

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

CHRISTIE JO BERKSETH-ROJAS	§	
DDS, individually and on behalf of all	§	
others similarly situated,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 3:20-CV-0948-D
VS.	§	
	§	
ASPEN AMERICAN INSURANCE	§	
COMPANY,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION  
AND ORDER

The instant motion to dismiss under Fed. R. Civ. P. 12(b)(6) presents the question whether plaintiff, a dentist, has plausibly pleaded a breach of contract or declaratory judgment claim based on an insurer’s failure to cover COVID-19 virus-based losses under an “all risk” commercial property insurance policy that requires direct physical damage or loss to property. Concluding that she has not, the court grants the insurer’s motion to dismiss and also grants plaintiff leave to replead.

I

This is an action by plaintiff Christie Jo Berkseth-Rojas DDS (“Dr. Berkseth-Rojas”)<sup>1</sup> against defendant Aspen American Insurance Company (“Aspen”) arising from Aspen’s denial of business interruption insurance coverage for losses Dr. Berkseth-Rojas alleges she

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<sup>1</sup>Dr. Berkseth-Rojas has also filed a motion to certify a class of plaintiffs similarly situated to her. This motion remains pending.

has suffered to her dental practice due to the COVID-19<sup>2</sup> pandemic. Dr. Berkseth-Rojas purchased an “all risk” commercial property insurance policy (the “Policy”) from Aspen that insured her Minneapolis, Minnesota dental practice for certain losses for the period December 6, 2019 to December 6, 2020.

According to her first amended complaint,<sup>3</sup> on March 19, 2020 the Governor of the State of Minnesota issued an executive order that “all non-essential or elective surgeries and procedures, including non-emerg[ency] or elective dental care, that utilize PPE or ventilators must be postponed indefinitely.” Am. Compl. ¶ 42 (internal quotation marks omitted; brackets in original). Dr. Berkseth-Rojas alleges that the presence of COVID-19 and this and similar executive orders (the “Orders”) caused her to lose practice income and incur extra expenses covered by the Policy, such as the cost of installing a sneeze-guard plexiglass shield in the reception area. She provided a notice of a claim under the Policy to Aspen on March 27, 2020. On the same day, Aspen denied the claim.

Shortly thereafter, Dr. Berkseth-Rojas filed this lawsuit, alleging claims for breach of contract and seeking a declaratory judgment that the Policy covers her business losses due

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<sup>2</sup>I.e., “coronavirus” or “SARS-CoV-2.”

<sup>3</sup>In deciding Aspen’s Rule 12(b)(6) motion, the court construes the first amended complaint in the light most favorable to Dr. Berkseth-Rojas, accepts as true all well-pleaded factual allegations, and draws all reasonable inferences in her favor. *See, e.g., Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004).

to the COVID-19 pandemic and executive orders.<sup>4</sup> Aspen moves to dismiss the suit under Rule 12(b)(6) for failure to state a claim on which relief can be granted.

## II

“In deciding a Rule 12(b)(6) motion to dismiss, the court evaluates the sufficiency of [plaintiff’s] amended complaint by ‘accepting all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.’” *Bramlett v. Med. Protective Co. of Fort Wayne, Inc.*, 855 F.Supp.2d 615, 618 (N.D. Tex.2012) (Fitzwater, C.J.) (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotation marks and alteration omitted)). To survive Aspen’s motion to dismiss under Rule 12(b)(6), Dr. Berkseth-Rojas must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (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*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*; *see also Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level[.]”). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘shown’—‘that the

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<sup>4</sup>The first amended complaint alleges eight counts. The four breach of contract counts (counts I-IV) are based, respectively, on the Practice Income, Civil Authority, Extra Expense, and Sue and Labor provisions. Each breach of contract claim has a corresponding declaratory judgment claim (counts V-VIII) based on the same provision.

pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679 (quoting Rule 8(a)(2)) (alteration omitted). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678 (citation omitted).

### III

The court turns first to Dr. Berkseth-Rojas’s claims for breach of the Policy.<sup>5</sup>

#### A

Dr. Berkseth-Rojas alleges that she has suffered covered business losses due to (1) the presence or spread of the COVID-19 virus generally and (2) the Orders prohibiting full operation of her dental practice. She avers that these are covered causes of loss that trigger Policy coverage under (1) the Practice Income provision, (2) the Extra Expense provision, (3) the Civil Authority provision, and (4) the Sue and Labor provision. Dr. Berkseth-Rojas asserts that the following are covered causes of loss: “[b]ecause of the spread or presence of COVID-19, the air in Plaintiff’s property has become unsafe, necessitating repairs such as the installation of a sneeze-guard plexiglass shield at the reception to protect patients and staff.” Am. Compl. ¶ 53.

In addition, the functional space in the building has been diminished by the spread or presence of COVID-19. For example, the waiting room and reception area have lost their normal functionality and their space has been diminished. Plaintiff has instituted measures to repair the physical loss or damage such as requiring patients to wait in their cars until called or texted by staff, allowing only one person in the

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<sup>5</sup>These claims are alleged in counts I-IV, based, respectively, on the Practice Income, Civil Authority, Extra Expense, and Sue and Labor provisions.

reception area at a time, and preventing adult patients from being accompanied.

*Id.* at ¶ 54. “The [Orders] . . . prohibited access to Plaintiff’s and the other Class member’s Covered Property, and the area immediately surrounding Covered Property, in response to dangerous physical conditions resulting from a Covered Cause of Loss.” *Id.* at ¶ 55.

Aspen maintains that Dr. Berkseth-Rojas has not alleged a covered loss within the scope of the Policy under any of the provisions she claims. It contends that, under the Practice Income, Extra Expense, Civil Authority, and Sue and Labor provisions of the Policy, coverage is only triggered by direct physical damage or loss to the dental practice; likewise, direct physical damage or loss to property other than the dental practice is required to trigger coverage under the Civil Authority provision. Aspen contends that, to sufficiently allege that any Policy provision applies, Dr. Berkseth-Rojas must assert that there has been direct physical damage or loss to some property. Aspen further maintains that, under Minnesota law, direct physical damage or loss means tangible, discernible alteration of insured property, not merely loss of use or functional impairment of property. *See* D. Mot. at 10-11 (citing *Pentair, Inc. v. Am. Guarantee & Liability Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (rejecting argument that “direct physical loss or damage is established whenever property cannot be used for its intended purpose”); *Source Food Tech., Inc. v. U.S. Fid. & Guarantee Co.*, 465 F.3d 834, 836 (8th Cir. 2006) (rejecting argument that losses due to government regulation are direct physical losses to property)). On this point, Aspen notes that Dr. Berkseth-Rojas alleges that “the air in [her] property has become unsafe” and that “functional

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