

Ill. Judge Lets NY Builders Press On In Virus Coverage Fight

By **Shawn Rice**

Law360 (August 13, 2021, 3:20 PM EDT) -- An Illinois state judge ruled that the coronavirus's presence was enough to allege "physical loss or damage" to property, allowing a coverage suit to proceed against Continental Casualty Co. over losses from the shutdown of a Brooklyn condominium tower project during the pandemic.

In an order issued Thursday, Judge Raymond W. Mitchell sided with New York contractor and developer JDS Construction Group LLC and 9 Dekalb Fee Owner LLC in refusing to toss their suit, saying they were able to show potential coverage under Continental's builders risk insurance policy.

The suit, filed in Cook County Circuit Court, alleges "the COVID-19 droplets or nuclei were present on solid surfaces and in the air at insured property" and "the virus, a physical substance" attached to the insured property, Judge Mitchell said, referring to the respiratory illness caused by the virus.

The judge noted allegations on how infected people carry virus droplets, which survive for an "extended, significant period of time" to surfaces, into the air and into a heating, venting and air conditioning system, "causing damage and alteration." The virus can make the air "unsafe and dangerous," the judge noted.

Work by the contractor and developer on the 80-story mixed-use condominium tower in Brooklyn was stopped in response to pandemic-related government orders in March 2020, according to court records. The pair were eventually allowed to partly reopen the jobsite in April 2020, but with reduced capacity.

A year after the initial shutdown order, the policyholders filed an amended suit, alleging Continental was responsible to cover their losses under the policy. Illinois-based Continental pushed in May to have the suit tossed, unsuccessfully arguing there weren't any allegations that the coronavirus materially altered the jobsite.

In denying Continental's bid for a dismissal on Thursday, Judge Mitchell also found the contractor and developer alleged enough for a physical loss to trigger the civil authority coverage of the policy, as they identified nearby health care facilities to the jobsite where the presence of the coronavirus was known.

Before the Empire State Development Corp. issued guidelines and executive orders allowed partial reopening, Judge Mitchell said, there was a period of time when access to the jobsite was barred. A ruling on the extent of these orders and guidelines would be better served later in the litigation, he added.

And the judge ruled the contractor and developer's mitigation expenses were enough to trigger the "sue and labor" provision of the policy, reserving the determination of the actual amount for trial.

Robin Cohen of Cohen Ziffer Frenchman & McKenna LLP, counsel for the policyholders, told Law360 in an emailed statement, "We are appreciative of Judge Mitchell's thoughtful decision that stayed true to the policy language designed to cover the type of business interruption that COVID-19 presents."

Judge Mitchell's ruling represented a policyholder win following a series of losses this month in Illinois, according to data from the University of Pennsylvania's COVID Coverage Litigation Tracker.

Virus exclusions doomed sporting goods franchisees' Illinois federal suit and an Illinois state suit lodged by the owner of three dental practices. Two Illinois federal judges also ruled a Hilton Garden Inn owner and a knife-sharpening business couldn't show direct physical loss in their pandemic coverage suits. Most of the businesses were based in Illinois.

A representative of Continental declined to comment Friday.

The policyholders are represented by Michael K. Forde, Brian P. O'Meara, Kevin R. Malloy and Ian P. Flanagan of Forde & O'Meara LLP and by Robin L. Cohen, Jillian Raines, R. Tali Epstein and Meredith Elkins of Cohen Ziffer Frenchman & McKenna LLP.

Continental is represented by Michael L. McCluggage, Brent R. Austin, Caroline P. Malone, John K. Adams and Robert E. Dunn of Eimer Stahl LLP.

The case is JDS Construction Group LLC et al. v. Continental Casualty Co., case number 2020 CH 05678, in the Circuit Court of Cook County, Illinois County Department, Chancery Division.

--Additional reporting by Ben Zigterman and Daphne Zhang.