IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

MDM CHIROPRACTIC CENTER, P.A.,
Appellant,

v.

PROGRESSIVE SELECT INSURANCE COMPANY,
Appellee.
_____/

APPELLATE DIVISION (CIVIL): AY
CASE NO: 2014-AP-000016-CAXX-MB
L.T. NO: 2013-CC-006318-XXXX-SB

Opinion filed: APR 25 2016

Appeal from the County Court in and for Palm Beach County,
Judge Reginald Corlew.

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PER CURIAM.

Plaintiff/Appellant, MDM Chiropractic Center, P.A. a/a/o Wilnes Pierre ("MDM"), filed an action to recover insurance benefits against Defendant/Appellee, Progressive Select Insurance Company ("Progressive Select"). On appeal, MDM argues that the trial court erred in dismissing MDM's complaint with prejudice. This Court agrees and reverses the trial court's dismissal order.

Factual Background

On May 23, 2013, MDM filed a complaint against Progressive Select in the County Court of the Fifteenth Judicial Circuit. MDM sought to recover no-fault insurance benefits from Progressive Select as an assignee of Wilnes Pierre. Progressive Select moved to dismiss MDM's complaint on the basis of res judicata. Progressive Select alleged that on November 13, 2012, MDM, as an assignee of Pierre, filed an action against Progressive American Insurance Company ("Progressive American") to recover insurance benefits stemming from the same automobile accident as the one at issue in the 2013 county court case. Although Progressive American filed a motion to dismiss the complaint on grounds that MDM named the wrong insurer, Progressive American and MDM settled the case for $500. The court granted Progressive Select's motion to dismiss filed in the underlying 2013 case and entered an order dismissing MDM's complaint with prejudice.

Analysis and Legal Ruling

An order dismissing a complaint with prejudice is reviewed *de novo*. *Buck v. Columbia Hosp. Corp. of S. Broward*, 147 So. 3d 604, 606 (Fla. 4th DCA 2014); *Stubbs v. Plantation Gen. Hosp. Ltd. P'ship*, 988 So. 2d 683, 684 (Fla. 4th DCA 2008) ("Generally, the standard of review of an order dismissing a complaint with prejudice is *de novo*.").

In ruling on a motion to dismiss, a court is generally limited to considering "the four

corners of the complaint, including the attachments incorporated in it, and all well pleaded allegations are taken as true." *U.S. Project Mgmt., Inc. v. Parc Royale E. Dev., Inc.*, 861 So. 2d 74, 76 (Fla. 4th DCA 2003). Typically, a court cannot consider affirmative defenses, such as res judicata, on a motion to dismiss. *May v. Salter*, 139 So. 3d 375, 376 (Fla. 1st DCA 2014) (citing *Calder Race Course, Inc. v. Dep't of Bus. & Prof'l Regulation,* 838 So. 2d 1241 (Fla. 1st DCA 2003)). An exception arises, however, when "the face of the complaint and attachments demonstrate a defense's unquestionable merit." *May*, 139 So. 3d at 376.

Progressive Select argues that the affirmative defense of res judicata appears on the face of the 2012 complaint filed by MDM against Progressive American. Accordingly, Progressive Select argues that the trial court in the instant case was permitted by Florida Rule of Civil Procedure 1.110(d) to consider the affirmative defense of res judicata in ruling on Progressive Select's motion to dismiss. Progressive Select has misinterpreted Rule 1.110(d).

Florida Rule of Civil Procedure 1.110(d) provides in relevant part that:

> In pleading to a preceding pleading a party shall set forth affirmatively . . . res judicata . . . and any other matter constituting an avoidance or affirmative defense. . . . Affirmative defenses appearing on the face of a *prior pleading* may be asserted as grounds for a motion or defense under rule 1.140(b) . . . .

(emphasis added). The Fourth District Court of Appeal has interpreted the "prior pleading" language of Rule 1.110(d) to refer to "one or more prior pleadings of the party *against whom the motion to dismiss is directed*, e.g., a complaint." *Palmer v. McCallion*, 645 So. 2d 131, 133 (Fla. 4th DCA 1994) (internal quotations omitted) (emphasis in original).

Progressive Select claims that the affirmative defense of res judicata was apparent on the face of the 2012 complaint against Progressive American. However, the "prior pleading" language of Rule 1.110(d) does not refer to a complaint filed in a prior lawsuit. *See Palmer*, 645

So. 2d at 132-33 (considering the pending complaint filed in the underlying case—rather than a complaint filed in a previous lawsuit between the parties—to be the "prior pleading"). The "prior pleading" in the instant case was the operative complaint filed in 2013 by MDM against Progressive Select. Therefore, the trial court could not have considered the 2012 complaint as a "prior pleading" under Rule 1.110(d) in ruling on the motion to dismiss.

Progressive Select argues that the trial court was entitled to take judicial notice of the 2012 complaint pursuant to section 90.202(6), Florida Statutes, and cites *Lagarde v. Outdoor Resorts of America*, 428 So. 2d 669 (Fla. 2d DCA 1982), for the proposition that an appellate court may take judicial notice of prior cases involving the same parties. However, *Lagarde* is inapposite to the instant case because, here, neither party requested the Court to take judicial notice of a prior appeal to this Court between the same parties to the underlying action. Further, nothing in the record indicates that Progressive Select requested the trial court to take judicial notice of the 2012 case.[1] Accordingly, the trial court did not properly take judicial notice of the 2012 proceeding in considering Progressive Select's motion to dismiss.

Alternatively, Progressive Select argues that the Tipsy Coachman rule supports an affirmance of the trial court's dismissal order. However, both of Progressive Select's alternative grounds would require the trial court to look beyond the four corners of the complaint. Accordingly, Progressive Select has not provided an appropriate alternative basis for affirming the trial court's dismissal order.

[1] At the hearing on Progressive Select's motion to dismiss, both counsel for MDM and counsel for Progressive Select argued the merits of Progressive Select's res judicata claim, which included discussion of the complaint and proposal for settlement filed in the 2012 county court case. However, counsel for MDM argued that the trial court's review should be limited to the instant complaint and objected to the court considering documents from the 2012 lawsuit. Nothing in the record reflects that Progressive Select requested the court take judicial notice of the court records from the 2012 lawsuit pursuant to section 90.203, Florida Statutes.

The county court's April 2, 2015 order dismissing the case with prejudice is REVERSED. This matter is REMANDED for further proceedings. With respect to MDM's motion for appellate attorneys' fees pursuant to section 627.428(1), Florida Statutes, this Court finds that MDM is entitled to an award of attorneys' fees conditioned upon MDM ultimately prevailing at the trial level. *Prof'l Med. Group, Inc. v. United Auto. Ins. Co.*, 967 So. 2d 243, 244 (Fla. 3d DCA 2007).

GILLEN, BRUNSON, and HAFELE, JJ., concur.