2021 WL 5702331
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United States Court of Appeals, Sixth Circuit.

Jennifer B. MILLER, fka Jennifer B. Fosgitt, Plaintiff-Appellant,

v.

BANK OF NEW YORK MELLON, Successor TRUSTEE TO JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, as Trustee F/B/O Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust 2005-10, Mortgage Pass-Through Certificates; Select Portfolio Servicing, Inc., Defendants-Appellees.

Case No. 21-1126
|
FILED December 01, 2021

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Attorneys and Law Firms

Darwyn Prentiss Fair, Law Office, Detroit, MI, for Plaintiff-Appellant.

Laura C. Baucus, David M. Dell, Dykema Gossett, Bloomfield Hills, MI, for Defendants-Appellees.

Before: McKEAGUE, GRIFFIN, and KETHLEDGE, Circuit Judges.

OPINION

McKEAGUE, Circuit Judge.

***1** Jennifer Miller bought a house in Midland, Michigan, in 2005 and took out a mortgage. After a decade, she ran into trouble making her payments. She unsuccessfully sought a loan modification from defendants, the successors in interest to her mortgage. In 2018, defendants initiated foreclosure proceedings against Miller, and after nearly a year of forbearance, the property was sold at a sheriff's auction in March 2019. Miller then brought this suit, alleging that the foreclosure was a breach of contract as well as violative of state and federal law. The district court dismissed a portion of her claims and granted summary judgment on the remainder. For the reasons set forth below, we AFFIRM.

I.

Plaintiff-Appellant Jennifer B. Miller (then Fosgitt) and her then-husband Richard Fosgitt II purchased 5004 Bristlecone Drive, Midland, Michigan, from Strata Homes LLC on October 17, 2005. She obtained a $423,600 loan from CMX Mortgage Company LLC and she and Fosgitt granted Mortgage Electronic Registration Systems, Inc. (MERS) a mortgage encumbering the property. Miller lived in the house from 2005 until 2011 and returned in 2017. As of August 2020, Miller lived at the property.

Miller's loan changed hands during this period. When payments began in December 2005, the loan was transferred from CMX Mortgage Company to Bear Steans ALT-A Trust 2005-10, Mortgage Pass-Through Certificates, Series 2005-10. In March 2016, Miller was told that her loan servicer changed from JP Morgan Chase Bank N.A. to Defendant-Appellee Select Portfolio Servicing, Inc. (SPS). In November 2016, the mortgage was assigned to Defendant-Appellee The Bank of New York Mellon, Successor Trustee to JPMorgan Chase Bank, National Association, as Trustee F/B/O Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust 2005-10, Mortgage Pass-Through Certificates, Series 2005-10 ("the Trust.")

Miller fell behind on her payments. Her last payment appears to have been made in 2017. By January 2019, SPS understood her to be 29 payments past due.

Beginning in December 2015, Miller began contacting her servicer regarding a loan modification. The record reflects many emails, letters and phone calls between Miller and her servicer, with her servicer typically responding that she needed to provide more documentation for her application to be complete. SPS first mailed Miller a notice of default on May 10, 2017. The notice of default provided 30 days to cure. Absent a cure payment, SPS was allowed to initiate foreclosure and require payment of the full unpaid amount.

On February 22, 2018, SPS mailed notice to the property that a foreclosure sale was scheduled for March 27, 2018. (Miller testified that she believed that she was residing at the property at the time.) Notice was also posted to Miller's door

and published in the local newspaper. The sale was adjourned every week until March 19, 2019.

On May 16, 2018, SPS mailed Miller a letter denying her application for a loan modification on the basis that she had not supplied the documents requested by SPS in a March 6, 2018 mailing. She appealed this decision with SPS and was again denied.

***2** The sheriff's sale finally took place on March 19, 2019. The Trust purchased the home for $413,650.00. The Trust agreed to extend the statutory six-month redemption period until October 19, 2019, but Miller did not redeem the property.

In August 2019, Miller filed this lawsuit in state court. Defendants removed the case and filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss. In January 2020, the district court dismissed all but three claims. After discovery, the defendants filed a motion for summary judgment. Miller did not respond to this motion. In January 2021, the district court granted summary judgment, dismissing the remainder of Miller's claims with prejudice. Miller then brought this appeal.

II.

The District Court dismissed seven of ten counts of Miller's complaint, and then granted summary judgment on the remainder. Miller appeals the dismissal and grant of summary judgment as to nine counts of her claim. [1]

We review a ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss de novo. *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008). The complaint is viewed in the light most favorable to the plaintiffs, the complaints' allegations are accepted as true, and reasonable inferences are drawn in favor of the plaintiffs. A "legal conclusion couched as a factual allegation" need not be accepted as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must state a claim that is " 'plausible on its face' " such that a court can make a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570).

We review a grant of summary judgment de novo. *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 811 (6th Cir. 2020). A motion for summary judgment should be granted if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

A. Illegal Foreclosure.

Miller made two claims that defendants' foreclosure was illegal. First, she alleged that defendants failed to follow Michigan's requirements for foreclosure by advertisement, Mich. Comp. Laws § 600.3204. Second, she alleged that defendants' foreclosure was illegal for a variety of reasons stemming from their alleged failure to provide a notice of default as required by the mortgage. The district court dismissed the first and granted summary judgment on the second, and we affirm both.

First, we address the foreclosure-by-advertisement requirements. Michigan law controls the steps a mortgagee must take in order to properly foreclose, as well as "the rights of both the mortgagee and mortgagor once the sale is completed." *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 359 (6th Cir. 2013). The statute provides certain mortgagors with six months following the sale to redeem the property. Mich. Comp. Laws § 600.3240(8). The filing of a lawsuit cannot toll the redemption period. *Conlin*, 714 F.3d at 360. Once the redemption period expires, the sheriff's deed vests in the grantee and the "mortgagor's 'right, title and interest in and to the property' are extinguished." *Id.* at 359 (quoting *Piotrowski v. State Land Office Bd.*, 4 N.W.2d 514, 517 (Mich. 1942)). Courts can only consider setting aside a foreclosure sale if there is a " 'clear showing of fraud, or irregularity' " in the foreclosure process itself. *Id.* at 359–60 (quoting *Schulthies v. Barron*, 167 N.W.2d 784, 785 (Mich. Ct. App. 1969)). To prove a foreclosure defect claim, plaintiffs must show that they were prejudiced by a defendant's defect such that "they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Id.* at 361

(quoting *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 337 (Mich. 2012)).

***3** In her complaint, Miller alleged that the Trust[2] did not own the Note. Therefore, she argued, the foreclosure by the Trust did not meet the requirements of Mich. Comp. Laws § 600.3204(1)(d). But the district court properly concluded that this was contradicted by the corporate assignment of the mortgage and the sheriff's deed, both included with the complaint.

Miller also argues that defendants' alleged violations of the federal regulations on so-called dual-tracking justifies setting aside the foreclosure as an illegal foreclosure-by-advertisement. Dual-tracking refers to the practice of reviewing an application for loan modification simultaneously with foreclosure proceedings. 12 C.F.R. § 1024.41(f) prohibits mortgagees from beginning foreclosure proceedings once a mortgagor has requested a loan modification. Defendants do not deny Miller's allegations that they initiated foreclosure proceedings before resolving Miller's outstanding application for a loan modification. But the regulations do not require a mortgagee to grant loan modification; they only require a mortgagee to consider a loan modification. 12 C.F.R. § 1024.41(a). And 12 C.F.R. § 1024.41(i) merely requires that the mortgagee considers one application for loan modification, not duplicative requests. The record shows that defendants sent notice denying Miller's loan modification application from March 2018 and provided her an opportunity to appeal.

This leaves the question of whether defendants' alleged violation of 12 C.F.R. § 1024.41(f) was an irregularity that prejudiced Miller from being in a better position to preserve her interest in the property absent the violation. Even if the regulatory violation is sufficient to constitute fraud or irregularity, Michigan law requires a further showing of prejudice to set aside a mortgage after the redemption window has closed. *See* *Conlin*, 714 F. 3d at 361 (citing *Kim*, 825 N.W.2d at 337). But Miller offers no evidence in pleading beyond the asserted regulatory violation to support a showing of prejudice. Particularly because defendants went on to consider her modification request and then continued to delay the foreclosure sale for nearly another year after, Miller is unable to establish a claim. The district court properly dismissed Miller's claim that the foreclosure should be set aside as a result of defendants' defects in the foreclosure process.

Miller also challenges the foreclosure sale as improper by the terms of her mortgage because she alleged that she never received a notice of default. The district court granted summary judgment because the record established that there was no genuine issue of material fact as to whether Miller was provided with the notice of default. The record demonstrates that Miller was mailed a copy of the notice of default on May 10, 2017. Nothing in the record substantiates the allegations made in the complaint that Miller did not receive the notice of default. Summary judgment was appropriate.

B. Damages for RESPA Violations.

Miller brought claims alleging violations of the Real Estate Settlement Practices Act (**RESPA**) and its associated regulations. She claims that defendants failed to adequately respond to her qualified written requests as required by 12 U.S.C. § 2605(e). She also claims that defendants violated the prohibition on dual tracking by pursuing a foreclosure while simultaneously reviewing Miller's loan modification.

***4** The district court dismissed all claims for lack of standing, determining that Miller had failed to plead sufficient damages to constitute an injury-in-fact. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Miller alleged in two counts that the defendants failed to respond adequately to her qualified written requests in violation of 12 U.S.C. § 2605(e). Specifically, "[d]efendants did not provide all of the information sought in the letters," and that she "was inconvenienced and incurred expenses in seeking the information that [d]efendants refused to provide." R. 1-2, P. 29. For that violation, Miller requested:

> actual damages, including, but not limited to (1) out-of-pocket expenses incurred dealing with the **RESPA** violation including expenses for preparing, photocopying and obtaining certified copies of correspondence, (2)

> lost time and inconvenience to the extent it resulted in actual pecuniary loss, (3) late fees and (4) denial of credit or denial of access to full amount of credit line, additional [statutory] damages in the amount of $2,000.00, plus attorney's fees, the costs of this lawsuit, and litigation expenses. [3]

R. 1-2, P 29.

12 U.S.C. § 2605(e) does not require a servicer to respond in full to a borrower's request. It requires a lender to provide "information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer." 12 U.S.C. § 2605(e)(2)(C)(i). So merely not providing some of the information Miller sought cannot be enough to seek damages. And Miller does not deny that SPS replied to her qualified written requests. We have held that the bar for adequately pleading **RESPA** violations dealing with qualified written requests is low. *See* *Marais v. Chase Home Fin. LLC*, 736 F.3d 711, 720–21 (6th Cir. 2013) (plaintiff stated a claim for damages when, due to deficient response, bank misapplied payments); *Mellentine v. Ameriquest Mortg. Co.*, 515 F. App'x 419, 422–25 (6th Cir. 2013) (plaintiffs stated a claim where the defendant missed the statutory deadline for a response and plaintiff sought "damages in an amount not yet ascertained"). But here, Miller has not pleaded a clear violation of the statute—SPS did not violate a statutory deadline or any procedural requirements, but provided information responsive to only some of her requests as allowed by statute. She also has not provided any theory for how the alleged violations caused her asserted actual damages. She does not put forward anything resembling a misapplied payment or other error that SPS failed to correct in its responses. Without more, she has not adequately plead a concrete injury-in-fact to survive dismissal.

As to Miller's claim for statutory damages, 12 U.S.C. 2605(f) allows for $2,000 in damages, in addition to fees and costs, only in a "case of a pattern or practice" of violation. Miller pleaded only the conclusion that there was a pattern or practice of violation without factual support for that conclusion. Given that her complaint fails to establish that there was a violation of 12 U.S.C. § 2605(e)(2)(C)(i), she is unable to establish a claim for statutory damages either. Taken together, she is unable to plausibly state a claim for relief for violations of 12 U.S.C. § 2605(e).

***5** Miller claimed damages in another count for defendants' alleged violations of the dual-tracking prohibition in 12 C.F.R. 1024.41. For those, she requested only that the court "award Plaintiff actual damages, additional damages of $2000, attorney's fees, costs and litigation expenses." R. 1-2. P. 32. Miller asserts no evidence of what harm she suffered as a result of the dual-tracking violations. She pleads only a regulatory violation and a prayer for relief. Such an allegation of a "bare procedural violation, divorced from any concrete harm" is insufficient to establish standing. *Spokeo, Inc.*, 578 U.S. at 341. As to her request for statutory damages for dual-tracking, she merely asserts that there was a pattern or practice without any other pleading to support the claim. Taken together, she has failed to "state a claim to relief that is plausible on its face." *Bell Atl. Corp.*, 550 U.S. at 570.

C. Action to Quiet Title.

Miller sought to quiet title, arguing that the defendants' interest in the property was invalid. As already discussed, the Trust validly took title upon the expiration of the redemption period. Nothing about the foreclosure process requires setting the sheriff's deed aside. The district court properly dismissed this claim.

D. Conversion to Judicial Foreclosure.

Miller argues that the district court improperly dismissed her claim for conversion to judicial foreclosure. The district court determined that there was no such cause of action. Miller states that the district court was mistaken but offers only a description of the judicial foreclosure process in lieu of argument.

Under a Michigan statute that was repealed before Miller defaulted, a borrower could obtain conversion of foreclosure by advertisement to a judicial foreclosure if the lender failed to properly engage in a loan modification process. *See* Mich. Comp. Laws § 600.3205a(5); *Estate of Doreen Bessette v. Wilmington Trust N.A.*, 2016 WL 6947480 at *3, n.2 (E.D. Mich. Nov. 28, 2016). That remedy is not available under current law and was not available at the time of the

foreclosure on Miller's home. *See id.*; Mich. Comp. Laws § 600.3101.

E. Breach of Contract.

Miller also made a claim for breach of contract. She alleged that "Defendants failed to provide Plaintiff the notices required by the Mortgage prior to foreclosing, constituting a breach of contract," and that defendants breached the implied covenant of good faith and fair dealing by "b. Dual tracking Plaintiff; c. Disingenuously negotiating loss mitigation assistance with Plaintiff; [and] d. Misleading Plaintiff about approval and extension of loss mitigation assistance as an alternative to foreclosure." R. 1-2, P. 30.

First, on the notice issue, the district court properly determined that defendants met their contractual obligations. As discussed above, Miller is unable to establish a genuine issue of fact as to whether she received the notice of default. She does not offer evidence that any other notice was insufficient or was not given beyond her own testimony that she does not remember seeing notice of the sheriff's sale posted on her door on February 28, 2019. Indeed, the years of correspondence between Miller and her servicer, including the yearlong delay of the sheriff's sale, undermine the notion that notice was insufficient.

Next, summary judgment was also appropriate as to the good faith and fair dealing claims. Michigan law recognizes a claim for breach of contract where a defendant has failed to meet the standards of good faith and fair dealing where "one party 'makes the manner of its performance a matter of its own discretion.' " *Brimm v. Wells Fargo Bank, N.A.*, 688 F. App'x 329, 331 (6th Cir. 2017) (quoting *Burkhardt v. City Nat'l Bank of Detroit*, 226 N.W.2d 678, 680 (Mich. 1975)). As defendants note, the mortgage specifically states that forbearance or loan modification is not required by the mortgage, nor does it waive or preclude the exercise of their rights.

***6** To be sure, the record does not suggest that SPS's loan modification scheme was a picnic. The record is replete with emails and communications from Miller that make clear that she spent well over a year stuck in bureaucratic purgatory—unable to get a representative on the phone and unable to get SPS to decide that her application complete. But throughout 2018 and 2019, her servicer evaluated her application for modification, delayed her sale weekly for a year, and responded to her requests. Miller is unable to identify any terms of the contract where defendants' discretionary performance breached the duty of good faith and fair dealing. *See id.* Thus, the district court properly found no genuine issue of material fact as to whether defendants breached their implied covenant.

F. Declaratory Judgment.

Finally, Miller sought a declaratory judgment. The district court granted summary judgment. A declaratory judgment is not an independent cause of action. *See* *Davis v. United States,* 499 F.3d 590, 594 (6th Cir. 2007). Because Miller's other claims have all been dismissed, a declaratory judgment is not available to her.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2021 WL 5702331

Footnotes

1 Miller did not appeal the district court's denial of injunctive relief which was styled as a count of her complaint.

2 Miller used the acronym "BONYTC," which the district court construed as Bank of New York Mellon. We will similarly construe the term to refer to Bank of New York Mellon as trustee, or the Trust.

3 The district court asserted incorrectly that this request for specific damages originated in Miller's response to defendants' motion to dismiss and determined that it could not properly consider them on defendants' Rule 12(b)(6) motion. Because these damages were, in fact, included within her complaint, we consider them here.

End of Document

[Cite as *Akron v. Baum*, 2021-Ohio-4150.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CITY OF AKRON Appellee v. MARK J. BAUM Appellant	C.A. No. 29882 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2019 07 2588

DECISION AND JOURNAL ENTRY

Dated: November 24, 2021

HENSAL, Presiding Judge.

{¶1} Mark Baum appeals from the judgment of the Summit County Court of Common Pleas, granting summary judgment in favor of the City of Akron ("the City"). This Court affirms in part and reverses in part.

I.

{¶2} The City filed a complaint against Mr. Baum for action on an account and unjust enrichment. It later amended its complaint to correct a typographical error. In its amended complaint, the City alleged that Mr. Baum was the owner of 2349 19th Street SW in Akron (the "Property") at all relevant times. The City alleged that it entered into an agreement with Mr. Baum whereby the City agreed to provide utility services to the Property in exchange for payment from Mr. Baum under account number 04-1469-303. The City alleged that it provided the utility services to Mr. Baum, that Mr. Baum failed to pay for those services, and that he owed $21,979.05 under his account. The City attached copies of Mr. Baum's utility bills to the complaint, which

indicated that Mr. Baum's balance was $21,979.05, and demonstrated how that balance accrued over several months. In his answer, Mr. Baum admitted that he owned the Property during the relevant time period and that he was responsible for the payment of utility services, but denied that he owed the City $21,979.05.

{¶3} The City then served discovery to Mr. Baum, including requests for admissions and interrogatories. Mr. Baum admitted that he owned the Property during the relevant time period and that the Property was occupied by tenants during part of that time. He also admitted that he no longer owns the Property. He indicated that he donated the Property to the Summit County Land Bank in December 2019 in exchange for a write off of the water bill.

{¶4} The City then moved for summary judgment, arguing that it was entitled to judgment as a matter of law on its claims for action on an account and unjust enrichment. In support of its motion, the City relied upon the affidavit of Duane A. Smith. Mr. Smith averred that he is the Utilities Accounting Supervisor for the City, and that he is responsible for managing delinquent account balances and maintaining the records for the Akron Public Utilities Bureau ("APUB"). He averred that the City created Mr. Baum's account after APUB received a request to replace the water meter at the Property in March 2014 and discovered that the Property was occupied, that Mr. Baum was the owner, and that the water service to the Property was turned on.

{¶5} Mr. Smith averred that the City provided water service, sewer service, and curbside service to the Property under Mr. Baum's account from 2014 until February 21, 2018, when the City shut off water and sewer service due to a past due account balance of $370.38. He averred that when the City shuts off water service to a property, the City deems the property "Vacant/Shutoff." When this occurs, the City completes interim readings at the property, which are consumption readings that are not billed. He averred that, when a consumption reading on a

"Vacant/Shutoff" property shows elevated usage, the account for that property may be activated to bill for the elevated usage.

{¶6} Mr. Smith averred that, after the City shut off water and sewer service to the Property on February 21, 2018, it completed three interim readings between March 2018 and October 2018, all of which showed elevated usage. After each reading, the City discovered that the water service had been turned on without authorization from the City. Mr. Smith averred that, after the first two interim readings, the City shut the water and sewer back off, deemed the Property "Vacant/Shutoff[,]" and then activated Mr. Baum's account in order to bill for usage. Mr. Smith averred that, after the third interim reading, the City activated Mr. Baum's account in order to bill for usage. Unlike the first two interim readings, however, he did not aver that the City then shut the water and sewer back off.

{¶7} Mr. Smith averred that the City issued bills and letters to Mr. Baum regarding the delinquent balance, but that his account remained unpaid. Mr. Smith averred that one of the letters, which was sent in January 2019, again informed Mr. Baum of the delinquent balance, as well as the fact that he could request a hearing before the City's Claims Commission if he was unsatisfied with the explanation of the account balance. Mr. Smith averred that Mr. Baum's account balance continued to remain unpaid, and that the City sent Mr. Baum a bill in February 2019 for $21,979.05. Mr. Smith supported his affidavit, in part, with copies of the meter readings and bills associated with Mr. Baum's account, which showed how the delinquent balance accrued over the prior months.

{¶8} Relying on Mr. Smith's affidavit, Mr. Baum's responses to its discovery requests, the meter readings and bills associated with Mr. Baum's account, and APUB's rules and regulations, the City argued that it was entitled to judgment as a matter of law on its claims for

action on an account and unjust enrichment. Regarding its claim for action on an account, the City acknowledged that an action on an account is an action for breach of contract. It argued that it had an implied-in-fact contract with Mr. Baum because it provided water, sewer, and curbside service to the Property, and Mr. Baum accepted those services. The City argued that Mr. Baum breached the implied-in-fact-contract by not paying for the services the City provided.

{¶9} Having set forth its argument regarding Mr. Baum's breach of an implied-in-fact contract, the City then argued that it established a prima facie case for action on an account because it established: (1) the existence of the account and Mr. Baum as the account's owner; (2) a beginning balance showing a provable sum that qualifies as an account stated; (3) listed consumption amounts that represented new monthly charges on the account; and (4) a summarization of the developing balance calculated based on current water and sewer consumption rates calculated monthly, past balances owed on the account, and any payments made on the account. The City argued that there was no genuine issue of material fact that Mr. Baum has an unpaid account balance of $21,979.05, and, therefore, that it was entitled to judgment as a matter of law on its claim for action on an account.

{¶10} Regarding its claim for unjust enrichment, the City argued that it conferred the benefit of water service, sewer service, and curbside service on Mr. Baum, which rendered the Property habitable for Mr. Baum's tenants while Mr. Baum owned the Property. The City argued that Mr. Baum had knowledge of this benefit, yet failed to pay for those services. It concluded that there was no genuine issue of material fact that the City is entitled to compensation in the amount of $21,979.05 for the benefit the City conferred upon Mr. Baum.

{¶11} Mr. Baum did not oppose the City's motion, and the trial court granted summary judgment in favor of the City. In doing so, it concluded that Mr. Baum breached an implied-in-

fact contract, and that he was unjustly enriched by receiving services from the City without paying for those services. Mr. Baum now appeals that order, raising one assignment of error for this Court's review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY RULING AGAINST THE APPELLANT ON AN UNPAID UTILITY BILL IN VIOLATION OF THE AKRON PUBLIC UTILITIES BUREAU RULES AND REGULATIONS.

{¶12} In his assignment of error, Mr. Baum argues that the trial court erred by granting summary judgment in favor of the City on its claims for action on an account and unjust enrichment. This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Pursuant to Civil Rule 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶13} The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact concerning the essential elements of the non-moving party's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civil Rule 56(C). *Id.* at 292-293. If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Id.* at 293. If the non-moving party does not oppose the motion for summary judgment, then this Court's review is

limited to whether the moving party met its initial summary judgment burden. *Bank of New York Mellon for Nationstar Home Equity Loan Tr. 2007-B v. Bridge*, 9th Dist. Summit No. 28461, 2017-Ohio-7686, ¶ 11, 22. Here, by failing to respond to the City's motion for summary judgment, Mr. Baum has forfeited the right to raise any argument on appeal that he did not raise below. *Id.* at ¶ 22; *Sovereign Bank, N.A. v. Singh*, 9th Dist. Summit No. 27178, 2015-Ohio-3865, ¶ 11 ("When the non-moving party fails to raise an argument when responding to the motion for summary judgment, the party forfeits the right to raise that argument on appeal.").

{¶14} This Court's review of the City's motion for summary judgment, and the materials attached thereto, indicates that the City demonstrated the absence of a genuine issue of material fact concerning the essential elements of an action on an account. "An action on an account is appropriate where the parties have conducted a series of transactions, for which a balance remains to be paid." *E. Ohio Gas Co. v. Kenmore Constr. Co. Inc.*, 9th Dist. Summit Nos. 19567, 19790 2001 WL 302818, *5 (Mar. 28, 2021). "Such action is founded on a contract, express or implied." *Id.* Thus, to prevail on a claim for action on an account, a plaintiff "must establish each of the essential elements of a contract claim." *Wadsworth Pointe Health Care Group, Inc. v. Baglia*, 9th Dist. Medina No. 17CA0064-M, 2018-Ohio-1978, ¶ 9.

{¶15} The trial court found that the City had an implied-in-fact contract with Mr. Baum. An implied-in-fact contract hinges upon proof of all of the elements of a contract. *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, ¶ 28 (7th Dist.2007). An implied-in-fact contract diverges from an express contract in the form of proof that is required to establish each contractual element. *Id.* "In express contracts, assent to the terms of the contract is actually expressed in the form of an offer and an acceptance." *Id.* "On the other hand, in implied-in-fact contracts the parties' meeting of the minds is shown by the surrounding circumstances, including

the conduct and declarations of the parties, that make it inferable that the contract exists as a matter of tacit understanding." *Id.*; *accord E. Ohio Gas Co.* at *5 ("To establish a contract implied in fact, a party must demonstrate that circumstances surrounding the parties' transactions make it reasonably certain that an agreement was intended."). Regarding an action on an account, this Court has stated:

> "To establish a prima facie case for money owed on an account, a plaintiff must demonstrate the existence of an account, including that the account is in the name of the party charged, and it must also establish (1) a beginning balance of zero, or a sum that can qualify as an account stated, or some other provable sum; (2) listed items, or an item, dated and identifiable by number or otherwise, representing charges, or debits, and credits; and (3) summarization by means of a running or developing balance, or an arrangement of beginning balance and items that permits the calculation of the amount claimed to be due."

Schottenstein Zox & Dunn Co., L.P.A. v. Reineke, 9th Dist. Medina No. 10CA0138-M, 2011-Ohio-6201, ¶ 18, quoting *Great Seneca Fin. v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, ¶ 6 (1st Dist.).

{¶16} The City submitted evidence that it provided utility services to the Property, which Mr. Baum accepted, and that the outstanding balance on Mr. Baum's account was $21,979.05. As previously noted, the City supported its motion for summary judgment, in part, with copies of meter readings and bills associated with Mr. Baum's account that dated back to when the City transferred the account from the previous owner of the Property to Mr. Baum. The City also supported its motion with a copy of APUB's rules and regulations that detailed quarterly water rates and billing practices, among other items. Having reviewed the City's motion for summary judgment and its attachments, this Court concludes that the City met its initial burden of demonstrating the absence of a genuine issue of material fact concerning the essential elements of its claim for action on an account. This Court, therefore, affirms the trial court's grant of summary judgment with respect to that claim. *See Bridge*, 2017-Ohio-7686, at ¶ 22 (noting that, when the

non-moving party fails to respond to the moving party's motion for summary judgment, this Court's review is limited to whether the movant met its initial summary judgment burden).

{¶17} We now turn to the trial court's grant of summary judgment on the City's claim for unjust enrichment. "'A claim for unjust enrichment, or quantum meruit, is an equitable claim based on a contract implied in law, or a quasi-contract' and 'the elements of [the claims] are identical.'" (Alterations sic.) *Baglia*, 2018-Ohio-1978, at ¶ 21, quoting *Padula v. Wagner*, 9th Dist. Summit No. 27509, 2015-Ohio-2374, ¶ 47. Generally, a party cannot recover under the theory of unjust enrichment when the subject matter of that claim is covered by an express contract or an implied-in-fact contract. *Deffren v. Johnson*, 1st Dist. Hamilton No. C-200176, C-200183, 2021-Ohio-817, ¶ 10, citing *Ryan v. Rival Mfg. Co.*, 1st Dist. Hamilton No. C-810032, 1981 WL 10160, *1 (Dec. 16, 1981); *Baglia* at ¶ 21, quoting *Padula* at ¶ 48 ("Ohio law does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject."); *see Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 661 (9th Dist.1992) ("The legal effect of an implied contract and an express contract is identical[.]"); *compare Zeck v. Sokol*, 9th Dist. Medina No. 07CA0030-M, 2008-Ohio-727, ¶ 13-16 (analyzing a situation wherein claims for breach of contract and unjust enrichment are both viable).

{¶18} The trial court determined that the City and Mr. Baum had an implied-in-fact enforceable contract and granted summary judgment in favor of the City on its claim for action on an account. Having determined that the parties had a contract, it erred by then granting summary judgment on the City's claim for unjust enrichment, which applies in the absence of an enforceable contract. This Court, therefore, reverses the trial court's grant of summary judgment on the City's claim for unjust enrichment. Mr. Baum's first assignment of error is overruled in part and sustained in part.

III.

{¶19} Mr. Baum's assignment of error is overruled with respect to the trial court's grant of summary judgment on the City's claim for action on an account, and is sustained with respect to the trial court's grant of summary judgment on the City's claim for unjust enrichment. The judgment of the Summit County Court of Common Pleas is affirmed in part and reversed in part.

Judgment affirmed in part,
and reversed in part.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

JENNIFER HENSAL
FOR THE COURT

TEODOSIO, J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

MARK J. BAUM, pro se, Appellant.

EVE V. BELFANCE, Director of Law, and KIRSTEN L. SMITH, Assistant Director of Law, for Appellee.

[Cite as *Nail Nook, Inc. v. Hiscox Ins. Co., Inc.*, 2021-Ohio-4211.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

THE NAIL NOOK, INC., :

Plaintiff-Appellant, :

No. 110341

v. :

HISCOX INSURANCE COMPANY INC., ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 2, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-933244

Appearances:

Taubman Law and Bruce D. Taubman, *for appellant*.

Bailey Cavalieri, L.L.C., Jolene S. Griffith, and Elan R. Kandel; Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., Judy Y. Barrasso, and Chloé M. Chetta, *for appellee*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiff-appellant, The Nail Nook Inc. ("Nail Nook"), appeals from the trial court's February 24, 2021 decision granting the defendant-appellee's, Hiscox Insurance Company, Inc.'s ("Hiscox" or the "insurance company") motion

for judgment on the pleadings. After a thorough review of the record and law, this court affirms.

I. Procedural History

{¶ 2} In June 2020, Nail Nook filed a complaint for declaratory judgment and breach of contract against Hiscox and defendant-appellee David I. Schonbrun ("Schonbrun"). Nail Nook subsequently dismissed the complaint, without prejudice, against Schonbrun only.

{¶ 3} The record establishes that Hiscox issued a commercial business owners insurance policy to Nail Nook, which operates a nail salon in Bratenahl. Nail Nook sought coverage under the policy for coronavirus-related business interruption losses as a result of Ohio Governor Mike DeWine's March 2020 executive order declaring a state of emergency due to the coronavirus; the order mandated the closing of certain businesses, including nail salons. Hiscox denied coverage, and Nail Nook filed the within action.

{¶ 4} In September 2020, Hiscox filed a motion for judgment on the pleadings under Civ.R. 12(C), contending that under the policy's "virus or bacteria" exclusion, Nail Nook was not entitled to coverage for its claim. Nail Nook opposed the motion, contending that the policy was ambiguous because it does not define "direct" or "physical loss or damage." Nail Nook maintained, as it alleged in its complaint, that its "physical property was damaged." Nail Nook did not address the policy's "virus or bacteria" exclusion, however.

{¶ 5} The trial court granted the insurance company's motion for judgment on the pleadings. The trial court did not reach the issue of whether Nail Nook could prove "direct physical loss of or damage to Covered Property," finding the Policy's "clear and unambiguous virus exclusion" precluded all potential coverage:

> [T]he clear and unambiguous virus exclusion contained in the insurance policy issued by Hiscox to Nail Nook specifically excludes coverage for any loss or damage caused directly or indirectly by a virus, such as the coronavirus (SARS-CoV-2).
>
> * * *
>
> Applying the plain language of the insurance policy, specifically the foregoing virus exclusion, to the allegations contained in Plaintiff's Complaint, the Court finds that Plaintiff can prove no set of facts that would entitle it to coverage under the policy for loss or damage caused by the coronavirus, as alleged.
>
> In its complaint, Nail Nook generally alleges that it sustained losses due to coronavirus. Nail Nook acknowledges the coronavirus is, in fact, a virus (Complaint at ¶ 9, 10, 11, 19) and this virus is capable of inducing physical distress, illness or disease (Complaint at ¶ 20, 21). The Court finds that under the policy's clear and unambiguous virus exclusion, Nail Nook's alleged losses are excluded from coverage.

Trial court's February 24, 2021 opinion and order.

{¶ 6} Nail Nook now appeals, raising the following assignment of error for our review: "The Trial Court erred in granting Appellee's judgment on the pleadings because Hiscox's insurance policy is ambiguous and subject to multiple interpretations."

A. Factual History: The Policy

{¶ 7} Hiscox issued Businessowners Policy No. UDC-2401467-BOP-19 to Nail Nook for the period December 1, 2019, through December 1, 2020 ("the

policy"). The policy primarily insures contents located at Nail Nook's place of business. Specifically, the policy covers "Business Personal Property * * * located in or on the buildings at the described premises," such as "office equipment, furniture, [and] computers." The policy does not cover the "described premises," as in Nail Nook's actual building or business space.

{¶ 8} Moreover, and relevant to this case, the policy's general coverage provision does not cover all losses. Rather, the policy insures against only "direct physical loss of or damage to Covered Property at the [described] premises * * * caused by or resulting from any Covered Cause of Loss." "Covered Causes of Loss" are "risks of direct physical loss unless the loss is [excluded or limited under the Policy]." "Additional Coverage" is available if the insured establishes a threshold claim for coverage because of "direct physical loss of or damage to" the contents; the "Additional Coverage" relates to certain financial losses caused by the "direct physical loss of or damage to Covered Property."

{¶ 9} The policy also has a "Business Income" provision, which provides:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." 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.

{¶ 10} Additionally, an "Extra Expense" provision of the policy provides as follows:

> We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no 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.

{¶ 11} The policy defines "period of restoration" as the time when physically lost or damaged property that caused the suspension of operation "should be repaired, rebuilt or replaced with reasonable speed and similar quality" or until "business is resumed at a new permanent location."

{¶ 12} The policy also sets forth the relevant exclusion:

> B. Exclusions
>
> 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.
>
> * * *
>
> j. Virus or Bacteria
>
> (1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

{¶ 13} As noted above, the trial court found that the "clear and unambiguous virus exclusion" precluded all potential coverage.

II. Law and Analysis

{¶ 14} In its sole assignment of error, Nail Nook challenges the trial court's judgment granting Hiscox's motion for judgment on the pleadings.

{¶ 15} A Civ.R. 12(C) motion for judgment on the pleadings raises only questions of law that are reviewed under a de novo standard of review. *Cohen v.*

Bedford Hts., 8th Dist. Cuyahoga No. 101739, 2015-Ohio-1308, ¶ 7. Courts review Civ.R. 12(C) motions under a Civ.R. 12(B)(6) standard:

> The Ohio Supreme Court has held that a Civ.R. 12(C) motion for judgment on the pleadings is to be considered as if it were a belated motion to dismiss for failure to state a claim upon which relief can be granted. *State ex rel. Pirman v. Money*, 69 Ohio St.3d 591, 592, 635 N.E.2d 26 (1994). Therefore, we will analyze the [Civ.R 12(C) motion] under the same principles which we would apply in reviewing a Civ.R. 12(B)(6) dismissal.

Black v. Coats, 8th Dist. Cuyahoga No. 85067, 2005-Ohio-2460, ¶ 6.

{¶ 16} "In order to dismiss a complaint for failure to state a claim upon which relief can be granted, the court must find beyond doubt that plaintiff can prove no set of facts warranting relief after it presumes all factual allegations in the complaint are true, and construes all reasonable inferences in plaintiff's favor." *Black* at ¶ 7, citing *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994).

{¶ 17} Initially, we recognize the well-established rule that construction of a written contract is a matter of law to be determined by the court. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. Accordingly, when the terms of a contract are clear and unambiguous a court "cannot in effect create a new contract by finding an intent not expressed in the clear language of the contract." *Id.* at 246.

{¶ 18} After reviewing the record, we agree with the trial court that, "[u]nder the policy's clear and unambiguous virus exclusion, Nail Nook's alleged losses are excluded from coverage."

{¶ 19} Moreover, the subject policy provides "Business Personal Property" coverage for things like "office equipment, furniture, and computers," but it does not insure Nail Nook's business activities generally. Coverage for business interruption losses is available only if the insured can prove a "direct physical loss of or damage to Covered Property" (i.e., the equipment, furniture, and computers) caused a suspension of business operations. Nail Nook has not alleged that its business personal property has been physically lost or damaged. Rather, it contended that its damages were "all due to the coronavirus." The plain language of the policy excludes coverage for such a loss.

{¶ 20} Hiscox has cited numerous Ohio and other states' cases that have considered business interruption losses due to the coronavirus. We note two in particular, *Santo's Italian Café LLC v. Acuity Ins. Co.*, 6th Cir. No. 21-3068, 2021 U.S. App. LEXIS 28720 (Sept. 22, 2021), and *MIKMAR, Inc. v. Westfield Ins. Co.*, N.D.Ohio No. 1:20-CV-01313, 2021 U.S. Dist. LEXIS 29591 (Feb. 17, 2021).

{¶ 21} In *Santo's*, an Italian restaurant in Medina, sued its insurer, Acuity Insurance Company, for coverage under its commercial property insurance policy, which covers business interruption "caused by direct physical loss of or damage to property," as a result of lost revenue due to the pandemic and the state's pandemic orders. The district court granted the insurance company's motion to dismiss, concluding that the policy did not cover this circumstance. The Sixth Circuit agreed and affirmed the district court's dismissal.

{¶ 22} The policy language at issue in this appeal is similar to the policy language at issue in *Santo's*. The policy language in *Santo's* stated that "[w]e will pay for direct physical loss of or damage to Covered Property * * * caused by or resulting from any Covered Cause of Loss." *Id.* at 3-4. With respect to "Covered Causes of Loss," the policy applied to "Risks of Direct Physical Loss." *Id.* at 4. The policy also provided numerous "Additional Coverages," one of which includes coverage for "Business Income and Extra Expense." *Id.* Under that provision, the insurance company was required to reimburse the restaurant owner for business income lost "due to the necessary suspension" of its operations if the "suspension" was "caused by direct physical loss of or damage to property" at the restaurant. *Id.* The policy defined a "suspension" as either "[t]he partial slowdown or complete cessation of * * * business activities" or when "a part or all of the described premises is rendered untenantable." *Id.*

{¶ 23} The Sixth Circuit considered the following question: "Does a pandemic-triggered government order, barring in-person dining at a restaurant, count as 'direct physical loss of or damage to' the property?" *Id.* at 5. The Sixth Circuit answered the question in the negative: "The policy does not cover this loss. The restaurant has not been tangibly destroyed, whether in part or in full. And the owner has not been tangibly or concretely deprived of any of it. It still owns the

restaurant and everything inside the space. And it can still put every square foot of the premises to use, even if not for in-person dining use." *Id.* at 8.[1]

{¶ 24} Although *Santo's* did not consider the "virus exclusion," *MIKMAR* did. In *MIKMAR*, the plaintiffs, MIKMAR, Inc. and Michael's Inc., were companies doing business as LaMalfa Centre and Vine Beverage and Caterers, which operated an adjoining hotel and banquet facility in Mentor. When the plaintiffs sustained losses due to the pandemic, they filed claims for lost business income under their insurance policies issued by defendant Westfield Insurance Company; the insurance company denied the claims. The plaintiffs then filed suit on their own behalf, as well as on behalf of a putative class of other hospitality businesses that own and operate hotels, banquet halls, and catering or event facilities. The insurance company filed a motion to dismiss for failure to state a claim upon which relief can be granted, which the trial court granted.

{¶ 25} The plaintiffs' policies were substantially similar, and provided coverage for "direct physical loss of or damage to Covered Property * * * caused by or resulting from any Covered Cause of Loss." *Id.* at 3. "Covered Cause of Loss" was defined as "[d]irect physical loss unless the loss is excluded or limited" under the policy. *Id.* The policies also provided "Business Income and Extra Expense" coverage.

---

[1] The policy also included the following exclusion: Acuity "will not pay for loss or damage caused directly or indirectly by * * * [a]ny virus * * * capable of inducing physical distress, illness or disease." *Id.* at 20. The Sixth Circuit declined to address this exclusion, stating that "the absence of initial coverage for [the restaurant's] claim suffices to reject it." *Id.*

{¶ 26} In regard to "Business Income and Extra Expense" coverage, the policies covered the "actual loss of Business Income" sustained "due to the necessary suspension of your 'operations' during the 'period of restoration.'" *Id.* at 4. The policies required that the "suspension must be caused by direct physical loss of or damage to the property" and the "loss or damage must be caused by or result from a Covered Cause of Loss," which also required direct physical loss. The policies also covered the "Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to the property at the described premises." *Id.*

{¶ 27} Business Income and Extra Expense coverage were both limited by the "period of restoration," which meant the time between the "direct physical loss or damage caused by * * * any Covered Cause of Loss" and the "date when the property * * * should be repaired, rebuilt or replaced[.]" *Id.* The end date for the period of restoration under MIKMAR's policy was alternatively the "date when business is resumed at a new permanent location." *Id.* at 4-5.

{¶ 28} MIKMAR's policy also contained several exclusions, one of which was the "virus or bacteria" exclusion. The exclusion precluded coverage for "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.* at 6. According to the policy, where an exclusion applies, the "loss or damage is excluded regardless of any other cause or event that contributed concurrently or in any sequence to the loss." *Id.* at 6-7. The district court found that the insurance company "carried its burden of showing that the

losses Plaintiffs allege fall squarely within the policy language of the virus exclusion. "In the Court's view, the language of the exclusion is plain and unambiguous and [excludes] the losses Plaintiffs allege." *Id.* at 30.

{¶ 29} The *MIKMAR* court reasoned that even if the government orders were in the "causal chain" of events leading to a plaintiff's loss, because the policy language excludes losses caused "directly or indirectly" by a virus, the exclusion applies:

> This policy language sweeps aside the causation question Plaintiffs raise to try to avoid application of the exclusion's plain language. * * * [T]he reach of the exclusion to losses a virus indirectly causes does not require parsing the causal chain legally and obviates the need for factual development. To the extent there is any doubt on the matter, [the] policy applies the exclusion "regardless of any other cause or event that contributed concurrently or in any sequence to the loss."

Id. at *29.

{¶ 30} Here, the trial court correctly ruled that the virus exclusion in Nail Nook's Policy is "clear and unambiguous"; the finding comports with other courts that have addressed substantially similar exclusions to the exclusion at issue in this case. As noted above, aside from the virus exclusion, and assuming all of the allegations in Nail Hook's complaint were true, Nail Nook did not have a valid claim for coverage because it could not prove "direct physical loss of or damage to Covered Property" required for "Business Income or Extra Expense" coverage under the policy.

{¶ 31} Based on the foregoing analysis, the trial court properly granted Hiscox's motion for judgment on the pleadings. Nail Nook's sole assignment of error is overruled.

{¶ 32} Finally, we join the Sixth Circuit in sympathizing with all businesses impacted by the pandemic and pandemic-related orders:

> The singular challenges facing restaurants, bars, and other hospitality services over the last eighteen months are not lost on us. Staying in business through a once-in-a-century pandemic (let us hope) that has prompted all kinds of new government regulations, including prohibitions on many in-person services, has to be trying. Sure, state and federal loans and grants have offered some support for entities that suffered government-created losses of this sort, and surely that aid has allowed some companies to survive. But that truth provides little solace to those that did not.
>
> That leaves a hard reality about insurance. It is not a general safety net for all dangers. If risk is not having money when you need it, insurance is one answer to perilous events that could prompt a sudden drop in revenue. Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for. That is why courts must honor the coverage the parties did — and did not — provide for in their written contracts of insurance.

Santo's Italian Café LLC, 6th Cir. No. 21-3068, 2021 U.S. App. LEXIS, at 22-23.

III. Conclusion

{¶ 33} After thoroughly reviewing the record, we affirm the trial court's judgment granting Hiscox's motion for judgment on the pleadings. Because there is no basis for coverage for coronavirus-related damages, the trial court properly granted Hiscox's motion.

{¶ 34} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, A.J., and
LISA B. FORBES, J., CONCUR