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## Appellate Division Grants Insured Second Chance to Comply with Policy Cooperation Clause

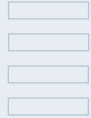
The Appellate Division, Third Department, recently considered a case in which the insurer disclaimed coverage for a fire loss as a result of the insured's alleged failure to cooperate in the investigation of the fire by producing one of its principals for an examination under oath. *Erie Insurance Company v JMM Properties, LLC.*, App. Div. 3d Dep't Sept. 9, 2009.

JMM Properties, LLC., a limited liability company, was the owner of a commercial building and premises in Oneida, New York. Its sole members were Michael Orr, Michael Froncek and Jeffrey Truman. The property was damaged by fire in November, 2006. Following the fire, the insurer obtained a recorded interview from Truman on December 7, 2006. The next day, the insurer wrote to Orr, Froncek and Truman requesting documentation, and requesting that Truman and Orr appear for an examination under oath (EUO).

The EUO's were postponed several times. In the interim, criminal charges were brought against Truman relating to the fire. Truman's criminal attorney refused to permit him to appear for his EUO scheduled in March, 2007, pending the conclusion of the criminal proceeding. The insurer took the position that Truman's refusal to submit to an EUO could result in a denial of the claim, and requested his appearance. The insurer advised the insured and Truman's criminal attorney that it was prepared to conduct the EUO's of Truman and Orr on May 16, 2007 at a specified location. Truman's criminal attorney and the insured advised the insurer that Orr and Truman would attend the examination on the date scheduled. According to the decision, two days before that date, the insurer advised insured's counsel, without notice to Truman or his criminal attorney, that the EUO's would be conducted at a different location. Truman evidently appeared at the previously scheduled location. The insurer would not conduct the EUO of Orr in Truman's absence. Subsequent efforts to produce Truman failed, and the insurer denied the claim on the ground, among other things, of Truman's failure to appear for an EUO or answer any questions relating to the fire.

*Erie Insurance* commenced a declaratory judgment action seeking a judgment that there was no coverage for the loss due to the defendant's breach of the cooperation clause of the policy. Supreme Court granted the plaintiff's motion for a declaratory judgment unless the defendant, JMM Properties, made Truman, Orr and Froncek available for an EUO within 30 days. *Erie* appealed the conditional judgment asserting that plaintiff's claim should have been dismissed for lack of cooperation.

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On appeal, the Appellate Division affirmed the lower court.

The Appellate Division noted that an insurer’s burden of proving lack of cooperation is a “heavy one” requiring a pattern of non-cooperation for which no reasonable excuse is present. The Court held that Truman’s refusal under the circumstances to submit to an EUO was a breach of the insurance policy, and the fact that there were criminal proceedings pending against him was not a valid excuse for non-compliance. However, the Court pointed to the necessity of assessing the corporate insured’s cooperation on the basis of the conduct of its principals “since business entities such as defendant necessarily co-operate or fail to do so because of the actions of their agents...[and] [i]t is only through them that the [entity] may assist in the investigation\*\*\*.” Considering the facts of this particular case, the Court found that JJM’s non-compliance “was not so willful as to warrant ‘the extreme penalty’ of excusing plaintiff from liability without giving defendant one last chance to perform in accordance with the policy’s provisions\*\*\*.”

The Court noted that the insured initially made all three of its principals available for EUO’s and Truman, himself, submitted to a recorded interview shortly after the fire. All documentation requested was supplied along with sworn proof of loss. The Court also emphasized that the evidence indicated that Truman did, in fact, appear for the May, 2007 EUO at the location originally designated by the insurer, and the insured continued to attempt to secure Truman’s attendance and repeatedly offered the unrestricted cooperation of Orr and Froncek, which was refused by the insurer. “To that end, any prejudice plaintiff may have sustained as a result of the delay in the investigation is due, at least in part, to its own conduct in refusing to examine Orr and Froncek prior to conducting an EUO of Truman. Had plaintiff proceeded with the EUO of Orr, who was allegedly with Truman on the day of the fire, material and relevant information pertinent to its investigation may have been adduced.”

This case demonstrates the Court’s willingness to grant a corporate insured some leniency and a second chance to cooperate where a principal fails, in some degree, to cooperate in the investigation of a property claim before dismissing the insured’s claim entirely for breach of the cooperation clause of a policy. Based on this Court’s decision, each case will depend on the specific factual issues in situations where there are more than one principal involved. ■

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