

RENDERED: OCTOBER 28, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000237-MR

YACOB SMOKE SHOP LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 14-CI-003520

ACUITY, A MUTUAL INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND STUMBO,
JUDGES.

D. LAMBERT, JUDGE: This is an appeal from the February 5, 2015 order of the Jefferson Circuit Court dismissing Munthar Yacob's (Yacob) complaint against appellee, Acuity, a Mutual Insurance Company (Acuity). The circuit court ruled that Yacob was not the real party in interest to bring the action under CR 17.01. After review, we affirm.

I. BACKGROUND

In December 2011, Ali Alaboodi, d/b/a Jacob's Smoke Shop, purchased a Biz-Pak Property Coverage insurance policy from Acuity. The policy covered Alaboodi's business and was to remain effective for one year. Shortly after purchasing the policy, Alaboodi returned to his native country of Iraq. Yacob, Alaboodi's father-in-law, managed the smoke shop in Alaboodi's absence.

On March 28, 2012, Yacob organized Jacob's Smoke Shop, LLC.¹ Yacob subsequently tendered an insurance premium payment to Acuity via check from Jacob's Smoke Shop, LLC. Acuity accepted this check.

On July 8, 2012, a theft occurred at the smoke shop. Yacob consequently submitted an insurance claim to recover the loss from Acuity. Acuity denied the claim.

In July 2014, Yacob sued Acuity and filed a declaratory judgment action regarding Acuity's responsibility to pay the claim under the insurance policy. Acuity defended that the named plaintiff, Yacob Smoke Shop LLC, was not the real party in interest to pursue any claims and moved to dismiss the suit on that basis. In response, Yacob attempted to amend his complaint to substitute Jacob's Smoke Shop, LLC as the named plaintiff. The circuit court ultimately

¹ This is the name of the business entity. A drafting error in its underlying complaint mistakenly identified the plaintiff as "Yacob Smoke Shop LLC" instead of "Jacob's Smoke Shop, LLC." For clarification, we refer to the business entity as "Jacob's Smoke Shop, LLC" throughout our analysis even though the style of the case remains "Yacob Smoke Shop LLC."

granted Acuity's motion to dismiss without granting Yacob's leave to amend the name of the entity. This appeal followed.

II. STANDARD OF REVIEW

A trial court's ruling on a motion to dismiss presents a question of law reviewed *de novo* on appeal. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010). The trial court must have liberally construed the pleadings in favor of the plaintiff and accepted any allegations against the defendant as true. *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky.App. 2009). If plaintiff's complaint is unsupported by any set of facts, it is proper for the trial court to dismiss the action. *Pari-Mutuel Clerks' v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Under CR 12.02, the trial court must treat a motion to dismiss as one for summary judgment when "matters outside the pleadings are presented to and not excluded by the trial court." A trial court faced with a converted summary judgment motion must determine whether any genuine issues of material fact exist that would prevent the moving party from obtaining a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). The trial court's decision regarding summary judgment is similarly reviewed under a *de novo* standard since only legal issues and no factual findings are required. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

III. DISCUSSION

On appeal, Yacob presents two arguments. First, he argues that Jacob's Smoke Shop, LLC is the real party in interest because it is the business that

suffered a loss covered by the Acuity policy. Second, Yacob alternatively argues that there is a factual dispute as to whether Acuity was equitably estopped from denying coverage because he detrimentally relied on Acuity's acceptance of a premium payment from Jacob's Smoke Shop, LLC. For the following reasons, we are not persuaded by these arguments.

CR 17.01 provides that "[e]very action shall be prosecuted in the name of the real party in interest." In other words, if the plaintiff is not the one "entitled to the benefits of the action upon the successful termination thereof[,]," then "he has no right to maintain [the] action." *Miller v. Paducah Airport Corp.*, 551 S.W.2d 241, 243 (Ky. 1977). This protects defendants from harassment at a later date by the party actually entitled to recover. *Id.* With respect to the real-party-in-interest doctrine, our Supreme Court has held that a limited liability company and its lone member are not legally interchangeable. *Turner v. Andrew*, 413 S.W.3d 272, 276 (Ky. 2013). Moreover, "[a] sole proprietorship . . . differs greatly from . . . limited liability companies" in that the owner of a sole proprietorship "is liable in his or her personal capacity for the liabilities of the sole proprietorship." *Sparkman v. Consol Energy, Inc.*, 470 S.W.3d 321, 328 (Ky. 2015).

Here, as a preliminary matter, the trial court considered evidence outside of the pleadings in making its ultimate decision to dismiss Yacob's suit. The trial court examined the language of the insurance policy as well as a copy of the premium check paid to Acuity from Jacob's Smoke Shop, LLC. In doing so,

the trial court compelled this Court to review the decision as an award of summary judgment in favor of Acuity.

This conversion did not change the substance of the trial court's decision, however, as neither Yacob nor Jacob's Smoke Shop, LLC had standing to maintain this action. Acuity insured Alaboodi as a sole proprietor and not the limited liability company organized by Yacob. These are distinct business organizations under Kentucky law; therefore, Jacob's Smoke Shop, LLC is not, as Yacob contends, the same business insured under the Acuity business policy. Furthermore, there is also no legal or equitable basis for holding that any party besides Alaboodi is the real party in interest. Though it is unnecessary to be a named insured in order to be entitled to proceeds of an insurance policy, *see Estes v. Thurman*, 192 S.W.3d 429, 432 (Ky. App. 2005), Jacob's Smoke Shop, LLC did not show that Alaboodi entered the insurance contract to benefit the company, nor did it show that Alaboodi was under any obligation to do so. In fact, there is no evidence in the record that Alaboodi was ever affiliated with Jacob's Smoke Shop, LLC—he was not a member, and even if he were, a limited liability company is not interchangeable with its members as a matter of law. Jacob's Smoke Shop has also failed to cite any legal authority supporting its position that a limited liability company obtains an equitable interest in the insurance policy of a non-member individual simply because the company has an insurable interest in the same property covered by the individual's policy and makes a single premium payment for the individual. Such an estoppel argument has been rejected as an

impermissible circumvention of the application and underwriting process. *See Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121, 127 (Ky. App. 2012) (where the companion of an automobile owner argued she was entitled to the benefits of the owner's underinsured motorist policy because she paid his premiums). And, the facts of this case require the same result. Jacob's Smoke Shop, LLC cannot unilaterally insure itself through Alaboodi's business policy merely by paying Alaboodi's premium.

Accordingly, the decision of the Jefferson Circuit Court is hereby affirmed.

STUMBO, JUDGE; CONCURS.

KRAMER, CHIEF JUDGE; CONCURS IN RESULT ONLY.

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