

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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**CA 19-00437**

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

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JACQUELINE ROSE AND HEATHER LAPIER,  
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,  
DEFENDANT-RESPONDENT-APPELLANT.

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DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (CHRISTOPHER M. BERLOTH  
OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF  
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered August 21, 2018. The order denied in part defendant's motion for summary judgment and denied plaintiffs' cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs owned a home that defendant insured. After the home was damaged in a fire, plaintiffs commenced this breach of contract action to recover certain expenses that defendant refused to cover. Plaintiffs appeal from an order insofar as it denied their cross motion for summary judgment on the complaint and granted that part of defendant's motion for summary judgment dismissing the second cause of action. Defendant cross-appeals from the order insofar as it denied those parts of its motion for summary judgment dismissing the first and third causes of action. We affirm.

Contrary to plaintiffs' contentions on their appeal and defendant's contentions on its cross appeal, Supreme Court properly denied both plaintiffs' cross motion and defendant's motion with respect to the first and third causes of action inasmuch as triable issues of fact preclude a grant of summary judgment to either party on those causes of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to plaintiffs' further contention on their appeal, the court properly granted that part of defendant's motion with respect to the second cause of action and denied that part of plaintiffs' cross motion with respect to the second cause of action inasmuch as defendant met its initial burden with respect to that cause of action and plaintiffs failed to raise a triable issue of fact

in opposition (*see generally id.*).

Entered: October 4, 2019

Mark W. Bennett  
Clerk of the Court