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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA10-491

BOBBY McMULLEN and ESTATE OF WILLIAM E. McMULLEN, DECEASED APPELLANT V. ARKANSAS ELDER OUTREACH OF LITTLE ROCK, INC., MALVERN NURSING HOME, and HEALTHCARE STAFFING ASSOCIATES, INC. APPELLEES	**Opinion Delivered** March 2, 2011 APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT [No. CV-06-201-2] HONORABLE PHILLIP H. SHIRRON, JUDGE REVERSED

LARRY D. VAUGHT, Chief Judge

Bobby McMullen, as personal representative of the estate of William E. McMullen, appeals from the decision of the trial court granting summary judgment on his claim for negligence to Arkansas Elder Outreach of Little Rock.[1] The trial court granted summary judgment based upon appellee's assertion that it was not subject to suit in tort on the basis of charitable immunity. On appeal, appellant argues that appellee should not have been allowed to assert charitable immunity because it failed to affirmatively plead the defense. We agree and reverse the decision of the trial court.

On August 4, 2006, appellant filed a complaint for negligence on behalf of his father in which he alleged, among other things, that his father sustained various injuries during his

[1]Separate defendant Malvern Nursing Home Partnership, LTD was non-suited by order filed March 13, 2007.

time as a patient in a nursing home owned by appellee. On September 1, 2006, appellee filed an answer to the complaint. In its answer, appellee alleged that it was a not-for-profit organization under Arkansas law and that it had been granted non-profit status pursuant to Internal Revenue Code section 501(c)(3).

On November 30, 2006, appellee filed a motion to dismiss, arguing that it was entitled to a dismissal because it was immune from suit and tort liability under the charitable-immunity doctrine. Appellant filed a response in which he requested that the motion be denied pending discovery related to the defense raised. Although appellant notes that the defense was not pled in appellee's answer, he offered no written response that the motion should be denied on that basis. However, at the hearing on the motion, appellant argued that the defense was waived because it was not pled in the answer. On May 21, 2007, the trial court denied the motion to dismiss.

On May 14, 2007, appellee filed a motion for summary judgment, again arguing that it was entitled to charitable immunity from suit. For almost two years, the case remained active while the parties completed discovery. Then, on March 19, 2009, appellee filed an amended motion for summary judgment, arguing the same grounds as it did in the previous motion. Appellant filed a response to the motion on April 8, 2009. In footnote one, on the first page of the response, appellant stated that he was not abandoning his initial argument that appellee waived its right to assert the defense of charitable immunity because it did not plead it in its answer, which was the sole reference to appellant's defective-defense argument before

the trial court ruled on the motion to dismiss.[2] The trial court considered the motion for summary judgment based upon the pleadings, without a hearing, and issued a letter order granting the motion on July 13, 2009.

On August 7, 2009, the appellant filed a motion to reconsider the letter ruling, and on September 17, 2009, the trial court issued an amended order granting appellee's motion for summary judgment.[3] The trial court issued an order in which it denied the motion to reconsider and issued a Rule 54(b) certificate on February 12, 2010. Appellant filed a timely notice of appeal.

On appeal, appellant contends that the trial court erred in its grant of appellee's motion for summary judgment. Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008). Summary judgment should be denied if, under the evidence, reasonable minds might reach different conclusions from the undisputed facts. *Brock v. Townsell*, 2009 Ark. 224, at 8, 309 S.W.3d 179, 185. We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* at 8, 309 S.W.3d at 185. Once the moving party has established a prima facie case for

[2]As to appellee's claim that appellant failed to raise this argument before the trial court in a timely manner, we disagree. Appellant's argument at the hearing on the motion to dismiss coupled with his summary-judgment response was sufficient to preserve the defective-defense argument for appeal. *See Jackson v. Ivory*, 353 Ark. 847, 862, 120 S.W.3d 587, 596 (2003).

[3]An amended order was issued because the original order was dated incorrectly.

summary judgment, the opposing party is required to meet proof with proof and demonstrate the existence of a disputed material fact. *Kearney v. City of Little Rock*, 2009 Ark. App. 125, 302 S.W.3d 629.

In the present case, the parties are not disputing any facts. The only question presented is whether the trial court committed error in allowing appellee to assert a charitable-immunity defense. As this presents solely a question of law, our review is de novo. *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 371 Ark. 217, 264 S.W.3d 465 (2007). Our supreme court has held that charitable immunity is an affirmative defense. *Felton v. Rebsamen Med. Ctr.*, 373 Ark. 472, 284 S.W.3d 482 (2008). An affirmative defense must be set forth in the defendant's responsive pleading. Ark. R. Civ. P. 8(c) (2010); *Poff v. Brown*, 374 Ark. 453, 288 S.W.3d 620 (2008). The burden of pleading and proving an affirmative defense is on the party asserting it. *Vent v. Johnson*, 2009 Ark. 92, 303 S.W.3d 46.

Appellee did not affirmatively plead the defense of charitable immunity in its answer. In addition, appellee failed to amend its answer to include the defense, as suggested by the trial court at the hearing on the motion to dismiss. However, appellee maintains that its statement in its answer that it is a not-for-profit organization that has received 501(c)(3) status is sufficient to raise the defense. Appellee's argument is founded on our holding in *Presley v. St. Paul Fire & Marine Ins. Co.*, 2010 Ark. App. 367, at 8, 374 S.W.3d 893, 898. In *Presley*, the applicable language in the pleading was that a hospital "was not subject to suit in tort due to the fact that it . . . has received 501(c)(3) designation from the Internal Revenue Service." 2010 Ark. App. 367, at 3, 374 S.W.3d at 895. The key distinction between *Presley* and the

case at bar is that the plaintiff in *Presley* specifically stated that the hospital "was not subject to suit in tort." *Id.*, 374 S.W.3d at 895. We found that language to be sufficient to raise the charitable-immunity defense. *Id.* at 3–6, 374 S.W.3d at 895-97. We did not conclude that the invocation of 501(c)(3) status alone is sufficient. *Id.*, 374 S.W.3d at 898. Such a finding would be contrary to our supreme court's holding that a plaintiff's answer that its organization is not run for profit is insufficient to raise the defense of charitable immunity. *Neal v. Sparks Reg'l Med. Ctr.*, 375 Ark. 46, 289 S.W.3d 8 (2008).

Appellee also argues that its motion to dismiss is a "responsive pleading" in which it could raise an affirmative defense. In support, appellee cites to cases in which the Arkansas appellate courts treated motions to dismiss as responsive pleadings. However, the key distinction between those cases and this case is that those cases involved situations in which the motion to dismiss was submitted in the place of an answer. *See, e.g.*, *Amos v. Amos*, 282 Ark. 532, 669 S.W.2d 200 (1984).

Here, appellee filed an answer and then filed its motion to dismiss 121 days after the complaint was filed, long after any responsive pleading would have been due. Again, appellee never amended its original answer. The raising of the defense in the motion to dismiss is not sufficient to satisfy the requirement that an affirmative defense be specifically pled. As such, appellant is correct in asserting that appellee failed to raise the defense in the proper manner, and the order of the trial court granting summary judgment to appellee is reversed.

Reversed.

ROBBINS and GLOVER, JJ., agree.