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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3617-20**

**PURE HAIR SALON LLC, d/b/a
PURE ORGANIC HAIR SALON,**

Plaintiff-Appellant,

v.

**HISCOX INSURANCE
COMPANY INC.,**

Defendant-Respondent.

Submitted January 10, 2023 – Decided March 10, 2023

Before Judges Gilson, Rose and Gummer.

On appeal from the Superior Court of New Jersey,
Law Division, Mercer County, Docket No. L-1621-20.

Ferrara Law Group, PC, attorneys for appellant (Ralph
P. Ferrara and Kevin J. Kotch, of counsel and on the
briefs).

Gimigliano Mauriello & Maloney, PA, Judy Barrasso
(Barrasso Usdin Kupperman Freeman & Sarver, LLC)
of the Louisiana bar, admitted pro hac vice, and
Janelle E. Sharer (Barrasso Usdin Kupperman
Freeman & Sarver, LLC) of the Louisiana bar,

admitted pro hac vice, attorneys for respondent (Stephen V. Gimigliano, Christopher K. Kim, Judy Barrasso, and Janelle E. Sharer, of counsel and on the brief).

PER CURIAM

Plaintiff operates a hair and beauty salon that was shut down for several months in 2020 under Governor Philip D. Murphy's Covid-19 Executive Orders. Plaintiff appeals from an order dismissing with prejudice its complaint seeking a declaration that defendant, its insurer, should pay the lost business income and extra expenses it incurred while the salon was closed or operating at a reduced capacity, and contending defendant breached its insurance policy by denying coverage. Plaintiff argues that it suffered a direct physical loss of or damage to its property, triggering coverage under the business income, extra expense, and civil authority provisions of its policy. Plaintiff also contends that the virus-exclusion provision in its policy does not apply or defendant should be barred from asserting that exclusion under the regulatory-estoppel doctrine. After the trial court rejected those arguments, we considered and rejected all those arguments as applied to almost identical insurance policies. See Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1 (App. Div. 2022). Because our holdings and reasonings in

Mac Property apply to plaintiff's policy, we affirm the order dismissing plaintiff's complaint with prejudice.

I.

Plaintiff Pure Hair Salon LLC, doing business as Pure Organic Hair Salon (plaintiff or Pure Hair), operates a full-service hair and beauty salon. Plaintiff had a businessowners insurance policy (the Policy) issued by defendant Hiscox Insurance Company, Inc. (defendant or Hiscox) covering the period from March 10, 2020, to March 10, 2021. During that period, plaintiff's salon was located in Sewell.

The Policy covered direct physical loss of or damage to Pure Hair's salon premises in Sewell unless the loss was excluded or limited under the Policy. In that regard, the Policy's general coverage provision stated: "We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." The Policy explained covered causes of loss are "[r]isks of direct physical loss unless the loss is [excluded or limited under the Policy]."

Pursuant to the Policy, Hiscox agreed to pay for, among other things, lost business income and extra expenses related to a covered loss. Accordingly, the Policy stated that Hiscox would pay for the "actual loss of

Business Income" and "necessary Extra Expense" Pure Hair "sustain[ed] due to the necessary suspension of [Pure Hair's] 'operations'" and "during the 'period of restoration.'" The Policy further stated: "The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss."

The Policy also provided coverage for losses caused by certain actions of civil authorities that prohibited access to Pure Hair's salon premises. That "Civil Authority" provision stated:

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

The coverage provided by the Policy was limited by certain exclusions.

The Policy contained a "Virus [o]r Bacteria" exclusion, which stated:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

. . . .

Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Beginning in early March 2020, Governor Murphy issued a series of Executive Orders to address the Covid-19 pandemic. Executive Order 103, issued on March 9, 2020, declared a public health emergency and state of emergency in New Jersey. Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020). Executive Order 104, issued on March 16, 2020, among other things, limited the scope and hours of operation for non-essential, retail, recreational, and entertainment businesses. Exec. Order No. 104 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020). Five days later, on March 21, 2020, Governor Murphy issued Executive Order 107, which provided, among other things, that "[a]ll recreational and entertainment businesses," including

businesses performing "personal care services," like beauty salons, hair-braiding shops, nail salons, and spas, "must close to the public as long as th[e] Order remain[ed] in effect." Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020). Thereafter, the Governor issued Executive Orders 119 and 138, which extended the public health emergency in New Jersey into June 2020. Exec. Order No. 119 (Apr. 7, 2020), 52 N.J.R. 956(a) (May 4, 2020); Exec. Order No. 138 (May 6, 2020), 52 N.J.R. 1107(b).

For several months in 2020, plaintiff's salon was closed, and its business operations were limited by those Executive Orders. Plaintiff contends that its business losses are covered by the Policy's business income, extra expense, and civil authority provisions. Consequently, it requested coverage from Hiscox, but Hiscox denied coverage.

In September 2020, plaintiff filed a two-count complaint against Hiscox. Plaintiff sought a declaratory judgment that Hiscox was obligated to provide coverage for plaintiff's business losses and that the virus-exclusion provision did not apply. Plaintiff also asserted a breach of contract claim, contending Hiscox had breached the Policy by denying coverage.

In response, Hiscox filed an answer and then moved, under Rule 4:6-2(e), to dismiss the complaint for failure to state a claim. After hearing

argument, on June 29, 2021, the trial court granted that motion, explaining its reasons on the record and issuing an order dismissing the complaint with prejudice.

The trial court held that the virus-exclusion provision in the Policy applied and excluded all coverage sought by plaintiff. The trial court also reasoned that, even without the virus-exclusion provision, the Policy did not provide coverage because plaintiff had not suffered a direct physical loss of or damage to its insured salon premises. In addition, the trial court held that the civil authority provision did not apply because it covered only business interruption caused by physical damage to a nearby property that resulted in authorities prohibiting access to Pure Hair's salon.

II.

Plaintiff appeals from the order dismissing its complaint with prejudice and makes four related arguments. First, it contends that it incurred direct physical loss of or damage to its salon. Second, it contends that the trial court erred in dismissing its claim under the civil authority provision. Third, it argues that the virus-exclusion provision does not apply to the loss caused by the Governor's Executive Orders. Finally, it contends that Hiscox should be

barred from asserting the virus-exclusion provision based on the regulatory-estoppel doctrine.

We use a de novo standard to review all of plaintiff's arguments. The appeal comes before us challenging an order dismissing the complaint for failure to state a claim, and appellate courts apply a de novo standard of review to orders of dismissal. See Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). Accordingly, we assume the allegation in the pleadings are true and afford the pleader all reasonable inferences. Sparroween, LLC v. Township of West Caldwell, 452 N.J. Super. 329, 339 (App. Div. 2017). "Where, however, it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate." Ibid. (quoting J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 397 (App. Div. 2010)).

The issues on this appeal involve the interpretation of an insurance policy. "In interpreting insurance contracts, we first examine the plain language of the policy and, if the terms are clear, they 'are to be given their plain, ordinary meaning.'" Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 270 (2008) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). "If

the language is clear, that is the end of the inquiry." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008).

"Exclusions in insurance contracts 'are presumptively valid and will be given effect if [they are] 'specific, plain, clear, prominent, and not contrary to public policy.'"" Mac Prop. Grp. LLC, 473 N.J. Super. at 35 (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)). Further, exclusionary provisions "containing 'an anti-concurrent or anti-sequential clause' ha[ve] been interpreted to unambiguously bar coverage for losses resulting in any manner from an excluded cause." Id. at 37 (quoting Wear v. Selective Ins. Co., 455 N.J. Super. 440, 454-55 (App. Div. 2018)). "Thus, coverage is excluded for a loss attributable to a given cause 'regardless of whether any other cause, event, material or product contributed concurrently or in any sequence' to that loss." Ibid. (quoting Wear, 455 N.J. Super. at 454).

All the arguments raised by Pure Hair have been analyzed and rejected in our decision in Mac Property. The insurance coverage provisions, the civil authority provisions, and some of the virus-exclusion provisions that we analyzed in Mac Property are substantively identical to the provisions in the Policy.

First, the virus-exclusion provision in the Policy applies and precludes the coverage that Pure Hair is seeking. We find no merit in Pure Hair's argument that its business losses resulted from the Governor's Executive Orders and not the Covid-19 virus. As we explained in Mac Property, "it is unequivocal that the virus was the sole reason the [Executive Orders] were issued." Id. at 40. The Policy, like some of those in Mac Property, contained a virus-exclusion provision "that included anti-concurrent and anti-sequential causation language, undoubtedly barring coverage" because the Covid-19 virus allegedly contributed to Pure Hair's business losses. See ibid.

Moreover, the plaintiffs in Mac Property made substantially the same argument regarding regulatory estoppel as Pure Hair asserts. Relying on Morton International, Inc. v. General Accident Insurance Co., 134 N.J. 1 (1993), Pure Hair contends Hiscox is estopped from enforcing the virus-exclusion provision because certain insurance industry trade groups, including the Insurance Services Office, Inc. (ISO), made misrepresentations to state regulators by stating the adoption of virus-exclusion provisions was only meant to clarify that coverage for disease-related agents in property insurance policies had never been in effect.

In Mac Property, we considered and rejected that argument, concluding that Morton is distinguishable. Id. at 32-34. We reasoned that the "ISO plainly stated that there would be no coverage for any virus-related claims" and, thus, had not made any misrepresentations, unlike the Insurance Rating Board in Morton, which had "made false statements that coverage would continue for the same types of pollution and damage going forward." Id. at 33-34. We further noted that our conclusion was consistent with federal courts that considered similar regulatory-estoppel arguments based on the ISO's statements. Id. at 32-33 (collecting cases). In addition, we explained that plaintiffs' regulatory-estoppel claim would inevitably fail because the defendants, like Hiscox, did not take a position regarding the interpretation of the virus-exclusion provision that differed from the ISO's representations to state regulators. Id. at 33.

Second, Pure Hair's claim for coverage fails because it has not shown any direct physical loss of or damage to its salon premises. We reject Pure Hair's contention that the phrase "physical loss of or damage to" as used in the Policy is ambiguous. We considered and rejected this same argument in Mac Property and noted our conclusion was consistent with other courts interpreting similar policy language. Id. at 19-27.

Finally, for the reasons we explained in Mac Property, the civil authority provision also does not apply to give coverage for the losses Pure Hair seeks. In Mac Property, we considered the plain language of civil authority provisions substantively identical to the civil authority provision in the Policy. We held that the plain language of those civil authority provisions did not afford coverage because, among other reasons, the plaintiffs' premises had not been selectively closed due to damage to nearby property. Id. at 30. Like in Mac Property, Pure Hair's salon premises was not selectively closed by the Executive Orders due to damage to nearby properties.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION