

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM - PART 54
3 - - - - -X

3 CONSOLIDATED RESTAURANT OPERATIONS,
4 INC.,
5 Plaintiff,
6 - against -
7 WESTPORT INSURANCE CORPORATION,
8 Defendant.

INDEX NUMBER:
450839/2021


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Microsoft Teams
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B E F O R E :

HONORABLE JENNIFER G. SCHECTER,
JUSTICE OF THE SUPREME COURT

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ALSO PRESENT:

Rachel Scharf

KAREN PERLMAN, RMR, CRR
SENIOR COURT REPORTER

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1 THE COURT: Good morning, everyone.

2 Hi, Karen.

3 Everyone ready to proceed?

4 MS. COHEN: Yes, Your Honor.

5 MR. McCORMACK: Yes.

6 THE COURT: Terrific. Good morning.

7 So we're here for oral argument today in what I'll
8 call *CRO versus Westport*. And this is Westport's motion to
9 dismiss. And at issue here is the insurance policy, which
10 insures, and I quote, All risks of direct physical loss or
11 damage to insured property while on insured location.

12 Now, CRO, as the policyholder here, has the burden
13 of showing that potentially there is coverage. So I'm
14 really going to start with CRO here.

15 And I'm also -- the most important documents for me
16 in connection with this motion are, of course, the insurance
17 policy and the complaint itself.

18 And I want to start with paragraph 63 of the
19 complaint. And focus in on the language there. And
20 specifically the portion that says even for restaurants
21 where coronavirus was present, and now I quote, no
22 restaurants had access limited or prohibited...due to the
23 actual, not suspected, presence of the virus.

24 Ms. Cohen, why isn't that the end here? How can it
25 be that losses here resulted from direct physical loss or

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1 damage to the insured property?

2 And most specifically what I want to know is, based
3 on the allegations in the complaint -- and I'd like you to
4 point me to the complaint, what is the insured property here
5 that was physically lost or damaged?

6 MS. COHEN: Thank you, Your Honor.

7 Let me direct your attention to paragraph 63. And
8 that paragraph was really designed to discuss communicable
9 disease sublimit.

10 That communicable disease sublimit is separate and
11 apart from the time limit coverage that we are seeking
12 coverage on. The communicable disease sublimit is something
13 that you buy extra. And it has its own requirements.

14 Now, Westport will concede that with respect to
15 that communicable disease sublimit, you do not need to show
16 physical loss or damage. With respect to all the other
17 coverages that -- all the other time element coverages, you
18 do need to show physical loss or damage.

19 The purpose of paragraph 63 was to demonstrate that
20 we might not fit within the communicable disease sublimit
21 because the orders that were issued were issued by
22 governors. And there is a factual issue whether
23 governmental orders include orders that are issued by the
24 governor. It wasn't intended to suggest that we do not have
25 physical loss or damage on the properties which are the

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1 restaurants.

2 If Your Honor goes --

3 THE COURT: Okay.

4 MS. COHEN: Yes?

5 THE COURT: Are you going to point me to
6 paragraph 36?

7 MS. COHEN: I'm going to point Your Honor to
8 paragraph 36 and to paragraph --

9 THE COURT: Because it doesn't work for me. And
10 I'll tell you why it doesn't work for me. Other than
11 reciting the language of the policy -- and we can go to 17
12 to 22 next also. But let's look at paragraph 36. The
13 losses result from direct physical loss or damage to
14 property, including, but not necessarily limited to, the
15 actual presence of the virus in the restaurants, and then it
16 says the threatened presence of the virus in the restaurant
17 due to its ubiquity and the loss of function, purpose, and
18 use of restaurants all caused by the virus, the resulting
19 disease, the pandemic, governmental negligence, or the
20 orders. And "the orders," I take it, are the stay-at-home
21 orders.

22 But in any event, I still don't see there any
23 allegation of what insured property was physically lost or
24 damaged.

25 MS. COHEN: So, Your Honor, paragraph 36 was

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1 intended to make clear, and maybe it hasn't done it for the
2 satisfaction of this Court, but paragraph 36 and
3 paragraph 61 was intended to allege that the virus, in fact,
4 was on the restaurants, including all of the restaurants.

5 And so what we intended to state in paragraph --
6 both 36 and paragraph 61, that, in fact -- and that is a
7 fact, Your Honor, because we can prove it -- that, in fact,
8 there was the virus on all 40 restaurants.

9 We have --

10 THE COURT: Let me ask you this: In the
11 same -- where -- how was the virus in all 40 restaurants?
12 And are you saying that the virus similarly was in every
13 place, or are you just saying in all 40 restaurants,
14 distinct from every place else?

15 MS. COHEN: We are -- Your Honor, if we're given
16 the opportunity -- and this is factually correct -- we can
17 prove that the virus was on the 40 properties, the 40
18 restaurants.

19 And the way --

20 THE COURT: So explain it to me --

21 MS. COHEN: Sure. Sure.

22 THE COURT: -- how was the virus on all 40 of the
23 properties because it did not come through to me in the
24 complaint or the papers.

25 MS. COHEN: Sure.

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1 The restaurants would log in who had the virus. So
2 for many of these restaurants, we have logs of individuals
3 who entered into the restaurants and who had the virus. And
4 so --

5 THE COURT: Okay.

6 MS. COHEN: And that's, by the way -- just to be
7 clear, Your Honor, that is very common both in New York and
8 in Dallas and across the country. The policyholders, when
9 they realized there was an issue, back in January and
10 February, they would try to retrace their steps and figure
11 out whether there were any customers who went and ate at the
12 restaurants who actually had COVID.

13 So we will be able to prove to Your Honor's
14 satisfaction that, in fact, it's not that it was just
15 ubiquitous, that's not what we're going to be suggesting.
16 What we're going to be proving is that, in fact, customers
17 and patrons of these restaurants ended up having COVID.
18 And, therefore, we're going to prove that, in fact, the
19 COVID was on the property.

20 THE COURT: Now, what property, in particular, was
21 it on? And what steps were taken to remove it, if any? So,
22 for example, if you're going to tell me that there was a
23 patron in the restaurant on X night, or X day, or at X time,
24 and they came in with the virus, what specific property of
25 these restaurants did they infect to render the property

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1 such that it was direct physical loss or damage that caused
2 the losses here?

3 MS. COHEN: Sure. So what we will show is when we
4 had evidence that there was COVID on the property, and we're
5 talking about the restaurants, the 40-plus restaurants --

6 THE COURT: On the tables? One second. When you
7 say "on the restaurant," are you saying on a doorknob? Are
8 you saying on the tables? And was it left there and
9 nothing -- not sanitized? Is it still there?

10 MS. COHEN: Okay. All of those questions,
11 Your Honor -- what we will show through expert testimony, if
12 given the opportunity, is that the virus is in the air --

13 THE COURT: So it's in the air. One moment.
14 Because I want to break down everything that you say. So
15 it's in the air.

16 Go ahead.

17 MS. COHEN: Okay. And the particles that are in
18 the air then drop down to the structures in the restaurants,
19 like the surfaces, the tables, the chairs, and they form
20 what is known as fomites or what we call disease vectors.
21 And they sit right on top of these tables and chairs.

22 And we will prove this through expert testimony.
23 We have this in other cases.

24 And what happens is if you touch the chair or the
25 table that has that fomite or that disease vector, you can

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1 -- and many did -- get the virus.

2 THE COURT: Okay.

3 MS. COHEN: So --

4 THE COURT: What if nobody that has the virus is in
5 the restaurant and the restaurant is clean, sanitized?

6 MS. COHEN: Well, it depends. You'll see in our
7 paragraphs 17 through 20, there is scientific evidence that
8 demonstrates that the particles stay on the surfaces for
9 weeks and so --

10 THE COURT: One moment. They stay on the surfaces
11 for weeks perhaps if it's left alone. What if -- what
12 if the -- what if the locations are sanitized? Minimally
13 sanitized?

14 I mean, we know that people went to grocery stores
15 who had COVID and the grocery stores weren't shut down, even
16 though the same thing that you're saying happened in those
17 locations, or in other places that were able to remain open,
18 the exact same thing was happening. So what makes the
19 restaurants special?

20 And, again, I appreciate that paragraphs 17 to 20
21 or 22 talk about what could happen and how in restaurants
22 it's particularly susceptible to transmission. Of course
23 that's because people are there with the virus and are
24 eating. And I don't know that that's the result of touching
25 the tables versus it's the people who are there with the

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1 viruses, there are other people and it's in the air, like
2 you said. That's the issue.

3 MS. COHEN: Sure. So -- so -- what we have alleged
4 and what is factually correct and what our experts will show
5 is that in a restaurant in particular, it's difficult to
6 control because the COVID is continually being reintroduced
7 as new customers eat at the restaurants. So it's --

8 THE COURT: So isn't that, Ms. Cohen, the result of
9 the fact that they're not going to have masks, it's easier
10 to ingest, but in theory they could wipe down the tables
11 every two minutes? And, again, to be clear, I'm not saying
12 that's practical. But what I am suggesting is that I'm not
13 understanding here how there's actual physical loss or
14 damage to the insured property that is alleged to have
15 caused these losses, as opposed to exposure to the virus in
16 the air and difficulties inherent in restaurants because of
17 how the virus is spread.

18 MS. COHEN: So let me answer that in two ways,
19 Your Honor. First of all, you can't just wipe it down. And
20 even if you could, it's constantly getting reintroduced.
21 And so because of the dangerous nature and the persistent
22 nature of the virus, just -- and because it's being
23 reintroduced continually --

24 THE COURT: Reintroduced by who? Or how?
25 Reintroduced how?

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1 MS. COHEN: Reintroduced by new patrons coming into
2 the restaurants.

3 THE COURT: So isn't that the problem, though, that
4 it's patrons who were bringing in the virus which is
5 communicable through the air, as opposed to property that
6 remains on the location?

7 If the property was unexposed to people, would it
8 be a loss or damage that would cause losses here? If just
9 the objects were in the restaurants without people, how
10 would that work?

11 MS. COHEN: So if Your Honor is asking me if
12 there's no new patrons that come in a restaurant and it's
13 not being reintroduced, the question is whether you can
14 just -- just rub it away, basically clean it away routinely.
15 The answer is no.

16 What the experts will testify is that you cannot
17 routinely just clean COVID. What you have to do is you have
18 to physically change the restaurant's configuration. You
19 have to add new ventilation systems. You have to do all --

20 THE COURT: One moment. I'm not understanding,
21 Ms. Cohen. All of that seems to be measures taken to
22 prevent people from transmitting the disease or the virus
23 one to the other. But that's not telling me that it's
24 damage to property, physical damage to property that's
25 causing the issues here.

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1 MS. COHEN: Your Honor, we respectfully disagree
2 for this reason is once the COVID is on the structures --
3 and we'll assume it's not being reintroduced. Your Honor is
4 asking a factual question as to whether it can just be
5 routinely cleaned. And what we are suggesting to the Court,
6 the answer is no. What we --

7 THE COURT: You know what, let's even take it out
8 of the facts --

9 MS. COHEN: Okay.

10 THE COURT: -- of possibilities. Let's take it on
11 the pleadings. What is the property here, the insured
12 property that suffered some type of physical loss or damage?

13 MS. COHEN: It's the restaurant, Your Honor. It's
14 the --

15 (Whereupon, the court reporter advised the Court
16 and counsel of audio interference.)

17 THE COURT: That person, I still see that they're
18 not on mute. All right.

19 581 -- 212, we're calling you out, please mute.

20 Let's -- they're still not muted. Maybe they don't
21 know how to mute.

22 If anyone knows who that person is, I'm speaking to
23 lawyers, because maybe you would know, I don't know. In any
24 event, let's try to --

25 THE CLERK: I muted them. I muted them.

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1 THE COURT: Thank you.

2 MS. COHEN: Your Honor, let me approach it a little
3 differently because what you're suggesting is that you're
4 focused on the language "physical damage." As Your Honor
5 noted from the beginning, we are dealing with -- we have to
6 either satisfy physical loss or physical damage.

7 THE COURT: Correct.

8 MS. COHEN: Okay. So --

9 THE COURT: I'm focused on "physical."

10 MS. COHEN: Okay. You're focused -- there is no
11 question that even they would concede that the virus is
12 physical. It creates --

13 THE COURT: The virus is physical.

14 MS. COHEN: Okay.

15 THE COURT: My question is what is the physical
16 loss or damage?

17 MS. COHEN: Okay. The physical loss -- and this
18 is on your --

19 THE COURT: Because to be clear, the cause here is
20 something physical. But I'm looking for physical loss or
21 damage, and specifically to insured property.

22 MS. COHEN: Sure.

23 So I am going to quote, Your Honor, and rely on the
24 appellate decisions in New York to give you that answer.

25 THE COURT: *Roundabout?*

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1 MS. COHEN: Okay. Not -- *Round-* -- where -- that's
2 a good -- that's a good way to start.

3 *Roundabout*, Your Honor, we are not *Roundabout*.
4 *Roundabout* --

5 THE COURT: Why? Because of the on-site/off-site
6 distinction? Because I don't buy that. I don't see how
7 this isn't squarely what *Roundabout* discusses.

8 MS. COHEN: Okay. Your Honor, *Roundabout* -- even
9 their cases agree that we are not within the *Roundabout* line
10 authority.

11 *Roundabout* was strictly a loss-of-use case where
12 there was no physical impact on the covered property.

13 Here, we fit with -- more within the *Port Authority*
14 cases, the *Kim-Chee* cases, the -- the *PepsiCo* case where you
15 have an intrusion of a hazardous substance on the property
16 that causes a loss of use. And what "loss of use" means is
17 you cannot use the property for its intended purpose.

18 What the carriers have done here, Your Honor, is
19 they created a false construct. Either you have loss of
20 use, untethered to physical impact, or you have structural
21 damage.

22 The appellate courts in New York have been clear.
23 There is a middle ground. And I'm focused on the physical
24 loss of use.

25 What the appellate courts in New York have said is

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1 if you have loss of use to -- as a result of the presence of
2 a hazardous substance on your property that causes you not
3 to be able to use the property for its intended use, that
4 constitutes physical loss. And that's --

5 THE COURT: So let's -- because Judge Rakoff
6 addressed that. And I know you're familiar with the
7 decision in the *Northwell Health* case.

8 MS. COHEN: Yes.

9 THE COURT: And he explained that there, the
10 buildings were unfit for occupancy and uninhabitable. And
11 that's how he distinguished those cases. Why isn't that
12 correct? Because, again, here, if no one with the virus
13 entered into the premises, there would be no problem with
14 the insured property. It's the people coming in who are
15 bringing the virus that are the problem. It's not the
16 premises that's uninhabitable. It's uninhabitable when
17 people with the virus, specifically, come in. And not all
18 people, but people with the virus.

19 So, again, why isn't that distinction compelling in
20 terms of -- and to be clear, everybody is sympathetic to the
21 plight of restaurants who were hit hard, just like other
22 businesses, as a result of the stay-at-home orders, and as a
23 result -- and the stay-at-home orders are as a result of the
24 virus.

25 But here, the language of the policy requires

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1 direct physical loss or damage to the property --

2 Karen, you're with us? Okay.

3 MS. COHEN: So, Your Honor, if that were correct,
4 all of the decisions, including all of the New York
5 appellate decisions would have come out in a different way.
6 *PepsiCo, Port Authority, Kingray* -- I could go on and on.
7 All of those cases were situations -- or many of
8 them -- were situations where the substance came onto the
9 property in part because people were on the property. There
10 was an intrusion of the substance onto the property.

11 The policy doesn't care how the substance gets on
12 the property. The fact that the substance, the hazardous
13 substance, is on the property, it affects the air, it
14 affects the structures, and creates the property to be
15 uninhabitable or can't be used for its intended purpose --

16 THE COURT: One moment. If it's on the property it
17 affects the air? Why can't the property it's on be cleaned
18 and replaced right back?

19 MS. COHEN: Because that's --

20 THE COURT: And no one else with the virus allowed
21 into the premises. Then there would be no issue.

22 MS. COHEN: Actually, Your Honor, that would fit
23 right into physical loss.

24 If, in fact, you have a virus that goes right onto
25 the property, and it affects the air, and it affects the

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1 structures, and the only way that you can get rid of it is
2 by not letting anyone else on the property, then we fit
3 right into physical loss of use.

4 THE COURT: No, no, no, no, no.

5 Anyone can come in, so long as they don't have the
6 virus.

7 MS. COHEN: But they don't -- we don't know that.
8 It's not that easy. It's not that easy, Your Honor.
9 People -- you can't tell if people have the virus or not.
10 Even --

11 THE COURT: You can't test people? One moment,
12 Ms. Cohen. You can't test people? I thought that's what
13 they've been doing in some restaurants. But you couldn't,
14 in theory, test each and every person before they come in
15 and only allow people who don't have the virus in the
16 restaurants, and then they could be in the restaurant?

17 I'm not talking about practical ease. But I'm
18 talking about -- again, I'm struggling with whether or not
19 there was direct physical loss or damage to the insured
20 property or the property was uninhabitable versus the
21 problem is is we don't want people congregating or didn't
22 want people congregating while this was a problem.

23 MS. COHEN: A couple of things --

24 THE COURT: It not being a function of the
25 property -- insured property but it being a function of

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1 people who have the virus and being together indoors where
2 it could spread because of the people.

3 MS. COHEN: I -- I -- I respectfully don't think
4 you can make that distinction under either the case law or
5 the policy.

6 The policy talks about direct physical loss. And
7 the question is what does direct physical loss mean? And in
8 the cases -- all of the New York cases suggest if you have a
9 substance on the property, regardless of how it gets there,
10 and it changes the character of the property and causes you
11 to shut down your property, the cases are clear, that's
12 physical loss of use. You have satisfied what constitutes
13 physical loss.

14 The fact that individuals brought in the substance
15 that's hazardous, that affects the quality of the air or
16 affects the structures, you're not wiped out because
17 individuals brought it in, you're also not -- you don't get
18 excluded from coverage because after that situation, you say
19 wait a minute, we're closing down the restaurant because we
20 don't want to reintroduce the virus into the property.

21 THE COURT: How about you don't introduce it
22 altogether?

23 MS. COHEN: If you don't, then we fit right into
24 physical loss because you basically have said the property
25 is unfit or unsuitable for -- for the intended purpose,

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1 which is in-person dining.

2 THE COURT: I'm sorry. I don't understand again.

3 How is it that the property is lost or damaged if
4 no person were in the restaurant? It wouldn't be able to be
5 used for its intended use, but the next question is going to
6 be what if we just allow people in who don't have the virus?
7 Then it's perfectly suited for its intended use.

8 MS. COHEN: Okay. So if you define "loss of use"
9 that you can't use it for its intended function, that's
10 precisely what we have here. We --

11 THE COURT: No. Wait.

12 MS. COHEN: Why not?

13 THE COURT: Wait. What if we only allow people in
14 the restaurant who are uninfected? Workers, people, they
15 could fully use the restaurant?

16 MS. COHEN: That's -- that's a scenario that just
17 doesn't exist in the real world.

18 So even if you or I got tested -- there are plenty
19 of people who have gotten tested where there were false
20 negatives or false positives that walked into the restaurant
21 and exposed the whole restaurant. That happens all of the
22 time, whether they use the rapid test, whether they
23 use -- my son got tested with the most -- the best test you
24 could have, and he was tested with no COVID, it turns out he
25 had COVID.

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1 THE COURT: My point is if -- I don't even want to
2 focus on the measures. My point is is that I'm struggling
3 with whether or not any insured property was physically lost
4 or damaged. And I'm still not --

5 MS. COHEN: Your Honor -- yeah --

6 THE COURT: -- hearing what the property was that
7 was physically lost or damaged.

8 I'm hearing that the restaurant couldn't function.
9 There's no doubt about that. There was -- well -- well,
10 there may be for take-out, I don't want to say no doubt
11 about it because it could have been used for different
12 purposes potentially. I don't know what happened with the
13 40 restaurants here. So I don't even know if that was a
14 total loss or any loss because, again, if people could go
15 in -- and that's another point.

16 If people could go in, for example, whoever had the
17 virus but recovered or went into the restaurant
18 to -- whether it's gather mail or do take-out, it's not the
19 purpose, maybe that would be ideal for the restaurants or
20 what was contemplated, but doesn't that show that it's not
21 the insured property that's lost or damaged?

22 MS. COHEN: So I'll answer that in a couple of
23 ways, Your Honor. The answer is no because the courts, the
24 appellate courts have defined what loss of use is. And they
25 have defined -- both the *Port Authority* case the *PepsiCo*

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1 case, even the *Kingray* case, has defined that there is this
2 category that if you have the presence of a hazardous
3 substance, like the virus, and it causes the restaurant or
4 the covered property not to be able to be used for its
5 intended function, which would be in-person dining here,
6 then that is sufficient to constitute physical loss.

7 You have to buy into the notion that physical loss
8 of use means that when initially the virus goes onto the
9 property, creates a dangerous situation, and it shuts down
10 the restaurant -- which it did, if you go to paragraph 35,
11 we have alleged that 30 of the 40 restaurants were
12 completely shut down.

13 And if you believe it was due -- which because
14 we're on a motion to dismiss, the allegations have to be
15 assumed as true. If you believe that the restaurants were
16 closed down because of the presence of the virus, we fit
17 right into the *Port Authority* case, we fit right into the
18 *PepsiCo* case.

19 Now, Your Honor mentioned, well, what if, you know,
20 you could do take-out or you could do it for another
21 function. That doesn't change the analysis.

22 The courts are clear. If you're shut down for your
23 intended purpose, which was -- everyone would concede is
24 in-person dining, that's sufficient.

25 And, in fact, if you look at the policy language,

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1 the policy language anticipates that you might have a
2 partial shutdown, you might have a full shutdown, but you're
3 entitled to coverage for both.

4 If you look at the definition of --

5 THE COURT: But in those cases that you were
6 talking about, was there property itself, insured property,
7 that was lost or damaged? Not the use --

8 MS. COHEN: Yes.

9 THE COURT: -- but the property?

10 MS. COHEN: I'm -- I'm not understanding the
11 question.

12 I'll give you an example --

13 THE COURT: It's okay because I'm not understanding
14 the argument that --

15 MS. COHEN: Sure.

16 THE COURT: -- insured property was lost or damaged
17 here.

18 MS. COHEN: Okay. So the insured property that I'm
19 referring to are the restaurants.

20 THE COURT: The business?

21 MS. COHEN: The business. The 40 restaurants that
22 we are seeking coverage for, for the business losses of
23 those restaurants.

24 THE COURT: So it's not tangible property, like
25 rugs or desks or tables, it's the business?

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1 MS. COHEN: Yes.

2 THE COURT: Okay.

3 MS. COHEN: The covered property that we're
4 referring to is the restaurant. And the question is whether
5 there was physical loss or damage to the restaurants. And
6 what we're arguing is -- and we're basing it upon the
7 appellate cases is once the virus went on the property --
8 and that's the restaurants, that's the covered properties --
9 and attached to the structures and the chairs and it went in
10 the air, it caused us -- it changed the physical impact of
11 that restaurant and required us to close down and caused
12 business losses.

13 THE COURT: Okay. Because loss or damage to
14 business itself, that was rejected in *Roundabout Theatre*.

15 MS. COHEN: *Roundabout Theatre*, Your Honor, even
16 under their cases say it's not relevant to this analysis.
17 Let me explain what I mean.

18 In *Roundabout Theatre*, they just shut off
19 the -- the show, not because there was any damage or
20 physical impact to the property --

21 THE COURT: Well, there actually was, but it was
22 fixed pretty quickly in *Roundabout*.

23 MS. COHEN: No, no.

24 THE COURT: Oh, I'm pretty sure that in *Roundabout*
25 there was some type of physical damage, but that they fixed

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1 it quickly. And so that wasn't the issue in terms of the
2 full closure. But there was damage.

3 But go ahead, Ms. Cohen.

4 MS. COHEN: Okay. So, Your Honor, I
5 would -- I -- because of all of the cases that I had --
6 *Roundabout*, the Court was clear, there was no physical
7 damage to the property at all.

8 What happened was there was a construction site
9 nearby. There was physical damage at the construction site
10 so they had to close down the theater. There was no
11 physical damage to the theater at all. No physical impact,
12 no physical damage. And the Court found in that case that
13 that was pure loss of use and therefore there was no
14 coverage.

15 THE COURT: They did say there was minor damage to
16 the roof and air-conditioning system, which was repaired
17 within one day. But anyway.

18 MS. COHEN: So *Newman Myers*, which is another First
19 Department decision, says when you're dealing with the
20 intrusion of hazardous substances, and you're alleging a
21 loss of use, the *Roundabout* line of authority is not
22 relevant because that's a pure loss-of-use case.

23 In *Newman Myers*, it said our case is like
24 *Roundabout* because it's pure loss of use. We don't have any
25 physical damage or physical loss. We were just shut down

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1 because -- in anticipation of Hurricane Sandy.

2 And so the Court, in *Newman Myers*, recognized that
3 there is a difference between pure loss-of-use cases, like
4 *Roundabout*, and cases where there is an intrusion of
5 hazardous substances.

6 Then you go to *Kim-Chee*, which is their case,
7 Your Honor. In *Kim-Chee*, which also was the intrusion of
8 the virus, the Court, in that case, said the *Roundabout* line
9 of authority is irrelevant when you're dealing with an
10 intrusion of a hazardous substance. You've got to look at
11 the cases that relate or deal with an invasion or presence
12 of substance on the property.

13 And what *Kim-Chee* said was that there's a spectrum.
14 On one side of the spectrum is *E. coli*, and carbon monoxide,
15 and all of the things that are hazardous that would be
16 difficult to clean.

17 And then on the other side, you have innocuous
18 dust. And you have to figure out factually when you're
19 dealing with the intrusion of substances like viruses on the
20 property, where do you fit within that spectrum? Are you
21 closer to *E. coli* or are you closer to dust? And what we
22 would suggest to this Court, that is a pure factual
23 determination. In order to determine whether we are like
24 *E. coli* or more like innocuous dust there has to be
25 discovery.

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1 Now, their retort is -- it is -- COVID is just like
2 dust. It's just like innocuous dust.

3 And we would submit, Your Honor, that is wrong.
4 And, in fact, it's galling to a lot of small businesses in
5 New York to suggest that COVID is like innocuous dust.

6 Innocuous dust hasn't killed 600,000 people.
7 Innocuous dust hasn't injured tens of millions of dollars.
8 It hasn't wiped out small businesses.

9 THE COURT: I don't think anybody compares the
10 impact of COVID to dust. The focus really is on the
11 insurance policy and what it says and whether there is
12 coverage or not.

13 And let's even focus more on the insurance policy
14 because that's where the analysis starts and ends.

15 It insures all risks of direct physical loss or
16 damage to insured property. And what I'm still -- I hear
17 the argument that the business is the insured property that
18 was damaged. But the policy contemplates that it's actual
19 property, not -- as in physical property, not business, that
20 has to be impacted. And what that is confirmed by, in terms
21 of -- that that is what the policy means, is that when
22 it -- the policy defines the period of liability and when it
23 ends. Right? It says, and I quote, When with due diligence
24 and dispatch, the building and equipment could be repaired
25 or replaced and made ready for operations. So what that

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1 contemplates is that something can be either repaired or
2 replaced.

3 Here, the tangible property that's impacted by the
4 virus -- and I'm not even clear that the argument still is
5 that that insured property is the equipment at the location
6 or based on the arguments being asserted, but what here was
7 repaired or replaced so that the restaurants could reopen?

8 MS. COHEN: So -- so, Your Honor, the restaurants
9 were repaired and replaced in the following way. First of
10 all, they had to reconfigure physically the space.

11 THE COURT: But they were able to do that?

12 MS. COHEN: Sure. But that's physically repairing
13 or replacing the property. They had to put in -- new
14 ventilation systems. That's physically repairing or
15 replacing the properties.

16 They -- they -- some -- they had to put in physical
17 partitions which physically repaired or replaced the
18 property. So the period of liability actually is helpful.
19 It starts when you experience the physical loss and it ends
20 when you can repair or replace the property. And we
21 physically repaired or replaced the property. The period of
22 liability helps us. It doesn't hurt us.

23 The fact of the matter is that we did repair and
24 replace. And we will be able to demonstrate, if given the
25 opportunity to show Your Honor, that we had to do all sorts

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1 of physical things to fix the properties to deal with -- to
2 make the restaurants habitable and -- and designed to do the
3 functions that it was designed to do, which is in --
4 in-person dining.

5 I think it's really important that -- I don't even
6 think the opposing counsel would argue that the insured
7 property is not the restaurants. I think they would concede
8 that when we're talking about the covered property, we're
9 talking about the restaurants. And when we're talking about
10 physical loss or physical damage, they would have to
11 concede, in light of *Port Authority* and *PepsiCo* and the
12 other appellate courts -- that if you have, for example,
13 *E. coli* or ammonia or even a virus that comes on the
14 property and causes you -- causes a physical impact on the
15 property that you have to shut down, they would concede that
16 you would have physical loss.

17 What they're arguing is twofold. They're arguing
18 you don't have physical loss or use -- physical loss or
19 physical damage because you could easily clean it off. But
20 what we're telling the Court is that's a factual
21 determination that you cannot make on the allegations here.

22 The allegations in this complaint, when you look at
23 paragraphs 12 to 20, talks about the serious nature of the
24 virus, talks about how it's difficult to control, talks
25 about how it stays on the property for weeks.

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1 Your Honor would have to make --

2 THE COURT: It doesn't talk about damage to the
3 restaurant. It talks about stayed in cabins on cruise
4 ships. It doesn't tell me that there was damage here to the
5 restaurants --

6 MS. COHEN: Fair enough.

7 THE COURT: -- in any of those paragraphs.

8 MS. COHEN: Okay. So -- so we're on a motion to
9 dismiss and all reasonable inferences have to be drawn in
10 our favor.

11 If you look at paragraph 31, paragraph 67,
12 paragraphs 12 to 20, and you combine all of those
13 paragraphs, those paragraphs in combination -- or at least a
14 reasonable inference can be drawn that COVID was on the
15 property, it caused a physical damage or a physical impact
16 to the property, it made us -- it made the property
17 unsuitable for its intended purpose.

18 And under paragraph 35, we had to shut the
19 restaurants down.

20 And if Your Honor thinks that the paragraphs are
21 insufficient to do that, then we're going to seek an
22 opportunity to amend. Because everything I just said, we
23 can prove unequivocally to the Court.

24 THE COURT: Okay. Let me hear from Mr. McCormack.

25 MR. McCORMACK: Good morning, Your Honor. I think

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1 you've hit on some salient points. And so rather than give
2 you my -- my long monologue, I'm just going to attack a few
3 issues. And, obviously, if you have any questions, may it
4 please the Court, please feel free to jump in.

5 THE COURT: Why -- I will jump in straight from the
6 get-go. Why should -- should there be leave to amend here
7 or a denial without prejudice?

8 MR. McCORMACK: No, Your Honor. And allow me to
9 elaborate, if you would.

10 The -- one of the arguments by Consolidated to
11 Plaintiff [sic] here is that all of these other New York
12 cases, all 30 of them that have addressed this issue, were
13 all the result of pleading failures.

14 But when you look at every single one of those
15 30 cases, not one of them dismissed without prejudice. They
16 all dismissed as a matter of law on the basis that there was
17 no plausible way to allege that there was direct physical
18 loss or damage to insured property. They studied every
19 aspect and every argument. They looked at the -- the scope
20 of the coverage. They looked at the fact that the policies
21 there, like this one, measured the loss by the repair and
22 replacement of property.

23 And, you know, one of the things that I think is
24 important is to bear in mind that, you know, the costs that
25 they're talking about -- for example, wiping down tables --

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1 were not cost to repair the table.

2 THE COURT: What about the new ventilation?

3 MR. McCORMACK: Yes. That was not to repair damage
4 to the old ventilation system by a covered risk. It was,
5 for example, to protect humans.

6 It is -- I think it was said in the Southern
7 District case, you know, ultimately the virus harms humans.
8 It does not hurt printing presses. And that is really the
9 key theme, I think, in understanding these cases is that
10 these costs -- and I have sympathy too, and I have a
11 business of my own that suffered itself. So I get it.

12 But these businesses did not suffer a fire or some
13 other direct physical loss to their property that had to be
14 repaired or replaced. Instead, due to government
15 restrictions, for the purposes of protecting humans, not to
16 protect the property from further damage when it had already
17 been damaged, to protect humans, good orders, rightful
18 orders, sensible orders, that they had economic losses. And
19 we appreciate that.

20 The other thing I want to be very careful with is
21 when we talk about cases, we can be -- we can be
22 overstepping. And so let me mention a few items on that.
23 There was a lot of references to all of the cases I rely
24 upon and my client relies upon as
25 being -- having -- recognizing that there is another line of

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1 cases out there in New York that's different. But every
2 time we heard that sentence, there was a slew of citations
3 to other cases outside of New York, not New York cases.

4 And the insurance contract here -- Your Honor may
5 be aware -- specifically says in it that New York law
6 governs the interpretation of this insurance contract.

7 So with -- with due respect to my learned
8 adversary, looking at cases in the Third Circuit, such as
9 *Port Authority*, which found that asbestos attached to
10 buildings might cause physical loss or damage -- by the way,
11 ultimately the Court granted summary judgment to the
12 insurers in that case -- is of no help to Your Honor when
13 you have 30 New York cases that have addressed not asbestos,
14 but COVID-19, and dismissed every single time with
15 prejudice.

16 Now, she did mention one New York case, so I want
17 to bring it up. She mentioned *PepsiCo*. It was never
18 mentioned at all in any of the papers thus far, so I was
19 surprised to hear it. But I do know the *PepsiCo* case. And
20 even though it's the first time it's been brought up in this
21 case, let's talk about it.

22 In *PepsiCo*, faulty material was introduced into the
23 soda. It permanently damaged the soda which was the insured
24 product. It destroyed it. All the soda, Your Honor, had to
25 be thrown away. That is not this case. That is not some

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1 other line of cases.

2 And *Roundabout* is not irrelevant. Of the 30 cases
3 in New York dealing with COVID-19 losses, 29 of
4 them -- 29 -- have cited *Roundabout* directly or cited a case
5 that quoted from *Roundabout*. So at least 29 learned New
6 York jurists out of 30 thought *Roundabout* was on all fours,
7 as do I.

8 It made the rule of law in New York, which is
9 different than some other jurisdictions, that loss of use is
10 not physical damage to insured property and it's their
11 burden, as you mentioned at the beginning, to show that.

12 You mentioned paragraph 63 at the opening, which is
13 that paragraph that says that the virus may not be present.
14 I do think that ends the case, as you mentioned. I do think
15 that, in my view, it's over.

16 And one of the things we have to bear in mind is
17 you cannot allege facts in the alternative. You -- facts
18 are different than causes of action. And the *Drexel*
19 decision in 157 Misc.2d 198 certainly supports that.

20 So to say now that where paragraph 31 says they did
21 not shut down, or paragraph 63 says the virus may not have
22 been physically present, to say now it's ubiquitous --

23 THE COURT: Actually, it says even if it was
24 present, that was the cause --

25 MR. McCORMACK: That's right.

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1 THE COURT: -- of the damage.

2 MR. McCORMACK: That's right. That's right,
3 Your Honor.

4 You -- with respect to the plaintiff, you cannot
5 escape such allegations. You can't change the script.
6 That's a factual allegation under -- under *Drexel* that's
7 binding upon them. And to me it ends the case.

8 There was -- there was a number of other cases
9 mentioned, and I'm not going to go into them in detail. But
10 I think it's important to remember that we do have cases on
11 point in New York and we don't need to travel outside our
12 borders to learn anything.

13 The other comment that was made, though not pled,
14 let's address it. There were -- there were undoubtedly sick
15 people on the premises. We don't have a factual allegation
16 of that, but let's take it to its ultimate conclusion.

17 If a sick person is on the premises, that is not
18 the actual presence of a virus on insured property that
19 caused physical loss or damage. It is -- having someone
20 walk through a building who may be sick from COVID-19 and
21 suffering with a fever is not the actual presence of the
22 virus on the property.

23 And so while we don't even have the allegation,
24 even if that allegation existed, that would take them
25 nowhere, in my humble opinion, if I might say.

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1 So I would also say that there was a lot of
2 comments that paragraph 63 had the intent and it had a
3 purpose. You can't take a factual allegation and a pleading
4 and say it had a purpose and, therefore, we wrote it that
5 way. It is what it is. They -- they are bound by that
6 factual allegation. And I think it sticks to them. And I
7 think, respectfully, it ends the case.

8 Just a couple of cleanups. I would note that the
9 *Newman Myers* case is not First Department appellate
10 authority over you. It is actually Southern District of New
11 York. So I would just like to make sure that the record is
12 clear on that.

13 And unless Your Honor has further questions,
14 I'm --

15 THE COURT: I don't. I've read the papers. I've
16 read the policy. I've read the complaint. I've read the
17 cases. And I am convinced that based on reasoning, such as
18 that in *Northwell Health versus Lexington Insurance Company*,
19 at 2021 Westlaw 3139991, that's a Southern District case.
20 It might be the most recent case on the subject, which was
21 decided July 26, 2021.

22 Based on the reasoning there, based on the binding
23 precedence in *Roundabout* that construed the same language,
24 the direct physical loss or damage, there just are no
25 allegations here that fall within the coverage provision.

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1 And on that basis I am going to grant Defendant's motion to
2 dismiss the case and declare in Defendant's favor.

3 Thank you very much.

4 Mr. McCormack, please make sure that the transcript
5 is e-filed within 45 days in accordance with my part rules,
6 okay?

7 MR. McCORMACK: I will, Your Honor.

8 THE COURT: I wish you all well. Thank you.

9 MS. COHEN: Thank you, Your Honor.

10 * * * *

11 The foregoing is hereby certified to be a true and
12 accurate transcript of the proceedings as transcribed from
13 the stenographic notes.

14 * * * *

15 ****REPORTER'S SIGNATURE IS ONLY VALID WHEN IN BLUE INK****

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