

No. 20-CI-007121

JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
BUSINESS COURT DOCKET
JUDGE ANGELA MCCORMICK BISIG

KEN COMBS RUNNING STORE, INC.

PLAINTIFF

vs.

**ORDER REGARDING
MOTION TO DISMISS**

OWNERS INSURANCE CO.

DEFENDANT

* * * * *

This matter is before the Court on a Motion to Dismiss filed by Defendant Owners Insurance Co. (“Owners”) on January 18, 2021.¹ Plaintiff Ken Combs Running Store, Inc. (“Ken Combs”) filed a Response on February 9, 2021. Owners filed a Reply on February 19, 2021. Owners also filed a Notice of Supplemental Authority on March 23, 2021, a Second Notice of Supplemental Authority on May 7, 2021, and a Third Notice of Supplemental Authority on June 7, 2021. Ken Combs filed a Notice of Supplemental Authority on May 7, 2021.

The Court heard oral argument on April 30, 2021. The Honorable Christopher B. Rambicure represented Ken Combs. The Honorable Taylor B. Johnson and the Honorable Brian C. Neal represented Owners. The matter now stands submitted. The Court, having considered the written memoranda, oral argument, record in the case, and being otherwise sufficiently advised, rules as follows.

¹ Although Plaintiff originally named Auto-Owners Insurance Co. as the Defendant in this Action, the Parties have agreed to substitute Owners as the named Defendant.

BACKGROUND

This case involves a dispute regarding insurance coverage. Plaintiff Ken Combs operates a retail specialty sports store in Louisville for which it has a commercial insurance policy (the “Policy”) issued by Defendant Owners. The Policy includes coverage for loss of business income during a suspension of operations “caused by direct physical loss of or damage to property.” Motion, Ex. A at 88.

On March 25, 2020, Kentucky Governor Andy Beshear issued an Executive Order in connection with the COVID-19 pandemic requiring closure of all non-life sustaining businesses other than as needed to conduct minimum basic operations. Ken Combs alleges that as a result of the Executive Order, it could not operate and thus suffered the physical loss of its business premises as well as related business income loss between March 25 and June 29, 2020. Ken Combs therefore filed a business income loss claim with Owners. Owners denied the claim.

Ken Combs then brought this Action seeking a declaratory judgment that Owners is obligated to provide coverage. Ken Combs also states claims for breach of contract and unjust enrichment. Owners now moves for dismissal of the Complaint.

1. Owners’ Argument

Owners argues that Ken Combs does not allege any loss or damage to the property at issue covered under the Policy’s business income provision. Owners points out that other jurisdictions have construed “physical loss or damage” to require a physical change or alteration to the property. Owners contends a substantial majority of courts have also held that the coronavirus and related governmental closure orders do not cause direct physical loss of or damage to property for purposes of insurance coverage. Owners further maintains the Policy is unambiguous and therefore the reasonable expectations doctrine does not apply.

Owners argues that the “period of restoration” term of the Policy demonstrates that physical damage is required for coverage insofar as the period is defined to end when the property “should be repaired, rebuilt or replaced.” Owners asserts that finding coverage under the Policy would render this term meaningless. Finally, Owners further contends Ken Combs’ unjust enrichment claim is untenable because the Policy is a controlling contract.

2. *Ken Combs’ Argument*

Ken Combs argues that use of the word “or” in the Policy’s provision of coverage for “direct physical loss or damage” indicates that loss and damage have separate meanings. Ken Combs contends coverage is therefore available not only for “damage” in the form of a physical alteration of the property, but also for “loss” such as a temporary deprivation of the premises. Ken Combs notes that some jurisdictions have interpreted the term “loss” to cover deprivation of the property due to governmental closure orders.

Ken Combs further argues it has stated allegations sufficient to state a claim under the Declaratory Judgment Act for an adjudication as to whether coverage is available under the Policy. Ken Combs similarly contends it has stated allegations sufficient to state a claim for breach of contract and a claim for unjust enrichment. Finally, Ken Combs maintains its unjust enrichment claim is viable because the Court has equitable power to find the Policy a contract of adhesion and order a return of the premiums paid by Ken Combs.

OPINION

1. *Civil Rule 12.02(f)*

Civil Rule 12.02(f) provides that a defense may be made by motion for “failure to state a claim upon which relief can be granted.” In reviewing a motion to dismiss for failure to state a claim, “the pleadings should be liberally construed in a light most favorable to the plaintiff and

all allegations taken in the complaint to be true.” Littleton v. Plybon, 395 S.W.3d 505, 507 (Ky. App. 2012). The Court “should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” Edmonson County v. French, 394 S.W.3d 410, 413 (Ky. App. 2013).

2. Availability of Coverage under the Policy

It is well established that insurance policies “should be interpreted according to the parties’ mutual understanding at the time they entered into the contract and ‘[s]uch mutual intention is to be deduced, if possible, from the language of the contract alone.’” Nationwide Mut. Ins. Co. v. Nolan, 10 S.W.3d 129, 131-32 (Ky. 1999). “The words employed in insurance policies, if clear and unambiguous, should be given their plain and ordinary meaning.” Id. at 131. The interpretation of an insurance policy is a question of law for the court. Kentucky Employers’ Mut. Ins. v. Ellington, 459 S.W.3d 876, 881 (Ky. 2015).

The Policy at issue here provides in relevant part that Owners

will pay for the actual loss of Business Income [Ken Combs] sustained due to the necessary suspension of [its] “operations” *during the “period of restoration.”* The suspension must be caused by direct physical loss of or damage to property at the described premises . . . caused by or resulting from any Covered Cause of Loss.

Response, Ex. A at 88 (emphasis added).² Notably, however, the Policy defines the termination date of the covered “period of restoration” as “the date when the property . . . should be *repaired, rebuilt or replaced* with reasonable speed and similar quality.” Id. at 104 (emphasis added).

Thus, while the Policy may provide coverage for business income losses caused by “direct physical loss of or damage to property,” its definition of the covered “period of restoration”

² The Policy is central to Ken Combs’ Complaint and the Court may therefore consider it without converting the present Motion to one for summary judgment. Netherwood v. Fifth Third Bank, Inc., 514 S.W.3d 558, 563-64 (Ky. App. 2017).

clearly and unambiguously indicates such coverage is limited to business income loss resulting from physical loss or damage that may be remedied by repair, rebuilding, or replacement of the property.

In considering the Policy as a whole, the Court therefore finds that coverage for business income loss is available under the Policy only where such loss is caused by physical loss or damage that may be remedied by repair, rebuilding, or replacement of the property. See Deerfield Ins. Co. v. Warren County Fiscal Court, 88 S.W.3d 867, 873 (Ky. App. 2002) (noting that insurance policies must be construed “as a whole.”). To interpret the Policy otherwise would impermissibly render its definition of the “period of restoration” meaningless. See Kemper Nat’l Ins. Cos. v. Heaven Hill Distilleries, Inc., 82 S.W.3d 869, 875-76 (Ky. 2002) (“[A]n insurance contract must be construed without disregarding or inserting words or clauses and ‘seeming contradictions should be harmonized if reasonably possible.’”).

Here, Ken Combs seeks coverage for business income losses caused solely by temporary governmental closure orders issued during the COVID-19 pandemic.³ However, the temporary governmental closure orders did not result in physical loss of property that could be remedied by repair, rebuilding, or replacement. Rather, any such loss could only be abated by a governmental decision to lift the closure orders in light of relevant public health considerations. Thus, the Court does not find such losses within the scope of coverage available under the Policy’s business income loss provisions.

The Court also does not find that application of the doctrine of reasonable expectations is warranted. That doctrine requires interpretation of an ambiguous insurance policy “so as to

³ Ken Combs does not allege any other basis for coverage, such as the physical presence of the coronavirus at its store.

provide the insured entity with all coverage that it may reasonably expect under the policy.” Deerfield Ins. Co., 88 S.W.3d at 873. However, the doctrine applies only where the policy is ambiguous. Id. (“Contracts of insurance *which are ambiguous* (i.e., *susceptible of more than one reasonable meaning*) are subject to the application of the doctrine of reasonable expectations”) (emphasis added); Brown v. Indiana Ins. Co., 184 S.W.3d 528, 540 (Ky. 2005) (finding doctrine of reasonable expectations inapplicable given lack of ambiguity in policy). Here, however, the Policy is not ambiguous but rather clearly and unambiguously limits coverage to physical loss or damage that may be remedied by repair, rebuilding or replacement of the property. Moreover, because the business income loss coverage is explicitly limited to a “period of restoration” ending when the property could be repaired, rebuilt, or replaced, the Court cannot find that Ken Combs could reasonably have expected coverage for losses caused by other forms of loss or damage. Accordingly, the Court also does not find that the doctrine of reasonable expectations is applicable or requires the requested coverage.

3. *Unjust Enrichment*

The Court also concludes that Ken Combs’ unjust enrichment claim must be dismissed. Admittedly, an unjust enrichment claim may be plead in the alternative to a contract claim and may even succeed where an otherwise controlling contract is “invalid, or subject to avoidance, or otherwise ineffective to regulate the parties’ obligations.” Superior Steel, Inc. v. Ascent at Roebing’s Bridge, LLC, 540 S.W.3d 770, 779 (Ky. 2017). However, where there is an enforceable controlling contract, no unjust enrichment claim may lie. Id. at 778 (“[U]njust enrichment is unavailable when the terms of an express contract control.”). As noted above, the Court finds that the Policy here clearly and unambiguously does not provide the coverage

requested by Ken Combs. Thus, because the Policy controls and dispositively establishes that the requested coverage is unavailable, Ken Combs' unjust enrichment claim must be dismissed.⁴

4. *Unconscionability*

Finally, the Court does not find that Ken Combs has stated allegations sufficient to support a claim that the Policy is an unconscionable adhesion contract. Unconscionability is a doctrine "directed against one-sided, oppressive and unfairly surprising contracts." Schnuerle v. Insight Commc'ns Co., L.P., 376 S.W.3d 561, 575 (Ky. 2012). Unconscionability may be procedural, as where it "pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language." Id. at 576. Unconscionability may also be substantive if it involves "contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent." Id. at 577. A contract may be unenforceable based upon either procedural or substantive unconscionability, or both. Id. at 576 n.12. Here, Ken Combs does not state any allegations in its Complaint that would support a finding of either procedural or substantive unconscionability. The Court therefore does not find a basis at this time on which such a claim may proceed.

Accordingly, Owners' Motion to Dismiss is GRANTED. Ken Combs' claims for declaratory judgment for coverage and for breach of contract are DISMISSED WITH

⁴ As discussed in further detail below, the Court also concludes Ken Combs has not stated allegations at this time sufficient to state a claim that the Policy is void as an unconscionable contract of adhesion. Were such allegations stated, Ken Combs' claim for unjust enrichment could again become viable given the potential for a finding that the contract is void. See Superior Steel, Inc., 540 S.W.3d at 779 (noting that unjust enrichment claims may be viable where an otherwise controlling contract could be invalid or otherwise subject to avoidance). Accordingly, the Court will dismiss the unjust enrichment claim without prejudice.

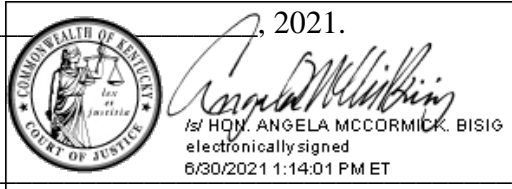
PREJUDICE. Ken Combs' claim for unjust enrichment is DISMISSED WITHOUT PREJUDICE.

ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendant Owners Insurance Co.'s Motion to Dismiss is **GRANTED**. Plaintiff Ken Combs Running Store, Inc.'s claims for declaratory judgment and breach of contract are **DISMISSED WITH PREJUDICE**. Ken Combs' claim for unjust enrichment is **DISMISSED WITHOUT PREJUDICE**.

This is a final and appealable Order and there is no just cause for delay in its entry or execution.

IT IS SO ORDERED this ____ day of _____, 2021.



JUDGE ANGELA MCCORMICK BISIG
DIVISION TEN (10)
JEFFERSON CIRCUIT COURT

cc: Christopher B. Rambicure
Ron Aslam
John P. Swain
Brian C. Neal
Taylor B. Johnson