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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

CHEZ MONIQUE RESTAURANT, INC. and MONIQUE DE LA CROIX,

Plaintiffs,

-against-

THE CHARTER OAK FIRE INSURANCE COMPANY,

Defendant.

Motion Sequence #2, #3
Submitted March 26, 2009

INDEX NO: 5016/08

The following motions were read on these motions:

CHARTER OAK Notice of Motion.....1
Defendant's Memorandum of Law in Support.....2
CHEZ MONIQUE and MONIQUE Notice of Cross-Motion.....3
MONIQUE Affidavit.....4
Plaintiffs' Memorandum of Law in Opposition to Motion in Chief and in Support of Cross-Motion.....5
CHARTER OAK Reply Affirmation and Opposition to Cross-Motion.....6
Defendant's Memorandum of Law in Further Support of Motion in Chief and Opposition to Cross-Motion.....7
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Defendant, THE CHARTER OAK FIRE INSURANCE COMPANY, moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint in its entirety. Plaintiffs, CHEZ MONIQUE RESTAURANT, INC. (hereinafter referred to as

"CHEZ MONIQUE") and MONIQUE DE LA CROIX (hereinafter referred to as "MONIQUE"), oppose the motion and cross-move for summary judgment, pursuant to CPLR §3212(c), based upon defendant's breach of contract and request an order directing an inquest on damages, including consequential damages, attorneys fees and punitive damages. The motion and cross-motion are determined as follows:

This action concerns a fire that took place on June 15, 2006. The fire destroyed the restaurant operated by CHEZ MONIQUE. MONIQUE is the sole officer and shareholder of CHEZ MONIQUE. It is not disputed that arson was the cause of the fire.

Nine (9) days before the fire, CHEZ MONIQUE switched insurance companies and obtained an insurance policy from defendant. The named insured in the policy is "CHEZ MONIQUE RESTAURANT, INC. d/b/a ROUGE". The policy provided the following insurance coverage: Business Personal Property with a limit of $600,000; Restaurant Equipment with a limit of $300,000; and Loss of Business Income for up to twelve (12) months with a limit of $112,500. CHEZ MONIQUE submitted an insurance claim for the full policy coverage. Defendant did not pay the claim, but instead opened an investigation into the claim.

The first two (2) public adjusters that plaintiffs hired to assist in processing their claim cancelled their agreements with plaintiffs. By letter to plaintiffs' adjuster, dated June 19, 2006, plaintiffs identified ten (10) categories of documents sought by defendant. By fax, dated June 21, 2006, Richard Greubel, defendant's major case unit adjuster, advised plaintiffs' adjuster that defendant would proceed with its investigation of the claim under a full reservation of rights (Exhibit "JJ" to defendant's moving papers).

In August, 2006, defendant issued a partial payment of $25,000.00 on plaintiffs' claim. The investigation by the Nassau County Fire Marshall continued in September 2006. On October 4, 2006, defendant made a second partial payment of $50,000.00 on plaintiffs' claim. By Fax, dated October 16, 2006, (Exhibit "O" to MONIQUE Affidavit), Mr. Greubel advised the State Insurance Department of the following:

> At present, the authorities have not determined any Insured involvement regarding the case of the fire(s), so we are proceeding with our adjustment.

On January 30, 2007, defendant requested a sworn statement in proof of loss, which CHEZ MONIQUE supplied on March 1, 2007. By letter, dated March 6, 2007, defendant advised that it did "not accept or reject the claim" because the claim "remains under investigation". Thereafter, by letter dated March 7, 2007, it requested an "examination under oath" and demanded production of thirty-five (35) categories of documents.

In April 2007, plaintiffs commenced an action against defendant in Supreme Court, Westchester County (hereinafter referred to as "the Westchester Action"), wherein they alleged four (4) causes of action: breach of contract, bad faith, several violations of Insurance Law §2601 for failing to accept or deny the claim, and for unfair settlement practices. Defendant moved for dismissal of the complaint in its entirety, as premature, and the motion was granted by decision and order of Honorable Justice W. Denis Donovan, dated September 7, 2007 (Exhibit "X" to Defendant's moving papers). Plaintiff's cross-motion for summary judgment on the issue of liability and for an inquest on damages was denied.

Plaintiffs commenced the instant action in March 2008. They allege four (4) causes of action: breach of contract, bad faith, failure to pay for debris removal, and violations of Insurance Law §2601 for unfair claim practices, and seek payment for attorneys fees, punitive damages and sanctions. Defendant denies the allegations of the complaint, alleges eleven (11) affirmative defenses and interposes a counterclaim for unjust enrichment based upon its payment of $75,000. In the motion in chief, defendant moves for summary judgment dismissing the complaint against both CHEZ MONIQUE and MONIQUE , and said plaintiffs seek summary judgment in their favor on the issue of liability on their first cause of action for breach of contract.

Summary judgment is the procedural equivalent of trial (*S.J.Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYZS2d 478, 313 NE2d 776 [C. A. 1974]). It is a drastic remedy that will only be granted where the proponent establishes that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]). On a motion for summary judgment the Court should refrain from making credibility determinations (*Ferrante v American Lung Assn.*, 90 NY2d 623, 665 NYS2d 25, 687 NE2d 1308 [C.A. 1997]).

Defendant's first contention is that MONIQUE has no standing to sue because she is not a named insured. Plaintiffs counter that MONIQUE has an insurable interest in the premises of CHEZ MONIQUE.

Only the named insured has standing to bring an action against an insurer for insurance proceeds (see, *Bronxville Properties, Inc. v Friedlander Group Inc.*, 307 AD2d 245, 763 NYS2d 834 [2nd Dept. 2003]). As MONIQUE is not a named insured, she has no

standing to sue. Accordingly defendant is entitled to summary judgment dismissing all claims against it by MONIQUE in the complaint.

Defendant further seeks summary judgment dismissing all claims in this action that were previously alleged in the Westchester action on the grounds of collateral estoppel. Here, the Westchester action was expressly dismissed as "premature". Judge Donovan's further statement that, "[h]ad the court not reached this conclusion, the alternative relief sought by defendant would have been granted", is pure *dicta*. As *dicta* in a decision is not entitled to collateral estoppel effect (*Chiarini v County of Ulster,* 9 AD3d 769, 780 NYS2d 669 [3rd Dept. 2004]; *Town of East Hampton v Omabuild USA No.1, Inc.*, 215 AD2d 746, 627 NYS2d 723 [2nd Dept. 1995]; *Sahn v AFCO Industries*, 192 AD2d 480, 597 NYS2d 294 [1st Dept, 1993]), the decision and order in the Westchester action does not bar the present action.

Defendant further submits that all claims in the complaint must be dismissed because plaintiffs failed to cooperate--an express condition precedent to coverage. Defendant contends that plaintiffs have wilfully refused to cooperate in defendant's investigation of the claim. The policy does contain a cooperation clause (Policy annexed as Exhibit "C" to defendant's moving papers, at pp. 27-28), and defendant argues that the insured's principal, MONIQUE's failure, *inter alia*, (1) to identify the persons who allegedly transported money from Romania to the United States to pay for renovations to the restaurant, and (2) to document the alleged transfer of Romanian property to her boyfriend, establishes a wilful failure to cooperate. Defendant further submits that MONIQUE did not file personal tax returns for the years 2003 through 2006, and consequently there is no

documentation of her financial condition at the time of the fire. Her testimony that she did not deposit in a bank the envelopes of cash she received from her parents in Romania, leaves her explanation of payment for renovations to the restaurant undocumented.

In opposition plaintiffs argue that only "substantial compliance" is required by the insured, and that they have done much more than substantially comply with defendant's requests for documentation.

An insurer who seeks to disclaim coverage on the grounds of non-cooperation is required to demonstrate: (1) that it acted diligently in seeking to bring about the insured's cooperation; and (2) its efforts were reasonably calculated to obtain the insured's cooperation; and (3) the attitude of the insured was one of willful and avowed obstruction (*Country-Wide Ins.Co. v Henderson*, 50 AD3d 789, 856 NYS2d 184 [2nd Dept. 2008], citing *Thrasher v United States Liability Ins. Co.*, 19 NY2d 159, 278 NYS2d 798 [C.A.1967]). Mere efforts on the part of the insurer, and mere inaction on the part of the insured, do not suffice (*Country-Wide Ins.Co., supra* at 791, citing *Empire Mutual Ins.Co. v Stroud*, 36 NY2d 719, 367 NYS2d 972, 328 NE2d 485 [C.A. 1975]; *see also*, *State Farm Mut. Auto. Ins. Co. v Campbell*, 44 AD3d 1059, 845 NYS2d 88 [2nd Dept. 2008]). Furthermore, to borrow a well-established rule from discovery cases, a failure to produce documents because they do not exist or are not in the possession of the party from whom production is sought, is not a basis for a finding of willfulness [*Maffai v County of Suffolk*, 36 AD3d 765, 829 NYS2d 566 [2nd Dept 2007]; *Euro-Central Corp v Dalsimer*, 22 AD3d 793, 803 NYS2d 171 [2nd Dept. 2005]; *Bach v City of New York*, 304 AD2d 686, 757 NYS2d 759 [2nd Dept. 2003]). An insured's duty to cooperate is satisfied by substantial compliance (*New*

York Central Mutual Fire Ins. Co. v Rafailov, 41 AD3d 603, 8940 NYS2d 358 [2nd Dept. 2007]).

On this record defendant has failed to meet its heavy burden as to the first and third prongs of the *Thrasher* test. Defendant's "Reservation of Rights" letter was not even sent to the insured, but to the insured's then-adjuster, and the demand for the sworn statement in proof of loss was not made until nearly seven (7) months after the fire. Furthermore, plaintiffs have produced numerous documents. Their failure to identify certain persons or to produce documentation of former property ownership in Romania appears to be more a function of inability than refusal. Finally, the failure to produce documents that do not exist cannot be found to be willful. Overall, on this record, the Court is compelled to conclude that defendant has failed to show plaintiffs' attitude is one of "willful and avowed obstruction". Consequently, defendant's motion for summary judgment on its condition precedent defense must be denied and this defense is dismissed.

Defendant additionally seeks summary judgment dismissing plaintiffs' claims for attorneys' fees and punitive damages. Plaintiffs seek such damages pursuant to General Business Law §349 in their fourth and fifth causes of action. While General Business Law §349(h) does provide for treble damages and reasonable attorneys fees, relief under this statute is available only with respect to conduct that is consumer-oriented; private contract disputes do not " fall within the ambit of the statute" (*New York University v Continental Insurance Co.*, 87 NY2d 308, 639 NYS2d 283, 662 NE2d 763 [C.A.1995], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, NA*, 85 NY2d 20, 623 NYS2d 529, 647 NE2d 741 [C.A. 1995]). As there has been no showing on this voluminous record

that this action involves anything other than a private contract dispute, defendant's request for summary judgment dismissing plaintiffs' claims for attorneys' fees and punitive damages pursuant to General Business Law §349 is granted.

In reviewing plaintiffs' claims for attorneys' fees and punitive damages, it has come to the Court's attention that the fourth and fifth causes of action allege violations of Insurance Law §2601. There is no private cause of action under Insurance Law §2601 (*Rocanova v Equitable Life Assurance Society of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 [C.A. 1994]; *Kantrowitz v Allstate Indemnity Co.*, 48 AD3d 753, 853 NYS2d 151 [2nd Dept. 2008]). In the interest of judicial economy and limiting the issues for trial, this Court, *sua sponte,* grants defendant summary judgment dismissing the fourth and fifth causes of action, in their entirety, as a matter of law.

Plaintiffs also seek attorneys' fees in their second and third causes of action for bad faith and breach of contract as to debris removal, respectively. However, an insured may not recover expenses incurred in bringing an affirmative action against its insurer to settle policy coverage issues (*New York University v Continental Insurance Co., supra* at 317-318; *Kantrowitz v Allstate Indemnity Co. supra,* at 754). Additionally, attorneys' fees are considered incidents of litigation, and a prevailing party may not collect them from the loser unless so authorized by contract, statute, or rule (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 549 NYS2d 365, 548 NE2d 903 [C.A. 1989]). No contractual provision, statute, or rule authorizing such fees herein has been cited, and the Court is aware of none. Consequently defendant is entitled to summary judgment dismissing plaintiffs' claims for attorneys' fees in the second and third causes of action.

The Court now turns to the plaintiffs' cross-motion. Plaintiffs' request summary judgment on the issue of liability on their causes of action for breach of contract, and an inquest on all damages. This request is squarely met by defendant's sixth affirmative defense that the fire was intentionally set by plaintiffs or caused to be set by others with plaintiffs' knowledge and consent.

Direct proof of arson is rarely available, and courts have recognized that an insurer's burden may be satisfied by circumstantial evidence (*Maier v Allstate Ins. Co.*, 41 AD3d 1098, 838 NYS2d 715 [3rd Dept. 2007]; *Stone v Continental Ins. Co.*, 234 AD2d 282, 650 NYS2d 772 [2nd Dept. 1996]; *2423 Mermaid Realty Corp. v New York Property Ins. Underwriting Assn.*, 142 AD2d 124, 534 NYS2d 999 [2nd Dept 1988], *lv app den* 74 NY2d 607 [C.A.1989]). The standard of proof for arson in a civil case is "clear and convincing" [*Maier v. Allstate Ins. Co., supra; 3910 Super K, Inc. v Pennsylvania Lumbermens Mutual Ins. Co.*, 219 AD2d 589, 631 NYS2d 364 [2nd Dept. 1995]; *Torian v Reliance Ins. Co.*, 171 AD2d 971, 567 NYS2d 913 [3rd Dept. 1991]; *Ausch v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 43, 511 NYS2d 919 (2nd Dept.), *lv app den* 70 NY2d 610 [C.A.1987]), and the elements to be proven are motive and opportunity (*Maier v Allstate Ins. Co., supra; see, Chenango Mutual Ins. Co. v Charles*, 235 AD2d 667, 652 NYS2d 134 [3rd Dept. 1997]).

Here, defendant MONIQUE expressly denies that she started the fire, or had anything to do with the fire (MONIQUE Affidavit, pars. 11-14). However the presence of MONIQUE at the restaurant shortly before the fire was discovered, the lack of forced entry to the restaurant at the time of the fire, the increase in the insurance coverage nine (9) days prior to the fire, and the contention that CHEZ MONIQUE was losing money, all

support the elements of arson (*see, Torian v Reliance Insurance Co., supra*). On this record defendant has raised a triable issue of fact as to MONIQUE's motive and opportunity to start the subject fire. Accordingly, plaintiffs' request for summary judgment on the liability issue presented in their first cause of action for breach of contract must be denied.

Plaintiffs argue that defendant should be estopped from denying coverage altogether because it did not disclaim coverage within a reasonable time as a matter of law. Insurance Law §3420(d) is plaintiffs' statutory basis for this argument, but this statute is inapplicable herein since plaintiffs' claim does not involve death or bodily injury. Instead common law principles govern, under which the insurer's delay, even if unreasonable will not estop the insurer from disclaiming unless the insured has suffered prejudice from the delay (*Topliffe v U.S. Art Co. Inc.*, 40 AD3d 967, 838 NYS2d 571 [2nd Dept. 2007]; *Legum v Allstate Ins. Co.*, 33 AD3d 670, 821 NYS2d 895 [2nd Dept. 2006]; *Scappatura v Allstate Ins. Co.*, 6 AD3d 692, 775 NYS2d 162 [2nd Dept. 2004]; *Vecchiarelli v Continental Ins. Co.*, 277 AD2d 992, 716 NYS2d 524 [4th Dept. 2000]). In the case at bar, where plaintiffs received $75,000.00 from defendant and made no efforts to reopen the restaurant, plaintiffs have failed to demonstrate any prejudice resulting from defendant's alleged delay in disclaiming coverage (*see*, *Precision Auto Accessories, Inc. v Utica First Insurance Company*, 52 AD3d 1198, 859 NYS2d 799 [4th Dept.], *lv app den* 11 NY3d 709 [C.A.2008]). Therefore, the Court finds that no estoppel is warranted.

Finally, plaintiffs' seek a determination that they are entitled to consequential damages based upon defendant's failure to promptly investigate, adjust and pay the claim

(*Bi-Economy Market, Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 856 NYS2d 505, 886 NE2d 127 [C.A. 2008]). It is clear that any determination with respect to an award of consequential damages in this case is premature, as triable issues of fact exist regarding plaintiffs' breach of contract claims and defendant's defenses. In addition, profitability of the restaurant has not been established. Consequently, the request for summary judgment entitling CHEZ MONIQUE to an award of consequential damages, as a matter of law, is denied as premature.

Based on the foregoing, it is hereby

ORDERED, that defendant's motion for summary judgment dismissing the complaint is granted as to plaintiff, MONIQUE DE LA CROIX, and is denied as to plaintiff CHEZ MONIQUE RESTAURANT, INC.; and if is further

ORDERED, that defendant is also granted summary judgment dismissing the plaintiff' fourth and fifth causes of action against CHEZ MONIQUE for violations of Insurance Law §2601, and on their the claims for attorneys' fees in the second and third causes of action; and it is further

ORDERED, that plaintiffs' cross-motion for summary judgment on the issue of liability on their first cause of action for breach of contract, and for an inquest on damages, is denied; and it is further

ORDERED, that plaintiff's additional request for judgment as a matter of law entitling them to consequential damages is denied as premature; and it is further

ORDERED, that the caption shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

CHEZ MONIQUE RESTAURANT, INC.,

Plaintiff,

-against- INDEX NO: 5016/08

THE CHARTER OAK FIRE INSURANCE COMPANY,

Defendant.

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and it is further

ORDERED, that all parties shall appear for a previously scheduled Certification Conference on July 16, 2009 at 9:30 A.M. before the undersigned.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 15, 2009

WILLIAM R. LaMARCA, J.S.C.

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