

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

**ZINA HARATZ, DDS, P.A.,**  
Appellant,

v.

**DENTAL TEAM OF ATLANTIS, LLC,**  
Appellee.

No. 4D2022-3228

[September 13, 2023]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Gregory M. Keyser, Judge; L.T. Case No. 50-2022-CA-002091-XXXX-MB.

Oscar Syger of the Law Offices of Oscar Syger, P.A., Boca Raton, for appellant.

Evelyn Greenstone Kammet and Miguel Espinosa of Vernis & Bowling of Miami, P.A., Miami, for appellee.

DAMOORGIAN, J.

Zina Haratz, DDS, P.A. (“Plaintiff”) appeals the final order dismissing its action with prejudice against appellee, Dental Team of Atlantis, LLC (“Dental Team”), for failure to comply with statutory conditions precedent. Because factual issues remain as to whether Dental Team waived compliance with conditions precedent, we reverse.

The case’s relevant facts, as gleaned by the four corners of the complaint and the exhibits attached thereto, are as follows. Dental Team is a limited liability company created pursuant to chapter 605, Florida Statutes (2020). Plaintiff is a professional association and a cash contributing member of Dental Team.

In 2022, Plaintiff filed a complaint against Dental Team for failure to provide access to financial records. The complaint alleged Dental Team was a “Member Managed LLC” and that, pursuant to section 605.0410, Florida Statutes, Plaintiff served a demand for Dental Team’s business records on February 4, 2022. The complaint further alleged that Dental

Team “violated its disclosure obligations under Fla. Stat. § 605.0410, as it did not provide all financial records required to be furnished under the statute.” Finally, the complaint generally alleged that Plaintiff “complied with all conditions precedent to bringing this action or the conditions precedent have been waived by [Dental Team].”

Plaintiff attached two exhibits to the complaint. The first exhibit was a copy of the parties’ operating agreement. In relevant part, the operating agreement states: “The Members are executing this Agreement for the purpose of forming a Manager-Managed Florida Limited Liability Company . . . .” The agreement further reflects that Plaintiff signed the agreement as a member only. The second exhibit was a copy of the demand for statutory inspection and reproduction of business records that Plaintiff served on Dental Team.

In response, Dental Team moved to dismiss the complaint with prejudice for failure to serve a sufficient records request. The motion argued that Dental Team was a manager-managed LLC—not a member-managed LLC as alleged in the complaint—as evidenced by the operating agreement attached to the complaint, and that therefore Plaintiff’s demand was subject to the requirements of section 605.0410(3), Florida Statutes (2022). Pursuant to section 605.0410(3), the demand was required to “describ[e] with reasonable particularity the information sought and the purpose for seeking the information, and if the information sought is directly connected to the member’s purpose.” § 605.0410(3)(b)2.b., Fla. Stat. (2022). Dental Team argued Plaintiff’s records request failed to comply with these statutory requirements. The motion to dismiss did not address the complaint’s allegation that Dental Team waived compliance with conditions precedent.

The matter ultimately proceeded to a hearing on the motion to dismiss. During the hearing, Dental Team acknowledged the complaint’s waiver allegation but argued the waiver issue was “outside the four corners [of the complaint] and not appropriate for this hearing at this juncture, but it would be brought up certainly later.”

Following the hearing, the trial court entered an order granting the motion to dismiss with prejudice. The court made several relevant findings in the order. First, the court concluded the operating agreement, which was attached to the complaint, clearly showed that Dental Team was a manager-managed LLC. Second, the court found that Plaintiff’s records request failed as a matter of law to comply with the requirements of section 605.0410(3), Florida Statutes (2022). In so finding, the court noted “that said failure to comply has not been contested by Plaintiff. Plaintiff’s

position, however, is that [Dental Team] is a member-managed, and not a manager-managed LLC, and that therefore, Plaintiff has no obligation to comply with Fla. Stat. § 605.0410(3).” Third, the court found that because compliance with section 605.0410(3) was a condition precedent to filing suit, Plaintiff “lack[ed] standing to maintain this lawsuit as pled” and could not “acquire standing mid suit regarding this type [of] claim.” Notably, the dismissal order did not address the complaint’s allegation that Dental Team waived compliance with conditions precedent. This appeal follows.

“A trial court’s dismissal of a claim with prejudice is reviewed de novo.” *Ackerman v. HMC Assets, LLC*, 338 So. 3d 295, 296 (Fla. 4th DCA 2022) (citation omitted). “The purpose of a motion to dismiss is to test the legal sufficiency of the complaint, not to determine factual issues.” *Cousins v. Post-Newsweek Stations Fla., Inc.*, 275 So. 3d 674, 678 (Fla. 3d DCA 2019) (citations and internal quotation marks omitted).

On appeal, Plaintiff argues dismissal was improper in light of the complaint’s unrefuted allegation that Dental Team waived compliance with conditions precedent. Dental Team seemingly concedes that its motion to dismiss failed to refute the complaint’s waiver allegation, but nonetheless argues dismissal was proper because the waiver allegation “was entirely conclusory” and “unsupported by ultimate facts.”

We begin our analysis by addressing, and rejecting, Dental Team’s argument that the waiver allegation was insufficiently pled. Florida Rule of Civil Procedure 1.120(c) establishes a special pleading rule in regard to conditions precedent: “In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.” In other words, under rule 1.120(c), “a plaintiff is allowed to allege in a generalized fashion that all the conditions precedent to a cause of action, whatever they may be, have either occurred or been performed.” *Bank of Am., Nat’l Ass’n v. Asbury*, 165 So. 3d 808, 810 (Fla. 2d DCA 2015). This is because the purpose of the rule “is to put the burden on the defendant to identify the specific condition that the plaintiff failed to perform—so that the plaintiff may be prepared to produce proof or cure the omission, if it can be cured.” *Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626, 626 (Fla. 5th DCA 2012).

Although rule 1.120(c) does not address the requirements for alleging waiver of conditions precedent, it stands to reason that if a plaintiff is permitted to generally allege performance of conditions precedent, a plaintiff is likewise permitted to generally allege waiver of those conditions

under the rule. See *Exposito v. Pub. Health Tr. of Miami-Dade Cnty.*, 141 So. 3d 663, 666–67 (Fla. 3d DCA 2014) (holding general allegation in the complaint that statutory conditions precedent “have been performed, have occurred, or have been waived” was sufficient to “compl[y] with the plain language of Florida Rule of Civil Procedure 1.120(c)” (emphasis added)); *Smith v. Rainey*, 747 F. Supp. 2d 1327, 1337 (M.D. Fla. 2010) (holding allegation in complaint that “[a]ll conditions precedent have been satisfied, complied with or waived, including but not limited to applicable notice provisions” was “sufficient to satisfy the pleading requirements of . . . Florida Rule of Civil Procedure 1.120(c)” (alteration in original) (emphasis added)).

As Dental Team failed to refute the complaint’s waiver allegation, factual issues remain as to compliance with conditions precedent, thereby rendering the matter unsuitable for resolution on a motion to dismiss.<sup>1</sup> See *City of Coconut Creek v. City of Deerfield Beach*, 840 So. 2d 389, 393 (Fla. 4th DCA 2003) (“Our courts have repeatedly affirmed that failure to comply with a statutory condition precedent, *absent waiver or estoppel*, requires dismissal.” (emphasis added)); *Cousins*, 275 So. 3d at 680 (“To the extent factual issues remain as to compliance with conditions precedent, those matters are premature and are unsuitable for resolution on a motion to dismiss.”).

Although moot in light of our holding above, we point out that even if dismissal was proper, the complaint should have been dismissed without prejudice. See *City of Coconut Creek*, 840 So. 2d at 393–95 (recognizing that if a complaint is dismissed for failure to comply with a statutory condition precedent, dismissal should be without prejudice with leave to amend if the statute of limitations has not expired). In dismissing the complaint with prejudice based on Plaintiff’s inability to “acquire standing mid suit,” the trial court appears to have conflated the issues of standing and compliance with conditions precedent. See *Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281, 1284 (Fla. 2d DCA 2005) (“A claimant’s standing to bring an action is distinct from questions arising from the claimant’s noncompliance with one or more conditions precedent to maintaining the action.”). While a party’s lack of standing to

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<sup>1</sup> We note that even if Plaintiff was required to plead the waiver allegation with specificity, Dental Team waived any pleading deficiency by failing to raise the issue below and by agreeing the waiver issue could “be brought up certainly later.” See *Roland v. Fla. E. Coast Ry., LLC*, 873 So. 2d 1271, 1275 n.6 (Fla. 3d DCA 2004) (recognizing that pleading deficiencies can be waived if the opposing party proceeds to address the issue on the merits).

bring an action is a defect that cannot be cured mid-suit, the failure to comply with a condition precedent is a potentially curable defect.

*Reversed and remanded.*

GROSS and GERBER, JJ., concur.

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***Not final until disposition of timely filed motion for rehearing.***