SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Abruzzo Docg, Inc. v. Acceptance Indem. Ins. Co.

2026 NY Slip Op 02810 · No. 2022-02854 · Decided May 6, 2026

SUMMARY

The Appellate Division, Second Department, affirmed dismissal of the plaintiffs' breach-of-contract claims arising from insurers' denial of COVID-19-related coverage under commercial all-risk policies. The court held that alleged reconfigurations and other operational changes did not constitute direct physical loss or material physical damage, and reached the same result under California law for one policy. It modified the order to treat dismissal of the declaratory-judgment claim as a declaration in the defendants' favor and remitted for entry of an appropriate judgment.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Colleen D. Duffy, J.P.; Paul Wooten, J.; Phillip Hom, J.; Elena Goldberg Velazquez, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Department
DECIDED	May 6, 2026
DOCKET	2022-02854
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiffs appealed from an order granting the defendant insurers' CPLR 3211(a) motions to dismiss the first through sixty-third causes of action in the amended complaint.
STANDARD OF REVIEW	On a CPLR 3211(a)(7) motion, the court liberally construes the pleading, accepts alleged facts as true, affords the plaintiff every favorable inference, and determines whether the allegations fit within any cognizable legal theory. Insurance-contract interpretation is a question of law when the provisions are unambiguous.
PRECEDENTIAL VALUE	Published New York Appellate Division decision
PARTIES	Abruzzo Docg, Inc., et al., Aemal, LLC, et al., Other plaintiffs except Abruzzo Docg, Inc., G & L Restaurant, LLC, Il Rifugio, Inc., La

Vecchia, LLC, Mannaggia, Inc., and Monopolio, LLC v. Acceptance Indemnity Insurance Company, et al., Defendant insurers

TOPICS

insurance coverage | duty to indemnify | declaratory relief insurance | motions to dismiss | appellate procedure

PRACTICE AREAS

insurance law | contract law | civil procedure | appellate procedure | commercial litigation

QUESTIONS PRESENTED

1. Whether the amended complaint adequately alleged direct physical loss of or damage to insured property under the commercial all-risk policies.
2. Whether changes to restaurant layouts and operations required by COVID-19 Executive Orders constituted a material physical alteration or complete and persistent dispossession of insured property.
3. Whether the declaratory-relief cause of action should be treated as seeking a declaration in the defendants' favor where no factual questions were presented and the plaintiffs were not entitled to coverage as a matter of law.
4. Whether California law produced a different result for the policy covering Global Dining, Inc.

HOLDINGS

1. A policy covering direct physical loss or damage requires either a material physical alteration of the property or a complete and persistent dispossession; impaired functionality, loss of use, and operational or layout changes alone do not satisfy that requirement.
2. Although a properly pleaded declaratory-judgment cause of action ordinarily should not be dismissed before an answer merely because the plaintiff may not ultimately prevail, the court may reach the merits and treat the motion as one seeking a declaration in the defendant's favor when no questions of fact are presented.
3. Under the agreed application of California law, the alleged COVID-19-related operational and physical changes likewise did not constitute physical loss of or damage to covered property.

KEY QUOTATIONS

> *“"direct physical damage" "must be understood to require a material physical alteration to the property—one that is perceptible, even if not visible to the naked eye"”* (*2)

> *“"A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration."”* (*2)

FACTUAL BACKGROUND

The plaintiffs owned restaurants, bars, and dining establishments in New York City and purchased commercial all-risk policies covering direct physical loss of or damage to their properties. They alleged that COVID-19 Executive Orders required them to reconfigure spaces, erect barriers, rearrange floor plans, and reposition entrances and exits, which they claimed constituted covered physical loss or damage. The insurers denied the claims.

PROCEDURAL HISTORY

Plaintiffs, owners of New York City restaurants and other dining establishments, sued their insurers for breach of contract and declaratory relief, alleging that COVID-19 Executive Orders and resulting alterations to their premises constituted direct physical loss of or damage to insured property. The Supreme Court, Kings County, granted the insurers' motions to dismiss the asserted causes of action. The Appellate Division modified the order as to the declaratory-relief cause of action, treated the motions as seeking declarations in the defendants' favor, granted them, affirmed the order as modified, and remitted for entry of judgment.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remitted to the Supreme Court, Kings County, for entry of a judgment, inter alia, declaring that the defendants are not obligated to provide the plaintiffs with insurance coverage for the alleged injuries.

CASES CITED

- Drive N.J. Ins. Co. v. RT Hospitality Grp., LLC, 240 A.D.3d 105, 109
- Keller v. Keller, 237 A.D.3d 1183, 1184
- S. Donadic, Inc. v. Utica Mut. Ins. Co., 230 A.D.3d 606, 608
- Burlington Ins. Co. v. NYC Tr. Auth., 29 N.Y.3d 313, 321
- Consolidated Rest. Operations, Inc. v. Westport Ins. Corp., 41 N.Y.3d 415, 423, 426, 428-429, 431-432
- Carrols Rest. Group, Inc. v. American Guar. & Liab. Ins. Co., 225 A.D.3d 1133, 1134
- Another Planet Entertainment, LLC v. Vigilant Ins. Co., 15 Cal. 5th 1106, 1141
- United Talent Agency v. Vigilant Ins. Co., 77 Cal. App. 5th 821, 833-834
- 88-18 Tropical Restaurante Corp. v. Utica First Ins. Co., 223 A.D.3d 772, 773
- Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie, 87 A.D.3d 1148, 1150
- Matter of 22-50 Jackson Ave. Assoc., L.P. v. County of Suffolk, 216 A.D.3d 943, 947
- Lanza v. Wagner, 11 N.Y.2d 317