PREPARED BY THE COURT

DGMB CASINO d/b/a RESORTS CASINO HOTEL, Plaintiff, vs. AMERICAN GUARANTEE & LIABILITY INS. CO., Defendants.	:	SUPERIOR COURT OF NEW JERSEY ATLANTIC COUNTY – LAW DIVISION CIVIL ACTION DOCKET NO: ATL-L-1550-21 (CBLP) **ORDER**

THIS MATTER having come before the court on cross-motions for summary judgment, and the court having considered the motion papers, the opposition papers, and the arguments of counsel, and for the reasons set forth in the accompanying Memorandum of Decision,

IT IS on this 3rd day of JULY, 2023 **ORDERED AND ADJUDGED** that the Plaintiff's motion is **DENIED**, the Defendant's motion is **GRANTED**, and the complaint is **DISMISSED WITH PREJUDICE** in its entirety.

IT IS FURTHER ORDERED that this is a final order, which shall be deemed served on all counsel of record via filing in e-courts.

Sarah Beth Johnson
SARAH BETH JOHNSON, J.S.C.

x Opposed (cross-motions)
_____ Unopposed

SUPERIOR COURT OF NEW JERSEY

SARAH BETH JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
(609) 402.0100 ext. 47870

MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: Jose A. Calves, Esq.
BROWN & CONNERY, LLP
Joshua L. Mallin, Esq.
WEG & MYERS, P.C.
Attorneys for Plaintiff

Caroline McKenna, Esq.
FORD MARRIN ESPOSITO WITMEYER & GLESER, LLP
Michael Menapace, Esq.
WIGGIN AND DANA LLP
Attorneys for Defendant

RE: DGMB Casino, LLC v. American Guarantee & Liability Ins. Co.

DOCKET NO. ATL-L-1550-21

This is a declaratory action by which Plaintiff seeks coverage under an insurance policy issued by Defendant. Both parties moved for summary judgment in their favor, urging conflicting interpretations of the relevant policy language.

For the reason set forth herein, the court finds the unambiguous language of the relevant policy provision does not provide coverage under the facts alleged by Plaintiff, whose claim also fails to implicate the existence of fortuity necessary for coverage under an insurance contract. The Plaintiff's motion is DENIED, the Defendant's motion is GRANTED, and the complaint is dismissed with prejudice in its entirety.

The factual and procedural history is as follows:

Plaintiff DGMB Casino, LLC is the owner and operator of the Resorts Casino and Hotel located at 1133 Boardwalk in Atlantic City, New Jersey. Defendant American Guarantee and Liability Insurance Company issued insurance policy no. ERP 0697918-01 to Plaintiff, effective December 30, 2018 to December 30, 2019. Two endorsements extended the policy effective date through April 1, 2020.

At issue here is the policy provision for coverage up to $500,000.00 entitled "Tenants Prohibited Access," Section 5.02.29 (hereinafter TPA), which provides

> The Company will pay for the actual Gross Earnings loss sustained, as provided by this Policy, resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if access to that **Location** by the Insured's suppliers, customers or employees is physically obstructed due to the owner,

> landlord or a legal representative of the building owner or landlord, prohibiting access to the Insured Location. This Coverage will only apply when the period of time that access is prohibited exceeds the time shown as **Qualifying Period** in the **Qualifying Period** clause of the Declarations section. If the **Qualifying Period** is exceeded, then this Policy will pay for the amount of loss in excess of the Policy Deductible, but not more than the limit applying to this Coverage.

There is an exclusion relating to this provision, Section 5.02.29.01, which states:

> The following additional exclusion applies: This Policy excludes loss directly or indirectly caused by or resulting from prohibited access to the Insured Location, when such prohibited access is caused directly or indirectly by the failure of the Insured to comply with the terms and conditions of any contracts the Insured has for the use of such **Location** regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss.

The TPA provision does not require that the insured suffer physical loss or damage to obtain coverage under the policy.

As of March of 2020, Plaintiff ran multiple operations on the insured premises including hotel, food and beverage, retail, facilities, and construction operations.

On March 9, 2020, New Jersey Governor Phil Murphy issued Executive Order No. 103 declaring a State of Emergency and a Public Health Emergency due to the COVID-19 pandemic. On March 16, 2020, Governor Murphy issued Executive Order No. 104, which ordered all casino gaming floors closed to the public, including retail sports wagering lounges and casino concert and entertainment venues.

Neither Executive Order required the closure of hotels. However, the suspension of casino operations led Plaintiff to cease all operations at the property and limit public access thereto. Plaintiff was aware that closing the property would cause it to incur economic losses.

The property remained closed to the public until July 2, 2020 when Plaintiff resumed all operations after the Governor's issuance of Executive Order No. 157 permitting casino gaming with certain public health restrictions.

On May 11, 2020, Plaintiff submitted a Sworn Statement in Proof of Loss seeking $500,000.00 in indemnification for the "Partial Amount Claimed" under the TPA provision. By letter dated June 17, 2020, Defendant issued a denial of coverage in connection with the Proof of Loss statement. Plaintiff sought reconsideration of the Defendant's denial, but Defendant indicated its decision to deny the claim under the TPA provision was final as of June 24, 2020.

Plaintiff filed the instant action in May 2021. Defendant filed its answer in July 2021, and the parties engaged in discovery.

On October 7, 2022, the parties filed simultaneous motions for summary judgment under Rule 4:46-2. Opposition and reply briefs were filed thereafter, and the court held oral argument on March 2, 2023. The matter is listed for trial beginning September 5, 2023.

The Motion Standard

Rule 4:46-2 provides that summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." All inferences of doubt are drawn against the movant in favor of the opponent of the motion. See Brill vs. Guardian Life Ins. Co., 142 N.J. 520 (1985).

In deciding a summary judgment motion, the court's "function is not … to weigh the evidence and determine the truth … but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540. The court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Ibid.

The thrust of Brill is that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' … the trial court should not hesitate to grant summary judgment." Ibid.

The Parties' Contentions

The motion papers contain multiple alternative arguments under which the parties claim they are entitled to relief. The court finds the following contentions relevant to its determination.

Plaintiff argues that it was entitled to $500,000.00 of coverage under the TPA provision for the economic losses it incurred when it ceased all operations between March 9 and July 2, 2020. Plaintiff does not seek coverage for physical loss or damage caused by the COVID-19 virus or the Governor's Executive Orders. Rather, Plaintiff seeks partial indemnification for the economic losses it incurred when management decided to shut down operations and restrict access to the premises.

Plaintiff argues that nothing in the language of the TPA prevents it from obtaining such coverage because Defendant was aware that Plaintiff is its own property owner/landlord. Plaintiff asserts it must only demonstrate (1) the property owner/landlord (i.e. Plaintiff) restricted physical access to the premises for more than 48 hours, (2) it incurred economic losses, and (3) there are no circumstances giving rise to an exclusion of coverage under Section 5.02.29.01.

In short, Plaintiff asserts the Defendant's denial of coverage is based on a misinterpretation of the insurance contract language, and the undisputed facts establish that Plaintiff is entitled to coverage under the TPA provision and the entry of judgment in its favor.

Defendant submits Plaintiff voluntarily closed hotel operations and restricted access to the premises when it was not required to do so and knowing that it would incur significant economic loss as a result of its actions. Defendant argues, under these circumstances, the Plaintiff's claims fail for a lack of fortuity, which is a requirement of all insurance contracts.

Defendant also asserts that there are material issues of fact precluding the entry of judgment in favor of Plaintiff because there is conflicting evidence of the Plaintiff's reason(s) for the shut down and the extent to which access to the property was restricted. Defendant submits that such factual disputes preclude Plaintiff from obtaining summary judgment its favor. However, if court accepts the Plaintiff's allegations in connection with the defense's motion, it should find that Plaintiff is not entitled to coverage, and the claim should be dismissed.

Defendant submits that a plain reading of the TPA indicates coverage is triggered only when a third-party property owner/landlord prevents the insured from entering the premises for more than 48 hours and the insured incurs economic losses from the lockout. Defendant argues that there is no authority supporting the notion that Plaintiff can choose to cause its own loss and then seek insurance coverage.

In response to the Defendant's fortuity argument, Plaintiff argues that the events leading to the decision to shutter the hotel were fortuitous and unplanned, and the shut down was not undertaken with the intent to trigger coverage under the TPA. Plaintiff further submits that, if the court applies the fortuity doctrine to these events, it renders the coverage offered by the policy illusory.

Analysis

Does the TPA provision provide Plaintiff with coverage under the undisputed factual circumstances presented by Plaintiff? I find that it does not under (1) a plain reading of the policy language and (2) the application of the fortuity doctrine.

Insurance policies are analyzed using general contract principles. Cypress Point Condo. Ass'n v. Andria Towers, LLC, 226 N.J. 403, 415 (2016). Interpretation of an insurance contract is a question of law for the court. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004). "[W]hen interpreting an insurance policy, courts should give the policy's words 'their plain, ordinary meaning.'" NAV-ITS, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110, 118 (2005) (quoting President v. Jenkins, 180 N.J. 550 (2004)).

The intention of the parties must be determined from the policy language. Stone v. Royal Ins. Co., 211 N.J. Super. 246, 248 (App. Div. 1986). Clear and unambiguous policy terms must be enforced as written. Id.; Simonetti, 372 N.J. Super. at 428. Ambiguous provisions should be interpreted in favor of the insured, but policy language should not be contorted or strained to find ambiguity where none exists. Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 537 (1990).

"[A]ny far-fetched interpretation of a policy" does not create an ambiguity. Boddy v. Cigna Prop. & Cas. Cos., 334 N.J. Super. 649, 658 (App. Div. 2000); Simonetti, 372 N.J. Super. at 428 (noting the court cannot make a better contract for the parties than the one that they themselves agreed to). Ambiguities exist only where "'the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" Nunn v. Franklin Mut. Ins. Co., 274 N.J. Super. 543, 548 (App. Div. 1994) (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)). Policy terms are not ambiguous merely because they are undefined. Boddy, supra, at 656-57.

The insured "bears the burden of establishing that a claim is within the basic policy terms." Cobra Prods. Inc. v. Fed. Ins. Co., 317 N.J. Super. 392, 401 (App. Div. 1998). The insurer bears the burden of proving that an exclusion applies. Zurich Am. Ins. Co. v. Keating Bldg. Corp., 513 F.Supp.2d 55, 70 (D.N.J. 2007); see also Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997).

The court must engage in "a broad search 'for the probable common intent of the parties in an effort to find a reasonable meaning in keeping with the express general purposes of the policies.'" S.T. Hudson Engineers, Inc. v. Pennsylvania Nat. Mut. Cas. Co., 388 N.J. Super. 592, 604 (2006). Any interpretation should fall within the reasonable expectations of the parties. Id.

The provision at issue is titled "Tenants Prohibited Access" and provides for coverage when the insured's business activities are suspended for more than 48 hours because the property owner or landlord physically obstructs access to the premises and the insured suffers economic loss. Coverage under this provision is excluded when access is prohibited, and loss is caused, by the insured's failure to comply with any contract term governing its use of the property.

A plain reading of this language indicates that coverage is available when a third-party property owner or landlord locks out the insured from the premises for more than 48 hours for reasons unrelated to the insured's breach of the lease and the insured suffers economic loss. Considering the policy as a whole, I find this interpretation falls within the reasonable expectations of the parties. Because that is not what occurred here, Plaintiff has not met its burden of establishing its claim falls within the policy terms.

Even ignoring the concept of tenancy implicated in the provision title, I do not accept the Defendant's failure to define "owner" and "landlord" as a third-party under the policy terms as permitting Plaintiff to obtain coverage under the TPA. I do not find these terms are ambiguous within the context of the entire policy such that the ambiguity inures to the benefit of Plaintiff because Defendant knew (or should have realized) that Plaintiff was its own landlord and capable of locking out itself.

But, if I did construe this ambiguity in favor of Plaintiff, its claim for coverage would still fail for lack of fortuity.

The fortuity doctrine indicates that "insurance is not available for losses that the policyholder knows of, planned, intend, or is aware are substantially certain to occur." Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Stroh Companies, Inc., 265 F.3d. 97, 106 (2d Cir. 2001) (internal citation omitted). Although there is not extensive New Jersey authority on the application of the doctrine, it is nonetheless a fundamental contract principle recognized under New Jersey law. See e.g. Ohio Cas. Ins. Co. v. Island Pool & Spa, Inc. 418 N.J. Super 162, 175 (App. Div. 2011) (holding "requiring coverage for loss that is within the insured's control 'would transform … policies into performance bonds.") Stated simply, "[i]nsurance policies are written to protect against fortuitous occasions[.]" Astro Park Corp. v. Fireman's Fund Ins. Co., 284 N.J. Super 491, 497 (App Div. 1995).

Here, the parties could not have foreseen the public health emergency caused by widespread transmission of the COVID-19 virus; nor could they have anticipated the issuance of Executive

Orders declaring a public health emergency and closing all casino operations. However, no Executive Order or other fortuitous event mandated the Plaintiff's closure of hotel operations. Rather, Plaintiff voluntarily shut down all operations because it believed it would be more economically advantageous to do so than operating the hotel without casino gaming.

Thus, even if I found that Plaintiff was both the owner/landlord and the tenant/insured under the terms of the TPA provision, I could not conclude that Plaintiff was denied access to the property due to circumstances beyond its control, i.e. Plaintiff was locked out not because of a breach of the lease but due to a fortuitous event. Plaintiff admits it chose to cause its own economic loss.

Under this scenario, I do not find that the Defendant's declination of coverage under the TPA renders the policy illusory. In reaching this determination, I am not focused solely on the Plaintiff's decision to shutter all operations, which was clearly an intentional act. I have also considered the events leading to the Plaintiff's decision to do so – most importantly the fact that nothing prevented Plaintiff from continuing to operate its hotel and other non-gaming businesses (albeit with restrictions) during the relevant time period.

I accept the proposition that Plaintiff suffered greater injury than it anticipated as a result of its actions. However, I decline to find that the injury (i.e. $11 million in lost revenue) was entirely unplanned, unintentional, or fortuitous when Plaintiff could have resumed non-gaming operations before the issuance of Executive Order No. 157 in July 2020.

That is, I find there is a question of fact arising from the Plaintiff's fortuity argument regarding whether Plaintiff could have taken some action to mitigate its losses during the 4-month period when gaming was prohibited such that it would not need to seek the $500,000 of coverage offered by the TPA. That issue – perhaps unintentionally before me – nonetheless precludes the entry of judgment in the Plaintiff's favor.

Moreover, the Plaintiff's reliance on the decision of Nat'l Union Fire Ins. Co. v. Stroh, supra, is misplaced. The issuance of Executive Order No. 104 was a fortuitous event that negatively impacted a significant part of the Plaintiff's revenue. However, it did not require Plaintiff to cease all operations in the way that glass shards in bottles of iced tea warranted a product recall. Taking the Plaintiff's allegations at face value, its decision was prompted by purely economic motives, not public health and safety concerns.

In sum, I do not find an ambiguity in the language of the TPA, and it does not apply to provide coverage in the factual scenario alleged by Plaintiff. But if I did find an ambiguity, and I interpreted the TPA in the manner sought by Plaintiff, the lack of fortuity underlying the Plaintiff's losses still renders the TPA inapplicable to the Plaintiff's claim.

Conclusion

The undisputed factual record, combined with the applicable law, establishes that Defendant is entitled to summary judgment in its favor and the dismissal with prejudice of the Plaintiff's claims. Accordingly, the Defendant's motion is **GRANTED**. The Plaintiff's cross-motion for summary judgment in its favor is necessarily **DENIED.**

An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision. The filing of the Order and this Memorandum on e-courts shall serve as service of same on all counsel of record.

Sarah Beth Johnson

SARAH BETH JOHNSON, J.S.C.