

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CA12-365

K. DANIEL MAESTRI, INDIVIDUALLY  
and as SOLE SHAREHOLDER of  
MAESTRI'S FOOD, INC.

APPELLANT

V.

SIGNATURE BANK of ARKANSAS et  
al., FIRST NATIONAL BANK of  
ROGERS, LINDSEY & ASSOCIATES,  
INC., et al., and BLOCK REALTY and  
AUCTION

APPELLEES

Opinion Delivered MARCH 13, 2013

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT  
[NO. CV-10-1945-2]

HONORABLE KIM M. SMITH,  
JUDGE

REVERSED AND REMANDED

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**BILL H. WALMSLEY, Judge**

K. Daniel Maestri, individually and as sole shareholder of Maestri's Food, Inc., appeals from an order of the Washington County Circuit Court dismissing his complaint against appellees on the basis of a defect in the summonses served on appellees. Appellant raises two points on appeal: (1) the trial court erred in holding that his service of a third amended complaint in accordance with Ark. R. Civ. P. 5(b) was insufficient, and (2) the trial court erred in ruling that the summonses issued pursuant to Ark. R. Civ. P. 4 were defective. We agree with appellant's second point, and reverse and remand.

On June 16, 2010, appellant sued appellees, asserting trademark infringement and violations of the Arkansas Deceptive Trade Practices Act, and a breach-of-lease claim against Signature Bank and Gary Head. The court ruled that appellant had failed to state a cause of

action in his complaint.<sup>1</sup>

Appellant filed an amended complaint against the same defendants, asserting claims for trademark violations, deceptive trade practices, and breach of contract. Appellees moved to dismiss that complaint on the same grounds, and the court entered an order dismissing without prejudice all of appellant's claims under Arkansas Rule of Civil Procedure 12(b)(6).

On May 4, 2011, appellant filed a "Third Amended Complaint" in the same lawsuit, with the same docket number of the case previously dismissed by the court. Appellant asserted the same claims and a claim for conversion. Appellant served appellees by mailing and faxing the complaint to appellees' attorneys. Appellees filed a motion to strike, asserting that appellant had failed to follow Rule 4 of the Arkansas Rules of Civil Procedure, which provides for the issuance of a summons and service of the complaint.

On July 1, 2011, the supreme court amended the rule setting forth the number of days within which a resident must answer a complaint from 20 to 30 days. *See Ark. R. Civ. P. 12(a)(1) (2012).*

On August 1, 2011, the trial court denied appellees' motion to strike:

Based on a review of the law and the facts of this case, it appears that Mr. Maestri had the right to "plead further." Ark. R. Civ. P. 12(j). For the reasons announced from the bench at the hearing, Defendants' Joint Motion to Strike the Third Amended Complaint is denied. However, *Plaintiff's obligation for proper service of process pursuant to Rule 4 of the Arkansas Rules of Civil Procedure remains.* (Emphasis added.)

Appellant had the circuit clerk issue summonses against appellees on August 19, 2011.

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<sup>1</sup>The trial court did not dismiss appellant's complaint; rather, the court gave appellant an opportunity to amend it.

In compliance with amended Rule 12(a)(1), the summonses notified each appellee that his pleading or answer must be filed within 30 days from the date of service. Appellees were served between August 22 and 24, 2011, which was within the 120-day period set out in Rule 4(i).

Appellee Paul Colvin filed a motion to dismiss on the ground that the summons was defective because it stated that he had 30, rather than 20, days from the date of service to file a pleading or answer. He alleged that 30 days was an incorrect time to respond pursuant to Ark. R. Civ. P. 12(a)(1) and that the law clearly required that compliance with Rule 4 must be exact. The other appellees adopted Colvin's motion. On January 11, 2012, the circuit court held that the correct period to respond to the complaint was 20 days. The court dismissed the complaint with prejudice because the summonses stated that the appellees had 30 days to respond, which the court said was incorrect.<sup>2</sup>

The basis for the court's ruling was that Rule 4(a) required the clerk to issue summonses "forthwith." Thus, the court concluded that the rule in force when the complaint was filed (May 4, 2011) governed. On May 4, 2011, this period was 20 days. Since compliance with the rule must be strictly construed and compliance must be exact, the court concluded that summonses giving a party 30 days to respond to the complaint were defective. Appellant filed a notice of appeal from the order granting appellees' motion to dismiss.

Appellant argues that the trial court erred in holding that the summonses, which stated

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<sup>2</sup>The dismissal was with prejudice because the complaint had previously been dismissed without prejudice. Ark. R. Civ. P. 41(b); *Mack v. Union Pac. R.R. Co.*, 2012 Ark. App. 115, 394 S.W.3d 848.

that appellees had 30 days to respond to the complaint, were defective. We agree.

In cases where the appellant claims the trial court erred in granting a motion to dismiss, the appellate court reviews the trial court's ruling de novo. *Holliman v. Johnson*, 2012 Ark. App. 354, 417 S.W.3d 222. Whether the trial court correctly interpreted an Arkansas court rule is a question of law that the appellate court reviews de novo. *Id.* This court gives the circuit court's ruling no deference on appeal in this instance. *Tucker v. Sullivant*, 2010 Ark. 170, 370 S.W.3d 812. This court construes rules using the same criteria that are used to interpret statutes. *Holliman, supra*. The first rule in considering the meaning and effect of a statute or rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* When the language is plain and unambiguous, there is no need to resort to rules of statutory construction. *Id.*

The trial court was correct in requiring appellant to comply with Rule 4(a) in obtaining service of summonses on appellees. Subsection (b) states that the summons "shall . . . state . . . the time within which these rules require the defendant to appear, file a pleading, and defend and shall notify him that in case of his failure to do so, judgment by default may be entered against him for the relief demanded in the complaint." Subsection (i) states that if service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice.<sup>3</sup>

Before July 1, 2011, resident defendants were required to respond to complaints

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<sup>3</sup>The trial court must dismiss the action without prejudice if service is not made within 120 days of the filing of the complaint and no motion to extend is timely made. *Tobacco Superstore, Inc. v. Darrough*, 362 Ark. 103, 207 S.W.3d 511 (2005).

within 20 days. On July 1, 2011, Rule 12(a)(1) was amended to provide: “A defendant shall file his or her answer within 30 days after the service of summons and complaint upon him or her.” The Reporter’s Notes provide that it

has been amended to require that both resident and nonresident defendants file a response within 30 days after service of the summons and complaint. The rule previously required that the resident defendant file the response within 20 days. On occasion the different response times led to the issuance of an incorrect summons by the clerk’s office and subsequent issues as to the sufficiency of process.

The purpose of the summons is to apprise a defendant that a suit is pending against him and afford him an opportunity to be heard. *Shotzman v. Berumen*, 363 Ark. 215, 213 S.W.3d 13 (2005). Arkansas Rule of Civil Procedure 3 provides that an action is commenced by filing a complaint with the clerk of the proper court. *Wilkins v. Food Plus, Inc.*, 99 Ark. App. 64, 257 S.W.3d 107 (2007). However, effectiveness of the commencement date is dependent upon obtaining service of the summons and complaint within 120 days of filing the complaint. Ark. R. Civ. P. 4(i).

The law in Arkansas is well settled that service of valid process is necessary to give a court jurisdiction over a defendant. *Dobbs v. Discover Bank*, 2012 Ark. App. 678, 425 S.W.3d 50. It is equally well settled that service requirements set out by rules, being in derogation of common-law rights, must be strictly construed and compliance with them must be exact. *Id.* A summons that provides an incorrect number of days within which the defendant must file an answer after service of the summons is defective and will result in the circuit court’s lacking jurisdiction. *Patsy Simmons Ltd. P’ship v. Finch*, 2010 Ark. 451, 370 S.W.3d 257; *Trusclair v. McGowan Working Partners*, 2009 Ark. 203, 306 S.W.3d 428; *Vinson v. Ritter*, 86

Ark. App. 207, 167 S.W.3d 162 (2004).

The trial court erroneously construed Rules 4 and 12. At the time appellant filed his third amended complaint, Rule 12(a)(1) required a defendant to answer within 20 days, and Rule 4(a) directed the clerk to issue a summons “forthwith” upon the filing of a complaint. Rule 4(a) did not, however, state that “forthwith” meant a specific number of days. Rule 4(i) gave the plaintiff 120 days after filing the complaint to complete service, and appellant served appellees within the 120-day limit. Additionally, when the summonses were issued by the clerk, they were in compliance with the amended version of Rule 12(a)(1). In *May v. Goodman*, 2013 Ark. 82, an opinion delivered February 28, 2013, our supreme court stated that its intention, by amending Rule 12(a)(1), was to “eliminate, not create, procedural traps.” In reversing the trial court’s dismissal of May’s complaint on the basis of a defective summons, our supreme court held that the rule change did not invalidate summonses issued before July 1, 2011. *Id.* Our decision today comports with the ruling in *May*.

Rule 12(a)(1) links the timeliness of a defendant’s answer to the date of service of the summons and complaint, not the date of filing the complaint. Rule 4(b) does not provide that the essential terms of a summons are to be determined *when the complaint is filed*. The trial court erred in construing this rule as if it implicitly contained such a requirement. When the summonses were issued and served, they complied with the rule then in effect, and they were served within the 120-day limit. Thus, we hold that the summonses were not defective and that the trial court did not lack jurisdiction. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

GLOVER and BROWN, JJ., agree.

*The Evans Law Firm, P.A.*, by: *Marshall Dale Evans*, for appellant.

*Everett, Wales & Comstock*, by: *Joel E. Cape*, for appellee Signature Bank of Arkansas.

*Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, by: *Tony Juneau*, for appellee First National Bank of Rogers.

*Hugh Jarratt*, for appellees Lindsey and Associates, James E. Lindsey, and Kirk Elsass.

*Barber, McCaskill, Jones & Hale, P.A.*, by: *Gail Ponder Gaines*, for appellees Paul Colvin, Jr., and Block Realty and Auction.