

[Cite as *Timberlake Apartments, L.L.C. v. Underwriters at Lloyds London*, 2022-Ohio-29.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

TIMBERLAKE APARTMENTS LLC	:	
	:	
Plaintiff	:	Appellate Case No. 29191
	:	
v.	:	Trial Court Case No. 2021-CV-823
	:	
UNDERWRITERS AT LLOYDS	:	(Civil Appeal from
LONDON	:	Common Pleas Court)
	:	
Defendant	:	

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OPINION

Rendered on the 7th day of January, 2022.

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ANDREW P. MEIER, Atty. Reg. No. 0083343 and CHASE T. KIRBY, Atty. Reg. No. 0099716, 140 North Main Street, Suite B, Springboro, Ohio 45066
Attorneys for Plaintiff

BRADLEY L. SNYDER, Atty. Reg. No. 0006276, 41 South High Street, Huntington Center, 21st Floor, Columbus, Ohio 43215, EMILY K. ANGLEWICZ, Atty. Reg. No. 0083129, 222 South Main Street, Suite 400, Akron, Ohio 44308
and
KEVIN A. LAHM, pro hac vice and KASSANDRA ALTANTULKHURR, pro hac vice, 1 North Franklin Street, Suite 3200, Chicago, Illinois, 60606
Attorneys for Defendant

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TUCKER, P.J.

{¶ 1} Timberlake Apartments, LLC, appeals from the trial court’s entry of summary judgment against it on its “Petition for Appointment of Neutral Umpire.” Timberlake had sought appointment of an umpire to help resolve its insurance claim against appellee Underwriters at Lloyd’s London for damage allegedly caused by a storm.

{¶ 2} The trial court converted a Civ.R. 12(B)(6) motion by Lloyd’s London into a Civ.R. 56(C) motion and entered summary judgment against Timberlake, holding (1) that Timberlake had failed to comply with conditions precedent to bringing a legal action against Lloyd’s London and (2) that coverage issues precluded appointment of an umpire.

{¶ 3} We conclude that the trial court erred in converting the motion to dismiss into a summary-judgment motion without first giving Timberlake an opportunity to present its own evidence in response. Accordingly, the trial court’s judgment will be reversed, and the case will be remanded for further proceedings.

I. Factual and Procedural Background¹

{¶ 4} Timberlake is insured under a Lloyd’s London policy covering physical loss or damage during the applicable policy period. The policy does not cover pre-existing loss or damage. If a covered event occurs, the policy obligates Timberlake to describe the nature of the loss, inventory its property, permit inspection of its property and books/records, and generally “cooperate” with Lloyd’s London in the investigation or

¹ For purposes of reciting the factual background, we are relying in part on evidentiary materials that accompanied Lloyd’s London’s Civ.R. 12(B)(6) motion. We recognize that a primary issue in this appeal is whether the trial court properly considered those materials without permitting Timberlake to respond. We use them here only to provide context for the parties’ dispute and the trial court’s ruling without any intent to make actual findings or give the materials preclusive effect in future proceedings.

settlement of a claim.

{¶ 5} Timberlake's policy with Lloyd's London also contains the following "APPRAISAL" provision:

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. * * * If there is an appraisal, we still retain our right to deny the claim.

{¶ 6} Finally, the policy includes a provision entitled "LEGAL ACTION AGAINST US." It states:

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and
2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

{¶ 7} On April 21, 2020, Timberlake submitted a notice of claim informing Lloyd's London that its property had sustained wind and hail damage on April 8, 2020. Lloyd's London responded by requesting additional information. The insurance company also had an adjuster inspect Timberlake's property. Following the inspection, Lloyd's London took

the position that some of the damage had occurred prior to inception of the policy. Through its adjuster, Lloyd's London advised Timberlake of its belief that repairs for damage caused by storm totaled \$4,951.66, which was below the policy's \$25,000 deductible. Lloyd's London refused to pay the claim for this reason.

{¶ 8} On September 21, 2020, Timberlake attempted to invoke the "appraisal" procedure set forth above. Thereafter, on September 30 2020, Timberlake provided Lloyd's London with its own appraisal, which reflected damages of \$274,380.49. The difference stemmed in part from an apparent disagreement about whether multiple roofs needed complete replacement or only replacement of some shingles as a result of the April 2020 storm and whether some of the needed repairs were attributable to a prior storm or to ordinary wear and tear.

{¶ 9} Lloyd's London responded by asserting that "coverage" issues remained unresolved and again requesting additional information, which Timberlake purportedly refused to provide. Ultimately, Timberlake's adjuster sent the following December 8, 2020 notice to Lloyd's London's adjuster:

You and your client feel that spot repairs are adequate while our client believes full roof replacements are required to indemnify them for this loss. Nowhere in the [policy] language does it state that we or your client are required to provide technical or other explanations as to why we disagree on the amount of loss, nor does it grant the right to deny appraisal once appraisal has been demanded. * * * As coverage has been extended, albeit below deductible, our dispute is not a coverage issue.

{¶ 10} Timberlake filed the present action on March 2, 2021 after Lloyd's London

failed to pay for full roof replacements or to nominate an appraiser under the policy's appraisal provision. Timberlake's petition alleged that its condominiums sustained storm damage while insured under a policy issued by Lloyd's London. The petition further alleged that Lloyd's London had investigated the matter and had failed to agree to the amount of loss claimed by Timberlake. Finally, the petition alleged Timberlake had invoked the appraisal provision, that Lloyd's London had refused to select an appraiser, that such refusal constituted a failure to agree on an umpire, and that Timberlake was entitled to have the trial court select an umpire.

{¶ 11} Lloyd's London responded with an April 2, 2021 Civ.R. 12(B)(6) motion to dismiss for failure to state a claim. The insurance company argued (1) that the petition failed to allege sufficient "material facts" to trigger the appraisal provision, (2) that unresolved coverage issues made resorting to the appraisal provision premature, and (3) that Timberlake had breached the policy by failing to cooperate with Lloyd's London's investigation. Alternatively, Lloyd's London argued that Timberlake should be required to file an amended petition because Timberlake had failed to attach a copy of the policy. Lloyd's London attached numerous exhibits to its motion to dismiss, including a full copy of the policy and assorted communications between the parties and their representatives.

{¶ 12} In a memorandum opposing dismissal, Timberlake maintained (1) that its petition satisfied Ohio's notice-pleading requirements, (2) that any potential coverage disputes did not preclude selecting appraisers and appointing an umpire where Lloyd's London admitted the existence of some covered loss, and (3) that the "cooperation" clauses in the policy did not warrant dismissal. With regard to this last argument, Timberlake challenged the trial court's ability to consider the exhibits attached to Lloyd's

London's motion (except for a copy of the policy) without giving Timberlake notice and converting the motion to dismiss into one for summary judgment. Finally, Timberlake disputed the need for an amended petition to include the policy given that Lloyd's London had supplied a copy of the policy with its motion.

{¶ 13} In reply, Lloyd's London urged the trial court to treat its motion as a motion for summary judgment and to consider its attached evidentiary materials. Applying Civ.R. 56(C) standards, Lloyd's London maintained that Timberlake had failed to comply with policy prerequisites to bringing a legal action. Lloyd's London also reiterated its arguments about a lack of cooperation and unresolved coverage issues. For these reasons, Lloyd's asserted its entitlement to judgment as a matter of law.

{¶ 14} On June 18, 2021, the trial court filed a Decision, Order, and Entry in which it converted the motion to dismiss into a motion for summary judgment and entered final judgment for Lloyd's London on the petition. In support of its ruling, the trial court reasoned:

Upon review of the policy at issue in this case, the Court notes that it clearly states that "[n]o one may bring a legal action against [Respondent] under this Coverage Part unless there has been full compliance with all of the terms of this Coverage Part. Further, upon review of the arguments set forth by the parties, there are clearly issues remaining as to coverage. Accordingly, it appears to the Court that appointing an umpire for appraisal of the property at issue is premature.

(June 18, 2021, Decision, Order, and Entry at p. 5.)

II. Analysis

{¶ 15} Timberlake advances the following two assignments of error on appeal:

1. THE TRIAL COURT ERRED BY IMPROPERLY CONVERTING UNDERWRITERS' MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT WITHOUT ALLOWING TIMBERLAKE A REASONABLE OPPORTUNITY TO RESPOND.
2. THE TRIAL COURT ERRED BY DETERMINING THAT APPOINTMENT OF AN UMPIRE IS PREMATURE.

{¶ 16} In its first assignment of error, Timberlake challenges the trial court's conversion of Lloyd's London's Civ.R. 12(B)(6) motion into a Civ.R. 56(C) motion for summary judgment. Timberlake contends the trial court committed reversible error by failing to provide prior notice and an opportunity for Timberlake to submit its own evidence to oppose summary judgment.

{¶ 17} Upon review, we find Timberlake's first assignment of error to be persuasive. Although a motion to dismiss may be converted into a motion for summary judgment, the trial court was required to give Timberlake an opportunity to present its own evidentiary materials establishing a genuine issue of material fact:

Civ.R. 12(B)(6) permits a defendant to assert, by motion, the defense of failure to state a claim upon which relief can be granted. When reviewing such a motion, the trial court must accept all of the allegations of the complaint to be true. *Groves v. Dayton Public Schools*, 132 Ohio App.3d 566, 567, 725 N.E.2d 734 (2d Dist.1999). Further, the trial court is confined to the averments set forth in the complaint. *Miami Valley Hospital v. Swartz*, 2d Dist. Montgomery No. 17513, 1999 WL 218177, *1 (April 16, 1999). If a

movant submits and relies on evidence outside the face of the pleadings to support his motion, the motion may be treated, with notice to the parties, as a motion for summary judgment pursuant to Civ.R. 56. *Id.* If the trial court does convert the motion to dismiss for failure to state a claim into a motion for summary judgment, the court must provide notice that it has done so to all parties at least fourteen days before the time fixed for hearing. *Id.*

Jones v. Upton, 2d Dist. Montgomery Nos. 26311, 26375, 2015-Ohio-1044, ¶ 10.

{¶ 18} Here Lloyd's London's inclusion of the insurance policy with its motion to dismiss did not compel conversion to a summary-judgment proceeding. Timberlake relied on the policy in its petition, implicitly incorporating the policy by reference. We note too that Timberlake should have attached a copy of the policy to its petition pursuant to Civ.R. 10(D)(1). Because Timberlake's petition referenced the policy but failed to include it, Lloyd's London was entitled to submit the policy with its Civ.R. 12(B)(6) motion. As noted above, however, Lloyd's London's motion also included numerous pages of correspondence, estimates, and other materials. Lloyd's London used these materials in an effort to establish a lack of cooperation by Timberlake and the existence of unresolved coverage issues.

{¶ 19} In finding that Timberlake had not satisfied all prerequisites to pursuing legal action, the trial court considered Lloyd's London's evidence and seemingly credited the insurance company's argument about non-cooperation. Moreover, in finding that coverage issues remained unresolved, the trial court certainly considered and credited Lloyd's London's evidentiary materials. The trial court erred, however, in converting Lloyd's London's motion into a Civ.R. 56(C) motion and considering these materials

without giving Timberlake an opportunity to present its own evidence addressing its cooperation and perceived coverage disputes. *State ex rel. Evans v. Mohr*, 155 Ohio St. 3d 579, 2018-Ohio-5089, 122 N.E.3d 1240, ¶ 6, quoting *Jefferson v. Bunting*, 140 Ohio St.3d 62, 2014-Ohio-3074, 14 N.E.3d 1036, ¶ 12 (“When a Civ.R. 12(B)(6) motion depends on extrinsic evidence, the ‘proper procedure is for the court to convert the motion to dismiss into a motion for summary judgment and provide the opposing party with notice and an opportunity to respond.’ ”).

{¶ 20} In opposition to our conclusion, Lloyd’s London claims Timberlake had sufficient opportunity to counter the insurance company’s evidence. Lloyd’s London notes Timberlake’s argument below that the trial court could not consider evidentiary materials without first converting the motion to dismiss into a summary-judgment motion. Lloyd’s London also reasons that Timberlake could have sought leave to file a sur-reply to present evidence.

{¶ 21} We find these arguments unpersuasive. In opposing Lloyd’s London’s Civ.R. 12(B)(6) motion, Timberlake correctly noted that the trial court could not consider the insurance company’s evidentiary materials without converting the motion into a Civ.R. 56(C) motion. We do not read Timberlake’s observation as an invitation to convert or as an acknowledgement that the trial court would convert the motion without giving Timberlake an opportunity to respond. Timberlake also had no obligation to seek leave to file a sur-reply to present its own evidence. Instead, Timberlake reasonably could have anticipated that the trial court would comply with the civil rules and give Timberlake notice before entering summary judgment for Lloyd’s London.

{¶ 22} Finally, Lloyd’s London contends the trial court could have entered the same

judgment on the face of the pleadings without converting to summary judgment. Specifically, Lloyd's London cites the portion of the policy precluding "legal action" against the insurance company unless "[t]here has been full compliance" by Timberlake with all coverage terms. Lloyd's London reasons that this language established a condition precedent to Timberlake filing its petition. In its motion below, Lloyd's London argued that Timberlake's petition was conclusory and failed adequately to allege compliance with the "legal action" provision. Although neither the insurance company's motion nor its appellate brief specifically referenced Civ.R. 9(C), Lloyd's London asserted during oral argument that dismissal was warranted because Timberlake's petition failed to allege the performance of all conditions precedent to pursuing legal action.

{¶ 23} Even if we accept, *arguendo*, that Civ.R. 9(C) did obligate Timberlake to allege satisfaction of all conditions precedent, the failure to plead performance of conditions precedent under Civ.R. 9(C) does not warrant entering final judgment with prejudice, which is what Lloyd's London requested and apparently received. The appropriate remedy would be to grant Timberlake leave to amend its petition or to dismiss without prejudice. *Compare Columbus Bar Assn. v. Dougherty*, 99 Ohio St.3d 147, 2003-Ohio-2672, 789 N.E.2d 621 (granting leave to amend to plead fraud with particularity under Civ.R. 9(B)); *In re Evans*, 51 B.R. 404 (Bankr.S.D. Ohio 1985) (granting leave to amend to correct failure to allege satisfaction of condition precedent).²

{¶ 24} For the foregoing reasons, the trial court erred in converting Lloyd's

² One potential problem with the trial court's entering summary judgment in favor of Lloyd's London is that its ruling could have preclusive effect in the future with regard to whether Timberlake cooperated with the insurance company or whether coverage issues in fact exist.

London's Civ.R. 12(B)(6) motion into a Civ.R. 56(C) motion and entering final judgment in favor of the insurance company without giving Timberlake prior notice and an opportunity to respond. The first assignment of error is sustained.

{¶ 25} In its second assignment of error, Timberlake contends the trial court erred in finding that appointment of an umpire is premature. The trial court made this determination in its summary-judgment ruling based on its assessment of Lloyd's London's evidentiary materials. Given that we are reversing the entry of summary judgment against Timberlake, we need not resolve this aspect of the trial court's decision.

{¶ 26} In light of our ruling above, there now is no judgment against Timberlake, which did not file its own dispositive motion. Therefore, Timberlake's petition will remain pending on remand along with Lloyd's London's Civ.R. 12(B)(6) motion and supporting evidentiary materials. If the trial court elects to consider those materials and convert the motion to one under Civ.R. 56(C), Timberlake will have an opportunity to present its own evidence and to address whether appointment of an umpire is premature due to perceived failures to cooperate with Lloyd's London's investigation or existing coverage issues. Because we are reversing the trial court's judgment, we need not resolve that issue now. The second assignment of error is overruled as moot.

III. Conclusion

{¶ 27} Having sustained Timberlake's first assignment of error, we reverse the trial court's entry of summary judgment in favor of Lloyd's London and remand the case for further proceedings.

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WELBAUM, J. and EPLEY, J., concur.

Copies sent to:

Andrew P. Meier
Chase T. Kirby
Bradley L. Snyder
Emily K. Anglewicz
Kevin A. Lahm
Kassandra Altantulkhurr
Hon. Dennis J. Adkins