RENDERED: SEPTEMBER 12, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001068-MR

DOUGLAS R. ADAMS AND
KATHERINE R. ADAMS — APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 12-CI-00306

TOKIO MARINE & NICHIDO FIRE
INSURANCE COMPANY, LTD. — APPELLEE

OPINION
DISMISING APPEAL

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Appellants, Douglas R. Adams and Katherine R. Adams, appeal from the trial court's grant of the motion filed by Appellee, Tokio Marine & Nichido Fire Insurance Company, LTD, to dismiss the Appellants' complaint for failure to state a claim upon which relief can be granted. After a thorough review

of the parties' arguments, the record, and the applicable law, we must conclude that the order appealed from was interlocutory and, accordingly, dismiss this appeal.

The facts underlying this appeal are not in dispute. On January 2, 2012, a motor vehicle accident occurred between Appellants and Elisha Jackson. The Appellants alleged that Jackson operated her vehicle in a careless and negligent manner resulting in a collision with the Appellants' 1997 Chrysler.[1] The Chrysler was insured by Metropolitan Direct Property and Casualty Insurance Company, hereinafter Metropolitan.[2] As a result of the accident the Appellants filed suit against Jackson, Metropolitan, and Appellee, Tokio Marine & Nichido Fire Insurance Company, Ltd., (hereinafter "Tokio Marine Nichido"). The Appellants alleged that Tokio Marine Nichido insured a 2009 Lexus that Appellants leased from Toyota, Douglas's employer.[3] Pursuant to that lease Toyota, as the leasor, provided uninsured and underinsured motorist coverage on the Lexus. That coverage was through Tokio Marine Nichido.

Tokio Marine Nichido moved the trial court to dismiss the claims against them for failure to state a claim per Kentucky Rules of Civil Procedure (CR) 12.02(f). Tokio Marine Nichido argued to the trial court that the insurance

[1] We have used the trial court's findings as to the make and model of Appellants' car in question. Both parties' briefs refer to a 2003 Ford Expedition instead of a 1997 Chrysler; however, neither party brought this inconsistency to this Court's attention nor has either party argued that the trial court's findings in this regard were incorrect.

[2] Neither Metropolitan nor Jackson is before this Court.

[3] We note that the policy in question is between Toyota and Tokio Marine Nichido, and does cover the leased Lexus.

policy did not provide uninsured/underinsured motorist coverage on the Chrysler involved in the accident, that the vehicle covered by the policy was a Lexus, that Toyota was the insured on the policy, and that Toyota paid the policy premiums.

In response, the Appellants argued that they were insureds of the first class and, as such, were entitled to greater protection than the limitations in the lease because: (1) Appellants paid for the lease and (2) the lease was through Douglas's employer, Toyota. The Appellants attached a copy of the lease to their response to Tokio Marine Nichido's motion to dismiss.

The court, in granting Tokio Marine Nichido's motion to dismiss, noted that the lease between Toyota and the Appellants provided that Toyota would provide uninsured/underinsured motorist insurance "without cost to you [the lessee] and that the insurance "only extend[s] to the vehicle when operated by you and/or eligible drivers or persons." Toyota provided this insurance to their employees. The court specifically relied upon the language of the lease to reach its conclusion that the Appellants did not pay for the insurance and, thus, were neither insureds of the first class nor entitled to greater protection than was given by the provisions in the lease. Thus, the court concluded that Appellants could not recover from Tokio Marine Nichido and entered an order granting the motion to dismiss but did not recite that the order was final and appealable. It is from this order that Appellants now appeal.

On appeal, the Appellants argue that they should be treated as insureds of the first class for all coverage through the Appellee's subject insurance

policy. In support thereof, they argue they made the lease payments and, thereby, bought and paid for the policy through Tokio Marine Nachido which Toyota provided to Douglas. In response, Appellee argues: (1) Appellants are not insureds of the first class under the policy and are not entitled to coverage for this accident; and (2) the appeal is taken from a non-appealable order and should thereby be denied as premature. With this in mind we turn to the dispositive issue on appeal, whether the order appealed from was interlocutory and, thus, not a final and appealable order.

At the outset we note that this matter is more properly considered to be a motion for summary judgment because the trial court considered matters outside the pleadings, specifically the lease, in reaching its decision. A trial court is free to consider matters outside the pleadings on a motion to dismiss; however, in doing so the court converts the request for dismissal into a motion for summary judgment. CR 12.02; *McCray v. City of Lake Louisvilla*, 332 S.W.2d 837, 840 (Ky. 1960). In *Hoke v. Cullinan*, 914 S.W.2d 335, 338 (Ky. 1995), our Supreme Court stated:

> [W]e regard it as of little moment that the trial court failed to clearly distinguish between motions to dismiss for failure to state a claim and motions for summary judgment. Manifestly, CR 12.03 contemplates a relationship between these procedural vehicles and contemplates that a motion for judgment on the pleadings may be treated as one for summary judgment and disposed of in that manner.

It has long been the rule in this Commonwealth that an appeal from a grant of summary judgment in an action involving multiple claims requires adherence to CR 54.02.[4]

> In *Turner Construction Co. v. Smith Brothers, Inc*., Ky., 295 S.W.2d 569, an appeal from a summary judgment was considered in an action involving multiple claims. It was held that this Court had no jurisdiction to hear such an appeal in the absence of a determination by the trial court that there was no just reason for delay in granting a final judgment. The judgment appealed from must contain such determination and must recite that it is final. CR 54.02. An examination of the judgment herein appealed from discloses that no such determination was made and no such recitals are contained therein. For discussion of the similar Federal rule*, see Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 76 S.Ct. 895, 100 L.Ed. 1297. The dismissal of a suit as to one of several defendants is not an appealable order regardless of whether or not the alleged liability is joint or several, *Minnesota Mining & Mfg. Co. v. Technical Tape Corp*., 7 cir., 208 F.2d 159, except by compliance with CR 54.02. It is our conclusion that this Court does not have

[4] (1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
(2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.
(3) For the purposes of this rule demands in an action for both injunctive relief and damages may be treated as separate claims.

> jurisdiction to consider the appeal. *See also Linkous v. Darch*, Ky., 299 S.W.2d 120.

Derby Road Bldg. Co. v. Louisville Gas & Elec. Co., 299 S.W.2d 122, 123 (Ky. 1957).

Sub judice, the Appellants brought suit against multiple parties alleging multiple claims. In granting Tokio Marine Nichido's motion to dismiss, the court only addressed the claims regarding Tokio Marine Nichido. The court did not state that its order was final and that there was no just reason for delay. Thus, we must conclude that the order was interlocutory and not subject to appeal. Accordingly, we dismiss this appeal.

In light of the aforementioned, we dismiss the appeal.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Bryan Begley Daley Lexington, Kentucky	John W. Pollom Lexington, Kentucky