IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT NASHVILLE

STATE OF TENNESSEE, ex rel., DOUGLAS SIZEMORE, COMMISSIONER OF COMMERCE AND INSURANCE Plaintiff/Appellee v. PETROLEUM MARKETERS MUTUAL INSURANCE COMPANY, A RISK RETENTION GROUP, (CYR OIL CORPORATION), Defendant/Appellant	)	Davidson Chancery No. 90-1102 Appeal No. 01A01-9603-CH-00115

FILED

September 18, 1996

Cecil W. Crowson
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE
THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

JOHN L. NORRIS
HOLLINS, WAGSTER & YARBROUGH
Suite 2210, 424 Church Street
SunTrust Center
Nashville, Tenness
ee 37219
Attorneys for Appellant

RICHARD H. DINKINS
TAMMY L. KENNEDY
WILLIAMS & DINKINS
203 Second Avenue, North
Nashville, Tennessee 37201-1601
Attorneys for Appellee

REVERSED and REMANDED.

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

W. FRANK CRAWFORD, JUDGE

ALAN E. HIGHERS, JUDGE

O P I N I O N

The issue is whether an insured's purported failure to cooperate with the insurer thereby forfeiting coverage was determinable by motion for summary judgment. We think the record reveals contested issues of material facts and therefore reverse and remand the case for trial.

Cyr Oil Corporation owns a number of service stations in Massachusetts. To insure its environmental impairment liability it purchased a policy of insurance from Petroleum Marketers Mutual Ins. Co. (Petromark), covering the period from February 10, 1988 to February 10, 1989. This was a claims-made policy covering risks reported during the policy period.

On January 29, 1989 Cyr learned that various levels of contamination existed at its locations in South Dartmouth, Walpole, Methuen, Somerset, and Stoughton, Massachusetts. Two days later, Cyr reported the contamination to the agent of Petromark.

Petromark employed Allied Adjustment Service to investigate the claims filed by Cyr on account of the discovered contamination.

In September 1989 Petromark employed another adjusting firm (Wilson, Elser) to investigate and adjust the loss.

The State of Tennessee, on the relation of its Commissioner of Commerce and Insurance, filed this action seeking the liquidation of Petromark. A Receiver was in course appointed, and on May 3, 1990 an Order of Liquidation was entered.

Cyr filed five claims with the Receiver, one for each of the contaminated locations. It is conceded that the claims were timely filed.

On August 29, 1995, the Receiver filed a motion for summary judgment as to all five claims for Cyr's failure to cooperate with Petromark's and the Receiver's investigation of the claims. In support of the motion, the Receiver filed the affidavits of Richard H. Dinkins, its counsel; J. Reginald Baugh, an adjuster for the environmental claims administrator for the Receivership; and Jeanne B. Bryant, Special Deputy Commissioner for Receiverships. To each of these affidavits were attached numerous exhibits. The Petromark policy provides in boiler-plate language

that "The insured, and any of its members, partners, officers, directors, administrators, stockholders and employees that the company deems necessary agree to cooperate with the company in the investigation, settlement or defense of any claim."

By affidavit, Jeanne B. Bryant cited the policy language requiring insureds to cooperate in the investigation of claims. She made some conclusory statements about the failure of Cyr to cooperate and the potential effect of such uncooperativeness on the Receiver's ability to administer claims. This affidavit has little or no probative effect since it is couched in conclusory, non-specific language. See *Dempsey v. Correct Mfg. Corp.,* 755 S.W.2d 798 (Tenn. Ct. App. 1988).

J. Reginald Baugh, an adjuster, deposed that "follow-up" requests for information were sent to Cyr, consisting of about twenty letters or questionnaires, which Cyr "did not and has not substantially responded to." The first of these letters was mailed February 15, 1989 to Cyr at its Lawrence, Massachusetts office. As we deduce, the contamination at all of the locations was caused by leaking fuel tanks, and the information sought was the age, size, and ownership of these tanks, date when Cyr became aware of the leakage, test results, names of employees who had knowledge of the leakage, any remedial efforts, and related information. Somewhat vaguely, Baugh deposed that the requested information was not forthcoming.

Cyr filed a prolix response to the motion for summary judgment, supported by the affidavits of G. J. Bruett, its President, and John L. Norris, its attorney.

Bruett deposed that he learned of the contamination on January 28, 1989, and reported claims to Petromark's agent in Worcester, Massachusetts three days later. He testified that the claims were investigated by Allied Adjustment Service (employed by Petromark), and that he furnished all available information to this adjuster.

In September, 1989, according to Bruett, Petromark employed a new adjuster, the Wilson, Elser firm, to provide claims administration to Petromark. He testified that all available information was again furnished. He further testified that if remediation costs were within the policy deductible, the adjusters made no

investigation, notwithstanding the likelihood that future remediation costs might exceed the deductible. Bruett further testified that Cyr provided all the information available to it, and that "to the extent relevant information was not furnished to the later adjusters or to the Receiver, it was because either the information had already been furnished to a previous adjuster or because the information was not available."

John L. Norris testified that he was employed by Cyr in 1993. At that time, Petromark was in Receivership, and Norris advised the Receiver that he wanted to "make sure" that the Receiver had all of the available information, and to that end requested a meeting. No response was ever forthcoming; instead, about two years later, the Receiver filed a motion for summary judgment.

Massachusetts and Tennessee law are not at odds respecting the right of an insurer to terminate its liability if the insured materially breaches the cooperation provision. *Foshee v. INA,* 269 N.E. 677 (Mass. 1971); *Morrison v. Lewis,* 221 N.E. 401 (Mass. 1966). Neither do these jurisdictions differ in the judicial view that a trial should not be conducted by affidavits. *Evans v. Norfolk and Dedham Mutual Fire Ins. Co.,* 1992 WL 48927 (Mass. App. 1992); *Taylor v. Nashville Banner Co.,* 573 S.W.2d 476 (Tenn. App. 1978). "In actions on insurance contracts if there is conflicting evidence or evidence from which different inferences can be drawn, the question whether there has been a misrepresentation, concealment, or breach of warranty of condition is one for the jury as the trier of facts, to be determined from all the evidence, and this rule is applicable to cooperation of the insured with a liability insurer." 44 AM JUR 2037; *Evans, supra.*

In this jurisdiction, we take the strongest legitimate view of the evidence in favor of the non-moving party and must deny the motion if there is any dispute as to any material, determinative evidence, or any doubt as to the conclusion to be drawn from all the evidence. *Roberts v. Roberts,* 845 S.W.2d 225 (Tenn. App. 1992); *Byrd v. Hall,* 847 S.W.2d 208 (Tenn. 1993).

We think that this record presents an issue of whether Cyr materially breached the cooperation clause. Three different sets of adjusters-investigators have been involved in the claims. As we deduce, these adjusters apparently did not

cooperate with each other fully, because each requested the same boiler-plate information. Superimposed is the affidavit of Bruen, the CEO of Cyr, that he furnished the requested information to the extent possible; further superimposed is the affidavit of Norris that he requested a conference with the Receiver to discuss the available evidence respecting the merits of Cyr's claims, and that the Receiver not only made no response, but two years later, filed a motion for summary judgment. We think it reasonable to observe that if the Receiver really desired any additional information she would have accepted the offer of Mr. Norris without hesitation.

In summary, this record is replete with contested issues of material fact, thus making summary judgment inappropriate. The judgment is accordingly reversed and the case remanded for trial. Costs are assessed to the receiver for Petroleum Marketers Mutual Insurance Company.

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William H. Inman, Senior Judge

CONCUR:

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W. Frank Crawford, Presiding Judge (W.S.)

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Alan E. Highers, Judge