

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MITSUI SUMITOMO INSURANCE USA INC.,

Plaintiff,

vs.

VOSGES HAUT-CHOCOLAT, LLC; VOSGES
HOLDINGS, LLC,

Defendants.

INDEX NO.:

DATE INDEX NO. PURCHASED:
JANUARY 20, 2021

SUMMONS

TO THE ABOVE-NAMED DEFENDANTS:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED and required to answer the attached complaint of the plaintiff in this action and to serve a copy of your answer upon the attorneys for the plaintiff at the address stated below.

If this summons was personally delivered to you in the State of New York, you must serve the answer within 20 days after such service, excluding the day of service. If this summons was not personally delivered to you in the State of New York, you must serve the answer within 30 days after service of the summons is complete, as provided by law.

YOU ARE HERBY NOTIFIED THAT if you do not serve an answer to the attached complaint within the applicable time limitation stated above, a judgment may be entered against you, by default, for the relief demanded in the complaint.

Plaintiff designates the County of New York as the place of trial.

Venue for this action is proper in the County of New York pursuant to CPLR 503(a) and 503(c). Plaintiff is a property and casualty insurance company organized under the laws of New York, and maintains its principal place of business at 560 Lexington Avenue, 20th Floor, New York, NY 10022.

Dated: January 20, 2021
New York, NY

**RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP**
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Mitsui Sumitomo Insurance USA Inc.

By: /s/ Brian E. O'Donnell
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Vosges Holdings, LLC
2950 N. Oakley Ave.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

<p>MITSUI SUMITOMO INSURANCE USA INC.,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>VOSGES HAUT-CHOCOLAT, LLC; VOSGES HOLDINGS, LLC,</p> <p style="text-align: right;">Defendants.</p>
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INDEX NO.:

COMPLAINT

Plaintiff, Mitsui Sumitomo Insurance USA Inc. (“**MSI**”), by and through its undersigned attorneys, alleges as follows:

NATURE OF THE ACTION

1. MSI brings this declaratory judgment action under an insurance policy it issued to Defendants Vosges Haut-Chocolat, LLC and Vosges Holdings, LLC (collectively, “**Vosges**”) effective from December 31, 2019 to December 31, 2020 (the “**Policy**”). MSI seeks a declaration that it has no obligation under the Policy to provide coverage to Vosges for their claimed business income losses due to public health orders issued in response to the COVID-19 global pandemic.

PARTIES

2. MSI is a property and casualty insurance company that is organized under the laws of New York and licensed by the State of New York to transact business (and does transact business) in that state. MSI’s statutory home office is also located in New York, New York.

3. Upon information and belief, defendant Vosges Haut-Chocolat LLC is a limited liability company, which is organized under the laws of Illinois with its principal place of business in Illinois, and which transacts and/or has transacted business in the State of New York, including by directing the negotiation and procurement of the Policy at issue in this litigation and/or by

manufacturing or selling its products in this state and/or by maintaining physical presence in this State.

4. Upon information and belief, defendant Vosges Holdings, LLC is a limited liability company, which is organized under the laws of Delaware with its principal place of business in Illinois, and which transacts and/or has transacted business in the State of New York, including by directing the negotiation and procurement of the Policy at issue in this litigation and/or by manufacturing or selling its products in this state and/or by maintaining physical presence in this State.

5. Upon information and belief, defendant Vosges Holdings, LLC is also registered with the New York State Department of State as a foreign limited liability company, with Cogency Global Inc., 122 East 42nd Street, 18th Floor, New York, NY 10168 designated as its registered agent for service of process.

6. Upon information and belief, a member of defendant Vosges Holdings, LLC is domiciled in New York.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to CPLR 3001. Justiciable controversies exist between the parties as to their rights and legal relations.

8. This Court has personal jurisdiction over each of the defendants pursuant to CPLR 302. Each of the defendants has engaged in transactions or business within this State from which this action arises.

9. Venue is proper in this County pursuant to CPLR 503(a).

BACKGROUND FACTS

A. The COVID-19 Pandemic

10. In or around late 2019, a highly contagious novel coronavirus, SARS-CoV-2, that causes a respiratory illness or disease known as COVID-19 emerged in China and quickly spread throughout the world, including to the United States.

11. The virus is primarily transmitted from person-to-person through respiratory droplets produced when an infected person coughs, sneezes, or talks.

12. On March 9, 2020, Illinois Governor J.B. Pritzker, exercising his emergency powers under state law, declared a state of emergency in Illinois in response to the outbreak of COVID-19.

13. On March 20, 2020, Governor Pritzker entered Executive Order 2020-10 ordering all individuals living in the State of Illinois to stay at home with limited exceptions and ordering the cessation of non-essential businesses and operations in response to the outbreak of COVID-19.

14. Similar orders were issued by county and local officials pursuant to their emergency powers under state law in response to the outbreak of COVID-19 (collectively, the “**Closure Orders**”).

15. Vosges claims to have lost revenues because of the Closure Orders issued in response to the outbreak of COVID-19.

16. Vosges claims to have lost revenue directly or indirectly because of a virus, SARS-CoV-2.

17. Vosges’ claimed lost revenue was not because of direct physical loss of or damage to their property.

18. The virus, SARS-CoV-2, has never been detected on Vosges’ property.

19. The Closure Orders were not issued in response to any property damage or loss.
20. The Closure Orders did not deny access to Vosges' premises.
21. Vosges' claimed lost revenue was not because of direct physical loss of or damage to property at another location upon which Vosges' business depends.

B. The MSI Policy

22. Vosges purchased a commercial property and liability policy from MSI for the December 31, 2019 to December 31, 2020 policy period (the "**Policy**"). A copy of the Policy is attached as **Exhibit A**.

23. Under the Policy, MSI generally agreed to pay for "direct physical loss to covered property at a 'covered location' caused by a covered peril."

24. The Policy defines a covered peril to mean "direct physical loss unless the loss is limited or caused by a peril that is excluded."

25. **Business Income Coverage.** The Policy provides business interruption coverage for the loss of income Vosges sustains "during the 'restoration period'" when their "'business' is necessarily wholly or partially interrupted by direct physical loss of or damage to" covered property "as a result of a covered peril." ("**Business Income Coverage**"). Business Income Coverage includes Vosges' earnings and their extra expenses. The "restoration period" ends on "the date the property should be rebuilt, repaired or replaced" or "the date business is resumed at a new permanent location."

26. **Civil Authority Coverage.** The Policy further provides civil authority coverage for income losses that Vosges sustains as the result of a civil authority's order when "access to 'covered locations' or a dependent location is specifically denied by an order of civil authority," as a result of "direct physical loss of or damage to property, other than at a 'covered location'" and "caused by a covered peril." ("**Civil Authority Coverage**").

27. **Dependent Locations.** The Policy further provides dependent locations coverage for the loss of income that Vosges sustains “during the ‘restoration period’” when their “‘business’ is interrupted by direct physical loss of or damage, caused by a covered peril to property at a ‘dependent location.’” (“**Dependent Locations Coverage**”). Dependent Locations Coverage includes Vosges’ earnings and extra expenses. The “restoration period” for Dependent Locations Coverage ends on “the date the property at the ‘dependent location’ should be rebuilt, repaired, or replaced” or “the date business is resumed at a new permanent location.” A “dependent location” is one that is “operated by others” that Vosges’ “‘business’ depends on,” including their suppliers’ locations, locations that receive their products, locations that attract customers to their business, and locations that make products for delivery to their customers under a contract of sale.

28. **Virus Exclusion.** The Policy includes the Virus or Bacteria Exclusion (“**Virus Exclusion**”), which bars coverage for all “loss or damage caused by, resulting from, or relating to any virus, bacterium or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.” The Virus Exclusion amends Perils Excluded, item 1 in the CO 1000 10 02 coverage form, which, in turn, includes the preamble that loss or damage caused “directly or indirectly” by a virus will be excluded “regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.”

29. **Other Provisions.** The Policy includes additional terms, conditions and exclusions that may apply to Vosges’ claim, including, for example, the Policy’s exclusion for all “loss caused by loss of use, delay, or loss of market.”

C. The Claim

30. In or around June 2020, Vosges submitted a claim to MSI under the Policy for business interruption losses and extra expenses purportedly sustained by Vosges beginning in mid-

March 2020 relating to the Closure Orders issued in response to the outbreak of COVID-19 (the “**Claim**”).

31. By letter dated September 14, 2020, MSI denied the claim (the “**Denial Letter**”). A copy of the Denial Letter is attached as **Exhibit B**.

32. In the Denial Letter, MSI stated that it was denying the claim for numerous reasons, including on the grounds that any losses sustained by Vosges resulted from a “virus” and thus were precluded from coverage under the Policy’s Virus Exclusion, on the grounds that there was no evidence of “direct physical loss of or damage to” Vosges’ property or property at a “dependent location,” and on the grounds that there was no evidence that any civil authority’s order was issued as a “result of direct physical loss of or damage to property.”

33. In the Denial Letter, MSI further stated that it was reserving all rights and defenses under the Policy, including its right to deny coverage for additional reasons, including that no action of civil authority “specifically denied” access to insured premises.

34. In the Denial Letter, MSI invited Vosges to let MSI know at their earliest convenience if they had any additional information or if circumstances change such that Vosges believed MSI should alter its coverage determination.

D. The Northern District of Illinois Action

35. On or about November 10, 2020, Vosges Haut-Chocolat LLC and Vosges Holdings Inc. instituted an action in the United States District Court for the Northern District of Illinois arising out of MSI’s denial of Vosges’ Claim (“**N.D. Illinois Action**”). A copy of the complaint in the N.D. Illinois Action, without its exhibits, is attached as **Exhibit C** (“**N.D. Illinois Complaint**”).

36. The N.D. Illinois Complaint contained no new facts that warranted MSI changing its coverage denial. Instead, the complaint in the N.D. Illinois Action confirmed that Vosges’

claimed losses were the result of COVID-19, that Vosges did not incur any direct physical loss of or damage to their property, that no civil authority order was issued as a “result of direct physical loss of or damage to property,” and that no civil authority order “specifically denied” access to the insured premises.

37. On November 10, 2020, MSI waived service of the N.D. Illinois Complaint.

38. On December 28, 2020, MSI informed the Court in the N.D. Illinois Action that it intended to file a timely motion to dismiss the N.D. Illinois Complaint.

39. On January 6, 2021, MSI, Vosges Haut-Chocolat LLC, and Vosges Holdings Inc. filed a joint status report in the N.D. Illinois Action in which MSI again stated that it intended to file a timely motion to dismiss.

40. On January 13, 2021, counsel for Vosges Haut-Chocolat LLC and Vosges Holdings Inc. informed counsel for MSI, for the first time, that a sub-member of Vosges Haut-Chocolat LLC was domiciled in New York, which could potentially destroy federal diversity jurisdiction of the N.D. Illinois Action.

COUNT ONE
(Declaratory Judgment Pursuant to CPLR 3001)

41. MSI repeats and realleges all of the foregoing allegations as if set forth at length herein.

42. Vosges has made claims for and requested that MSI provide coverage under the Policy for claimed income losses related to COVID-19.

43. MSI has properly denied coverage under the Policy for the claims made by Vosges.

44. An actual, justiciable controversy has arisen as to whether, under the terms, conditions, exclusions, and limitations of the Policy, MSI has an obligation to provide coverage for the losses claimed by Vosges.

45. Vosges has initiated the N.D. Illinois Action against MSI relating to MSI's coverage denial but has now advised that it may have initiated the litigation in an inappropriate forum.

46. MSI is initiating this action against Vosges in this court in order to obtain, in an appropriate forum, a declaration that it has no obligation to provide coverage for Vosges' Claim.

47. The parties' rights and obligations are determined by the terms, conditions, exclusions, and limitations of the Policy.

48. MSI is not obligated to provide coverage under the Policy for the losses claimed by Vosges.

49. There is no coverage for Vosges' claimed losses because the entirety of the Claim was caused directly or indirectly by a virus, SARS-CoV-2, and therefore is barred by the Policy's Virus Exclusion.

50. There is no coverage for Vosges' claimed losses under Business Income Coverage because Vosges' business was not interrupted by direct physical loss of or damage to property at a covered location.

51. There is no coverage for Vosges' claimed losses under Civil Authority Coverage because the Closure Orders did not specifically deny access to Vosges' property and were not issued as a result of direct physical loss of or damage to property.

52. There is no coverage for Vosges' claimed losses under Dependent Locations Coverage because Vosges' business was not interrupted by direct physical loss of or damage to property at a dependent location.

53. Pursuant to CPLR 3001, MSI is entitled to a declaration that, under the Policy, it has no obligation to provide coverage for the losses claimed by Vosges.

WHEREFORE, MSI demands judgment and respectfully requests that the Court enter judgment in MSI favor as follows:

- a. Enter a declaratory judgment that the Policy does not provide coverage for the losses claimed by Vosges; and
- b. Grant any further relief that the Court deems equitable and just.

**RIKER DANZIG SCHERER HYLAND &
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Dated: January 20, 2021

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