amanda M. Williams and Daniel E. Gustafson, **GUSTAFSON GLUEK PLLC**, 120 South Sixth Street, Suite 2600, Minneapolis, MN 55402; and Yvonne M. Flaherty, **LOCKRIDGE GRINDAL NAUEN PLLP**, 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401, for plaintiffs.

Shayne M. Hamann, **ARTHUR, CHAPMAN, KETTERING, SMETAK & PIKALA PA**, 81 South Ninth Street, Suite 500, Minneapolis, MN 55402, for defendant.

Plaintiff Kenneth Seifert filed this action to collect lost business income after executive orders mandated the closure of his hair salon and barbershop due to the rising number of COVID-19 cases in Minnesota, lost income alleged to be covered under the insurance policies he purchased from Defendant IMT Insurance Co. ("IMT"). IMT has filed a Motion to Dismiss, claiming that the policies do not cover Seifert's losses and that, even if they did, the virus exclusion contained in the policies would preclude recovery.

Because the business income provision of the policies insures against a direct physical loss of property, as when government mandates deprive a business owner of legally occupying or using the premises and property as intended, Seifert plausibly alleges that he is entitled to coverage. Additionally, because the virus exclusion is only triggered by a direct or indirect contamination of the covered premises, the exclusion has no effect with respect to Seifert's alleged losses. However, coverage under the civil authority provision of the policies is unavailable and the doctrine of regulatory estoppel is inapplicable. Thus, the Court will grant in part and deny in part IMT's Motion to Dismiss.

BACKGROUND

I. FACTUAL BACKGROUND

In an earlier decision, the Court laid out the relevant facts in detail. *See Seifert v. IMT Ins. Co.*, 495 F. Supp. 3d 747, 749–50 (D. Minn. 2020). As Seifert has not alleged any new facts in the Amended Complaint, the Court will briefly summarize them here.

Seifert's businesses, The Hair Place and Harmar Barbers, Inc., were ordered to close by two executive orders issued in response to the growing number of COVID-19 cases in Minnesota.¹ (Am. Compl. ¶¶ 1–2, 4, 27–28, Nov. 10, 2020, Docket No. 36.) As a

¹ Minn. Emergency Exec. Order No. 20-08 (Mar. 18, 2020), https://mn.gov/governor/assets/Filed%20EO-20-08_Clarifying%20Public%20Accommodations_tcm1055-423784.pdf; *see also* Minn. Emergency Exec. Order No. 20-04 (Mar. 16, 2020), https://mn.gov/governor/assets/2020_03_16_EO_20_04_Bars_Restaurants_tcm1055-423380.pdf.

result, Seifert contacted an authorized IMT agent to file a claim for lost business income. (*Id.* ¶ 35.) Seifert was advised that his losses were not covered. (*Id.* ¶¶ 5, 35.)

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.” (Aff. of Shayne M. Hamman ¶ 3, Ex. A (“Policy”) at 82, May 29, 2020, Docket No. 13-1.²) “Covered Cause[] of Loss” is defined as a “[d]irect physical loss unless the loss is excluded.” (Policy at 78.) “Operations” is defined as “business activities occurring at the described premises.” (*Id.* at 109.) And “period of restoration” is the period of time beginning “after the time of direct physical loss or damage” and ending on the date when “the property at the described premises should be repaired, rebuilt or replaced” or when “business is resumed at a new permanent location.” (*Id.* at 109–10.)

The policies also contain a civil authority provision, which protects against the actual loss of business income when “a Covered Cause of Loss causes damage to property” other than the insured property and, as a consequence, “[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage” and the civil authority has acted either in response to dangerous physical

² The four policies issued to Seifert are identical. As such, the Court will simply cite to Exhibit A instead of all four exhibits.

conditions from the damage or to have unimpeded access to the damaged property. (*Id.* at 85.)

Finally, the policies contain a virus exclusion, which precludes coverage for loss or damage caused by a “virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” (*Id.* at 96.) Such loss or damage, whether caused directly or indirectly, is excluded “regardless of any other cause or event that contributes concurrently or in any sequence to the loss . . . whether or not the loss event results in widespread damage or affects a substantial area.” (*Id.* at 93.)

II. PROCEDURAL BACKGROUND

On May 6, 2020, Seifert filed a Complaint, alleging breach of contract and seeking declaratory and monetary relief. (Compl. ¶¶ 37–48, May 6, 2020, Docket No. 1.) In response, IMT filed a Motion to Dismiss pursuant to Rule of Civil Procedure 12(b)(6). (Mot. Dismiss, May 29, 2020, Docket No. 9.) The Court granted IMT’s Motion without prejudice to allow Seifert an opportunity to amend the pleadings, especially as the law concerning business interruption coverage with respect to the COVID-19 pandemic was very much in development. *Seifert*, 495 F. Supp. 3d at 753; *id.* at 753 n.7.

On November 4, 2020, Seifert filed a Motion for Extension of Time,³ (Mot. Extension, Nov. 4, 2020, Docket No. 29), and then an Amended Complaint on November

³ Under Rule 6(b), “[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . if a request is made, before the original time or its extension expires.” Fed. R. Civ. P. 6(b)(1). “[M]otions to extend are to be

10, 2020, alleging three Counts: (1) Breach of Contract; (2) Declaration of Rights; and (3) Regulatory Estoppel, (Am. Compl. ¶¶ 57–76.) IMT has filed a second Motion to Dismiss pursuant to Rule 12(b)(6). (Mot. Dismiss, Nov. 24, 2020, Docket No. 37.)

DISCUSSION

I. STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), the Court considers all facts alleged in the complaint as true to determine if the complaint states a “claim to relief that is plausible on its face.” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Court construes the complaint in the light most favorable to the plaintiff, drawing all inferences in plaintiff’s favor. *Ashley Cnty. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

Although the Court accepts the complaint’s factual allegations as true, it is not bound to accept as true a legal conclusion couched as a factual allegation. *Bell Atl. Corp.*

liberally permitted . . . to secure the just, speedy, and inexpensive determination of every action.” *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987) (citation omitted); see also 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (4th ed.) (stating that a request will normally be granted absent bad faith or prejudice).

Here, Seifert proceeded to file the Amended Complaint late without having received permission first. However, the Court finds that there was good cause for the six-day enlargement and that IMT was not prejudiced by it. Further, the Court held a hearing and has fully considered the pleadings and briefs, and deciding a case on the merits is always preferable to dismissing an action based on a procedural technicality. As such, the Court will grant Seifert’s Motion for Extension of Time.



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