

***Santa Ynez Band of Chumash Mission Indians v. Lexington Insurance Co.***

(2023) 90 Cal.App.5th 1064

Court of Appeal, Second District, Division 6, California

A plaintiff opposing a summary judgment motion involving a property damage coverage claim must: 1) Be able to present proof that the alteration of its property actually caused damage; 2) Identify the specific property that has been damaged; 3) Present proof whether that property had to be replaced or was no longer usable; and 4) Present evidence of the dollar amount of its loss.

**FACTS**

In March 2020, Chumash Casino and Resort was forced to close due to COVID-19. The Casino and Resort Manager concluded that “the COVID-19 virus was present on and interacting with surfaces at the casino-resort.” The official Chumash tribal resolution regarding the closure stated COVID-19 was “causing physical loss or damage to property on or near tribal lands, including, without limitation, the Chumash Casino and Resort.” The casino-resort reopened on June 10<sup>th</sup>, 2020, after installing temperature check machines, over 1,000 plexiglass barriers at gaming machines and tables, and barriers between tables in employee break areas. Chumash was insured by Lexington Insurance Co. The insurance policy contained six separate provisions covering the property, but all required “direct physical loss, damage, or destruction of property.” Chumash filed a claim with Lexington for “property damage to the Chumash Casino and Resort”, claiming that the virus rendered its facilities “unsafe and unusable.” Specifically, they contended that “the policy does not contain any provision which purports to exclude coverage for physical loss or damage due to viruses or pandemics.” Lexington denied the claim.

Chumash then filed an action against Lexington alleging causes of action for: (1) declaratory relief, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing. Chumash filed for a motion for summary adjudication and Lexington filed a cross motion for summary judgment claiming that Chumash did not qualify for coverage because the property did not sustain property damage. The trial court granted summary judgment in favor of Lexington. Chumash appealed to this court.

**HOLDING/DISCUSSION**

Lexington cited *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821. There, the court quoted a federal decision which stated that the virus’s impact on physical property is inconsequential because it can be easily wiped off using cleaning materials. (*Id.* at 893). The court distinguished the virus from radiation, gas, chemical dust, asbestos, or other contaminants which could trigger coverage. In the present case, this court found it problematic that federal courts are not all in complete agreement about the impact of the virus on property. Other courts have held that COVID-19 can damage business property.

Here, the court relied on *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 109. There, the court criticized the opinion in *United States Talent Agency* for concluding that the COVID-19 virus does not damage property without evidence to support that conclusion. Instead, the court in *Marina Pacific* stated that whether the virus caused property damage should be determined by the evidence presented on a case-by-case basis and the courts should "actually receive evidence" on that issue. Therefore, the issue in this case is whether Chumash presented sufficient evidence to show that the virus actually caused physical damage to its property.

The rule articulated in this case is that a plaintiff opposing a motion for summary judgment involving a property damage claim must: (1) Be able to present proof that the alteration of its property actually caused damage; (2) Identify the specific property that has been damaged; (3) Present proof whether that property had to be replaced or was no longer usable; (4) Present evidence of the dollar amount of its loss. Chumash did not meet this burden. They did not present any evidence, for example, that its carpeting, gambling tables, or other property had to be replaced or could not be used again. The lack of any such facts was fatal to Chumash's claim. Based on the evidence presented, Chumash only presented evidence that they installed the standard pandemic-related precautions that many other businesses made. Additionally, Chumash's experts only made general or conclusory statements such as that the surfaces at Chumash were physically altered and the affected surfaces would be permanently altered. Chumash was required to specify what property was damaged and to submit a claim for the dollar amount of that loss.

**Affirmed.**