

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE, COUNTY, FLORIDA

CASE NO.: 2019-022607-CA-01 (32)

CARILLON HOTEL, LLC,

Plaintiff,

vs.

LEXINGTON INSURANCE COMPANY,

Defendant.

_____ /

**DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S COMPLAINT**

Defendant, LEXINGTON INSURANCE COMPANY ("LEXINGTON"), by and through its undersigned counsel, hereby files its Answer to Plaintiff's Complaint, and alleges:

INTRODUCTION

1. LEXINGTON is without knowledge of the allegations contained within Paragraph 1 of Plaintiff's Complaint and therefore denies the same.

2. LEXINGTON denies the allegations contained within Paragraph 2 of Plaintiff's Complaint.

3. LEXINGTON denies the allegations contained within Paragraph 3 of Plaintiff's Complaint.

4. LEXINGTON denies the allegations contained within Paragraph 4 of Plaintiff's Complaint.

5. LEXINGTON admits the allegations contained in Paragraph 5 of Plaintiff's Complaint.

6. LEXINGTON admits the allegations contained in Paragraph 6 of Plaintiff's Complaint.

7. LEXINGTON admits the allegations contained in Paragraph 7 of Plaintiff's Complaint.

8. LEXINGTON admits the allegations contained within Paragraph 8 of Plaintiff's Complaint.

9. LEXINGTON admits the allegations contained within Paragraph 9 of Plaintiff's Complaint.

10. LEXINGTON denies the allegations contained within Paragraph 10 of Plaintiff's Complaint as phrased.

11. LEXINGTON denies the allegations contained within Paragraph 11 of Plaintiff's Complaint.

12. LEXINGTON denies the allegations contained within Paragraph 12 of Plaintiff's Complaint as phrased.

13. LEXINGTON admits the allegations contained in Paragraph 13 of Plaintiff's Complaint.

14. LEXINGTON denies the allegations contained within Paragraph 14 of Plaintiff's Complaint as phrased.

15. LEXINGTON denies the allegations contained within Paragraph 15 of Plaintiff's Complaint as phrased.

16. LEXINGTON denies the allegations contained within Paragraph 16 of Plaintiff's Complaint as phrased.

17. LEXINGTON admits the allegations contained within Paragraph 17 of Plaintiff's Complaint.

18. LEXINGTON denies the allegations contained within Paragraph 18 of Plaintiff's Complaint as phrased.

19. LEXINGTON denies the other allegations contained within Paragraph 19 of Plaintiff's Complaint as phrased.

20. LEXINGTON denies the allegations contained within Paragraph 20 of Plaintiff's Complaint.

21. LEXINGTON admits the allegations contained within Paragraph 21 of Plaintiff's Complaint.

22. LEXINGTON denies the allegations contained within Paragraph 22 of Plaintiff's Complaint.

23. LEXINGTON denies the allegations contained within Paragraph 23 of Plaintiff's Complaint.

24. LEXINGTON denies the allegations contained within Paragraph 24 of Plaintiff's Complaint as phrased.

25. LEXINGTON denies the allegations contained within Paragraph 25 of Plaintiff's Complaint as phrased.

26. LEXINGTON denies the allegations contained within Paragraph 26 of Plaintiff's Complaint.

27. LEXINGTON is without knowledge of the allegations contained within Paragraph 27 of Plaintiff's Complaint and therefore denies the same.

28. LEXINGTON denies the allegations contained within Paragraph 28 of Plaintiff's Complaint.

29. LEXINGTON denies the allegations contained within Paragraph 29 of Plaintiff's Complaint.

COUNT I

30. LEXINGTON re-asserts its responses to Paragraphs 1-29 of Plaintiff's Complaint.

31. LEXINGTON admits the allegations contained within Paragraph 31 of Plaintiff's Complaint.

32. LEXINGTON denies the allegations contained within Paragraph 32 of Plaintiff's Complaint.

33. LEXINGTON denies the allegations contained within Paragraph 33 of Plaintiff's Complaint.

34. LEXINGTON denies the allegations contained within Paragraph 34 of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

For its First Affirmative Defense, LEXINGTON asserts the policy provides as follows:

MOLD / FUNGUS EXCLUSION (with direct result of covered loss exception)

This endorsement modifies insurance provided by the Policy:

In consideration of the premium charged, it is hereby understood and agreed that this Policy is amended as follows.

The Company shall not be liable for any loss or damage in the form of, caused by, arising out of, contributed to, or resulting from fungus, mold(s), mildew or yeast; or any spores or toxins created or produced by or emanating from such fungus, mold(s), mildew or yeast;

- (a) fungus includes, but is not limited to, any of the plants or organisms belonging to the major group fungi, lacking chlorophyll, and including mold(s), rusts, mildews, smuts and mushrooms;
- (b) mold(s) includes, but is not limited to, any superficial growth produced on damp or decaying organic matter or on living organisms, and fungi that produce mold(s);
- (c) spores means any dormant or reproductive body produced by or arising or emanating out of any fungus, mold(s), mildew, plants, organisms or microorganisms,

regardless of any other cause or event that contributes concurrently or in any sequence to such loss.

This exclusion shall not apply to any loss or damage in the form of, caused by, contributed to or resulting from fungus, mold(s), mildew or yeast, or any spores or toxins created or produced by or emanating from such fungus, mold(s), mildew or yeast which the Insured establishes is a direct result of a Covered Loss not otherwise excluded by the Policy, provided that such fungus, mold(s), mildew or yeast loss or damage is reported to the Company within twelve months from the expiration date of the Policy.

All other terms and conditions of the Policy remain the same.

Second Affirmative Defense

For its Second Affirmative Defense, LEXINGTON asserts the policy provides as follows:

4. PERILS EXCLUDED

This **Policy** does not insure:

* * * *

- B. against the cost of correcting defective design or specifications, faulty material, or faulty workmanship; however, this exclusion shall not apply to direct physical loss, damage or destruction resulting from such defective design or specifications, faulty material, or faulty workmanship. This exclusion shall not apply to property in transit;

Lexington determined that a portion of the claimed damages were the result of pre-existing building conditions of the above nature which are excluded under the policy.

Third Affirmative Defense

For its Third Affirmative Defense, LEXINGTON asserts the policy provides as follows:

4. PERILS EXCLUDED

This **Policy** does not insure:

* * * *

- D. against ordinary wear and tear, inherent vice, latent defect or gradual deterioration, evaporation, rust, shrinkage or change in color, flavor, texture or finish unless direct physical loss, damage or destruction not otherwise excluded ensues and then this **Policy** shall insure for such ensuing direct physical loss, damage or destruction;

Lexington determined that a portion of the claimed damages were the result of pre-existing building conditions of the above nature which are excluded under the policy.

Fourth Affirmative Defense

For its Fourth Affirmative Defense, LEXINGTON asserts the policy provides as follows:

4. PERILS EXCLUDED

This **Policy** does not insure:

- J. against smog or changes in temperature or changes in relative humidity unless direct physical loss, damage or destruction not otherwise excluded ensues and then this Policy shall insure for all such ensuing physical loss, damage or destruction.

To the extent that a portion of Plaintiffs damages are the result of changes in temperature or changes in humidity those damages are excluded.

Fifth Affirmative Defense

For its Fifth Affirmative Defense, LEXINGTON asserts the policy provides as follows:

30. SUIT AGAINST THE COMPANY

No suit or action on this Policy for the recovery of any claim shall be sustainable in any court of law or equity unless the **Insured** shall have fully complied with all the requirements of this **Policy**. If there is any dispute between the **Insured** and the **Company** as to whether the **Insured** has fully complied with all the requirements of this **Policy**, such a dispute may be resolved in a suit or action on the **Policy** for recovery of any claim.

Plaintiff did not fully comply as it filed suit prior to allowing for the continuance of the examination under oath and did not produce some documents in support of claim until after suit was filed.

Sixth Affirmative Defense

For its Sixth Affirmative Defense, LEXINGTON asserts the policy provides as follows:

B. Business Interruption

(1) Loss resulting from necessary interruption of business conducted by the **Insured**, whether total or partial, and caused by direct physical loss, damage, or destruction insured herein during the term of this **Policy** to real and personal property as described in Clause 2.A. of the Policy Provisions.

* * * *

(6) Experience of the Business:

* * * *

C. Extra Expense

(1) Extra Expense incurred resulting from direct physical loss, damage or destruction insured herein during the term of this **Policy** to real or personal property as described in Clause 2.A.

(2) Extra Expense means the excess of the total cost chargeable to the operation of the **Insured's** business over and above the total cost that

would normally have been incurred to conduct the business had no direct physical loss, damage or destruction occurred.

D. Rental Value

- (1) Rental Value loss sustained by the Insured resulting from direct physical loss, damage or destruction insured herein during the term of this **Policy** to real and personal property as described in Clause 2.A. but not exceeding the reduction in Rental Value less charges and expenses which do not necessarily continue.

* * * *

H. Provisions Applicable to Business Interruption, Extra Expense, Rental Value, Royalties Coverages, Delay in Completion of the Project and Time Element Extension

- (1) Period of Recovery (not applicable to Delay in Completion of the Project):
The length of time for which loss may be claimed:
- (a) shall commence with the date of such direct physical loss, damage or destruction and shall not be limited by the date of expiration or cancellation of this **Policy**;
 - (b) shall not exceed the length of time required to rebuild, repair or replace the property that has been lost, damaged or destroyed with the exercise of due diligence and dispatch; and
 - (c) shall include an Extended Period of Indemnity, not to exceed the time period indicated within the Limits of Liability, which is the additional length of time to restore the **Insured's** business to the condition that would have existed had no loss occurred, commencing with the later of the following dates:
 - (i) the date on which the liability of the **Company** for loss or damage would otherwise terminate; or
 - (ii) the date on which repair, replacement, or rebuilding of the property that has been damaged is actually completed;

In order for the coverage under the above provisions to be triggered, the business interruption must be caused by direct physical loss to the building by a covered loss. Lexington determined that the alleged damage to the building was not caused by a covered loss and did not exceed the deductible. Accordingly, no business interruption coverage is available.

Seventh Affirmative Defense

For its Seventh Affirmative Defense, LEXINGTON asserts the policy provides as follows:

REQUIREMENTS IN CASE OF LOSS

The Insured shall:

1. Give prompt written notice of any loss or damage to the Company,
2. Promptly contact the applicable authority having jurisdiction in the event a law has been broken, and promptly file a written report with such authority,
3. Protect the property from further loss or damage,
4. Separate the damaged and undamaged personal property,
5. Maintain such property in the best possible order, and
6. Furnish a complete inventory of the lost, destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed,
7. Furnish all other documents or insurance policies that the Company may reasonably require,
8. Allow the Company to access and inspect any of the damaged or undamaged property, and
9. Submit to examination under oath at such times as may be reasonably required about any matter relating to this insurance or any claim;

The Plaintiff did not furnish a complete inventory of destroyed or damaged property setting in detail the quantity, cost and actual cash value of the amount claimed. Plaintiff did not provide notice of a \$13 million dollar claim until November 2018, almost one year after the loss. Plaintiff did not provide the full claim until 2019. Additionally, Plaintiff filed suit prior to allowing a continued examination under oath after the delivery

of additional supporting documents to the claim on June 24, 2019 and other documents after suit was filed.

Eighth Affirmative Defense

For its Eighth Affirmative Defense, LEXINGTON asserts the policy provides as follows:

G. DEDUCTIBLE(S)

All losses, damages or expenses arising out of any one **Occurrence** shall be adjusted as one loss, and from the amount of such total adjusted loss US\$ 25,000 shall be deducted, except:

- (3) 5% of the Actual Value per Unit of Insurance at the time when such loss occurs at locations within counties identified in Addendum C for the peril of **Named Windstorm** subject to a minimum of US\$250,000 and a maximum of US\$ 2,500,000 in total for all Units of Insurance per **Occurrence** irrespective of the number of locations involved. This deductible shall apply only to those Units of Insurance suffering a loss in the **Occurrence** and for which a claim is being made;

The covered loss as calculated by Lexington does not exceed the deductible.

DEMAND FOR JURY TRIAL

LEXINGTON hereby demands a trial by jury of all issues so triable as matter of right.

Respectfully submitted,

BERK, MERCHANT & SIMS, PLC.

/s/Melissa M. Sims

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COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
email this 9th day of September, 2019 to:

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