

FILED & ENTERED on <u>9/10/07</u> WESTCHESTER COUNTY CLERK
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF WESTCHESTER

PRESENT: W. DENIS DONOVAN, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 6080/07  
 Motion Date: 7/13/07

THE CHARTER OAK FIRE INSURANCE  
 COMPANY,

Defendant.

-----X  
 DONOVAN, J.

The following papers were read on defendant's motion to dismiss and plaintiffs' cross-motion for entry of judgment and an inquest:

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits(1-9)	1
Notice of Cross-Motion/Affirmation/Affidavit/Exhibits(A-C)	2, 3
Affirmation in Opposition/Exhibits(1-15)	4
Memorandum	4A
Reply Affirmation & Affidavit/Exhibits(A-O)	5

Upon the foregoing papers, the motion and cross-motion are determined as follows:

Plaintiffs, a restaurant and its president, bring this breach of contract suit based defendant's failure to take the proper and contractually required actions following a fire

loss. The complaint seeks damages in the amount of \$1,150,500.00 as well as punitive damages and attorneys fees based on alleged unfair claims practices.

According to the complaint, defendant issued an insurance policy to the corporate plaintiff covering the period from May 31, 2006, to May 31, 2007. The fire that resulted in the loss occurred on June 15, 2006. Defendant demanded a proof of loss in February, 2007. Plaintiff submitted its proof of loss on March 1, 2007. The proof of loss reported that the restaurant had been totally destroyed and set the actual cash value of the loss at \$1,710,099.00. Plaintiffs allege that the policy requires defendant to provide insureds with notice of its intentions within 30 days after receiving the proof of loss. However, despite making payments totaling \$75,000.00 in August and October, 2006, defendant allegedly has failed to serve plaintiff with notice of its intentions. According to plaintiffs, defendant's ongoing failure to pay the balance of the fire loss claim constitutes a breach of the insurance policy.

Defendant now moves for the following relief:

- 1) dismissing the action in its entirety as premature; or
- 2) dismissing the second, third, and fourth causes of action, as asserted by the corporate plaintiff, for failure to state a cause of action, and dismissing the entire complaint, as asserted by the individual plaintiff, for lack of standing and failure to state a cause of action.

Plaintiffs cross-moves for summary judgment on the issue of liability and to schedule an inquest to determine damages.

The motion to dismiss on the ground that the action is premature is granted. Plaintiffs filed the complaint on April 10, 2007, approximately 40 days after they tendered the proof of loss. Previously, however, by letter dated March 7, 2007, defendant requested that plaintiffs submit to an examination under oath. The examination was held on April 19, 2007. Defense counsel then furnished plaintiffs with a transcript of the examination on April 26, 2007, along with a demand for document production. As of May 9, 2007, the date counsel served the motion to dismiss, plaintiffs had neither returned the signed transcript nor produced the documents.

The policy provides that an insured may not commence legal action against the insurer unless there "has been full compliance with all of the terms of this Coverage Form." Duties of the insured in the event of loss include an examination under oath, if requested by the insurer.

In this case, defendant requested the examination under oath less than one week after receiving plaintiffs' proof of loss statement. Despite the pendency of the examination, plaintiffs filed suit before the examination was held, and, therefore, before having complied with their duties as insureds. Plaintiffs claim to have supplied the signed transcript and the documents after the filing of the motion, thereby rendering this branch of defendant's

motion moot. Two issues persist, however.

First, defendant strenuously disputes the claim that plaintiffs produced all of the requested documents. Second, and more important, plaintiffs' compliance with the demand is immaterial. Even if plaintiffs fully complied with the document demand following the service of the motion, the action must be dismissed because compliance must occur before the action is filed [*Lentini Brothers Moving & Storage Co., Inc., v New York Property Insurance Underwriting Association*, 76 AD.2d 759 (1<sup>st</sup> Dept. 1980), *aff'd* 53 NY 835 (1981)].

Had the court not reached this conclusion, the alternative relief sought by defendant would have been granted. The second cause of action seeks damages based on defendant's alleged bad faith delay in effectuating a settlement of the claim. However, such a claim is duplicative of the breach of contract claim. There is no separate tort for a bad faith refusal to comply with an insurance contract [*Patterra v Nationwide Mutual Fire Ins. Co.*, 38 AD 3d 511 (2d Dept. 2007)]. The third and fourth causes of action are based, respectively, on alleged violations of Insurance Law § 2601 and General Business Law § 349. However, no private right of action presently exists under either of these two statutes [*Litvinov v Hodson*, 34 AD 3d 1332 (4<sup>th</sup> Dept. 2006); *Korn v First Unum Life Insurance Company*, 277 AD 2d 355 (2d Dept. 2000)].

In addition, the cross-motion would have been denied as premature since issue had not been joined [CPLR 3212(a)].

Accordingly, it is

ORDERED that the complaint is dismissed as premature; and it is further

ORDERED that the cross-motion is denied; and it is further

ORDERED that the Clerk is directed to enter the appropriate judgment.

**ENTER:**



**HON. W. DENIS DONOVAN**  
Justice Supreme Court

Dated: September 7<sup>th</sup>, 2007  
White Plains, New York

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