Cite as 2021 Ark. App. 275

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-20-321

	Opinion Delivered June 2, 2021
THE WOODLANDS NURSING & RETIREMENT CENTER, INC. APPELLANT	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. 26CV-17-487]
V.	
DEQUEEN THERAPY & LIVING CENTER, INC.; KILGORE CONSULTING, INC., FORMERLY KNOWN AS VICTORIA HEALTH CARE, INC.; AND JOSH KILGORE APPELLEES	HONORABLE LYNN WILLIAMS, JUDGE
	REVERSED AND REMANDED

BRANDON J. HARRISON, Chief Judge

The Woodlands Nursing & Retirement Center, Inc. (Woodlands), appeals the circuit court's order that dismissed with prejudice its claims against DeQueen Therapy & Living Center, Inc. (DeQueen); Kilgore Consulting Group, Inc. (KCG) (formerly known as Victoria Health Care, Inc.); and Josh Kilgore. Woodlands argues that the circuit court erred in finding that (1) amending a complaint without incorporating the prior complaint amounts to a dismissal of the prior complaint, and (2) Woodlands' suspended corporate charter was grounds for dismissal. We agree with both arguments and reverse and remand for further proceedings.

On 19 May 2017, Woodlands filed a complaint against DeQueen, KCG, and Kilgore alleging that DeQueen had breached a lease agreement by refusing to pay money

due to Woodlands and that Kilgore had failed to meet his obligations as guarantor.[1] The complaint also alleged that Kilgore had removed therapy equipment and other property from the premises that belonged to Woodlands. Woodlands claimed damages in excess of $1.3 million. Six days later, Woodlands filed an amended complaint containing the same allegations but with the lease agreement attached to the amended complaint.

On 19 July 2018, Woodlands filed a second amended complaint that added a request for punitive damages. The lease agreement was not attached to the second amended complaint. On 8 August 2018, Woodlands filed a third amended complaint that repeated the allegations in the second amended complaint and had the lease agreement attached.

On 29 March 2019, KCG moved to dismiss or, in the alternative, for summary judgment, citing two reasons. First, KCG argued that although Woodlands had identified itself as a corporation in good standing with its principal place of business in Hot Springs, Arkansas, it is actually a defunct Oklahoma corporation. KCG alleged that Woodlands had its corporate charter suspended in Oklahoma in April 2015 for failure to comply with tax laws, and "if an entity does not exist, it cannot transact business in Arkansas and as a result, it cannot maintain a cause of action" in Arkansas courts.

Second, KCG asserted that Woodlands had filed four complaints in the case, and each complaint subsequent to the original complaint had failed to incorporate any of the preceding complaints. Thus, Woodlands had effectively "filed a new and different cause of action each time and has superseded and dismissed the previous complaint." Rule 41 of the

[1]In its complaints, Woodlands uses the term "Kilgore" collectively to refer to both KCG and Kilgore individually.

Arkansas Rules of Civil Procedure dictates that a plaintiff can have only one dismissal without prejudice before the second dismissal becomes an adjudication on the merits. Here, Woodlands had dismissed its cause three times, and thus had dismissed this case with prejudice upon the filing of the second amended complaint.[2] In support, KCG cited *Edward J. DeBartolo Corp. v. Cartwright*, 323 Ark. 573, 916 S.W.2d 114 (1996) (explaining the widely recognized doctrine that an amended complaint, unless it adopts and incorporates the original complaint, supersedes the original complaint).

In response, Woodlands asserted that it had paid its franchise taxes in Oklahoma as of 9 April 2019 and that it was now in good standing in both Oklahoma and Arkansas. It argued that if there is a question as to its authority to maintain a lawsuit, then proceedings should be stayed until it obtains a certificate of authority. *See* Ark. Code Ann. § 4-27-1502 (Repl. 2016) (governing consequences of transacting business without authority). Woodlands also disagreed with KCG's interpretation of *DeBartolo* and argued that no appellate court in Arkansas had ever held that superseding a complaint is the same as dismissal of the complaint under Rule 41. Woodlands contended that court orders dismiss cases.

The circuit court held a hearing on 7 February 2020 and, after hearing arguments from counsel, took the matter under advisement. That same day, the court issued a letter opinion granting the motion to dismiss "[f]or the reasons stated in the Defendant's Motion and Brief[.]" The court's separate and subsequent written order, entered 11 February 2020, made the following findings.

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[2]KCG also made additional arguments in favor of summary judgment in its motion, but those arguments are not relevant to the points on appeal.

> 2. Giving due consideration to Rule 41 of the Arkansas Rules of Civil Procedure ("ARCvP") and the holding of the Arkansas Supreme Court in *Edward J. DeBartolo Corp. v. Cartwright*, 323 Ark. 573, 916 S.W.2d 114 (1996), this Court finds that since the Plaintiff has failed to attach, reference, adopt and/or incorporate the original Complaint or each preceding Complaint into any of the Amended Complaint(s) filed in this case, then each preceding complaint has been superseded and effectively dismissed.
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> 3. In addition to the failure of each Amended Complaint in this case to relate back to the preceding complaint, is the fact that every complaint filed in this case has been filed by a Plaintiff who represented to this court that it was an Arkansas Corporation in good standing with a principal place of business in Garland County, Arkansas. These representations were made when the Plaintiff entity was, in fact, a foreign corporation, having a principal place of business in Oklahoma and, at all relevant times, it's [sic] corporate charter had been suspended in that state.
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> 4. As a result of the circumstances enumerated in paragraph three (3) above, the original Complaint and each Amendment thereafter that [sic] has been filed by a Plaintiff that did not legally exist.
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> 5. The defects of Plaintiff's Complaint and Amended Complaints are incurable, as multiple amendments without a proper Plaintiff and without relation back equate to multiple dismissals. As such, this Court **grants the Motion to Dismiss** filed by Separate Defendant, Kilgore Consulting Group, Inc. and finds that Plaintiff's Complaint and the Amendments thereto shall be **dismissed with prejudice as to all Defendants**.

(Underline and bold in original.)

Woodlands moved for a new trial pursuant to Ark. R. Civ. P. 59 and argued that the circuit court had made errors of law in both bases for its ruling. Woodlands also filed a timely notice of appeal from the court's order and an amended notice of appeal after its motion was deemed denied.

On appeal, Woodlands provides the standard of review for a motion to dismiss in its brief. But that is mistaken. It is well settled that a motion to dismiss is converted to a motion for summary judgment when matters outside the pleadings are presented to and not

excluded by the court. *Koch v. Adams*, 2010 Ark. 131, 361 S.W.3d 817. Here, the court's order recited that it had considered the "Motions(s), Response(s), Reply(ies) and Briefs in Support thereof," as well as the oral arguments from counsel, and that the court was making its ruling "upon the inspection of the case file herein." Because the circuit court considered matters outside the pleadings when it ruled, we treat the court's dismissal as a granted motion for summary judgment.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Koch*, *supra*. On appeal, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Gentry v. Robinson*, 2009 Ark. 634, 361 S.W.3d 788. This court views 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. *Kyzar v. City of W. Memphis*, 360 Ark. 454, 201 S.W.3d 923 (2005). If there are no facts in dispute, our review focuses on the circuit court's application of the law to the facts. *See E B Mgmt. Co., LLC v. Houston Specialty Ins. Co.*, 2019 Ark. App. 294, 577 S.W.3d 408. We give the circuit court's conclusions of law no deference on appeal. *Id*.

As a preliminary matter, we address a motion to strike that was submitted with the case. On 17 February 2021, this court ordered rebriefing in this case due to a deficient abstract and addendum. *Woodlands Nursing & Ret. Ctr., Inc. v. DeQueen Therapy & Living Ctr., Inc.*, 2021 Ark. App. 70. Woodlands filed a new brief on 1 March 2021, and

DeQueen[3] moved to strike the brief due to an improper abstract. DeQueen argued that instead of condensing the transcript of the 7 February 2020 proceedings in first-person summary format, Woodlands had "simply printed all of the pages of the hearing, including asides and prefatory remarks, and submitted this as the Abstract." In response, Woodlands asserted that because there was no testimony given at the 7 February 2020 hearing, there was no testimony to convert to a first-person narrative. Instead, Woodlands set forth counsels' statements and arguments and the colloquies between the court and counsel as they took place during the hearing.

The hearing transcript spans twenty-eight pages, and Woodlands' abstract is twenty-six pages. The abstract is largely verbatim, but we often allow interactions between counsel and the court to be presented in this way so that the meaning and import of the arguments is accurately represented. While approximately eight pages of the abstract are not relevant to the appeal, as they concern arguments not ruled on by the circuit court, we disagree that this error is so egregious that it warrants striking Woodlands' brief. The decision is not a close one. *Striking a brief* is a serious sanction for a serious transgression. Nothing approaching that level occurred here. The motion to strike is denied.

Turning to the substantive points, Woodlands first argues that the circuit court erred in finding that an amendment to a complaint without incorporating the previous complaint amounts to a dismissal. It asserts that *DeBartolo* made clear that filing an amended complaint without incorporating a prior complaint results in the prior complaint being superseded, but

[3]For the analysis of the motion and the points on appeal, "DeQueen" will be used collectively to refer to all three appellees.

that is not the same as a dismissal. Woodlands says that a case can only be dismissed by order of the court, and there was no court order of dismissal in this case prior to the final order now appealed. DeQueen, on the other hand, continues to insist that Woodlands' multiple amendments to its complaint without incorporation of previous complaints invoked the "two-dismissal rule" under Ark. R. Civ. P. 41.

Rule 41(a) governs voluntary dismissals and provides,

> (1) Subject to the provisions of Rule 23(e) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.
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> (2) A voluntary dismissal under paragraph (1) operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.

For the "two-dismissal rule" to apply, there must be a dismissal under subsection (1), which requires an order of the court dismissing the action. As argued by Woodlands, no dismissal had ever been entered in this case before the order now on appeal. DeQueen cited no authority that equates the concept of "superseding a complaint" to a dismissal. It has also failed to provide any convincing legal argument that comes close to justifying the unusual assertion that a lawyer walks his own client into a deadly procedural trap by amending a complaint more than one time during a case (for to do it twice would invoke the two-dismissal rule). The circuit court erred by ruling that a superseded complaint is "dismissed" within the meaning of Rule 41.

Woodlands' second point on appeal concerns its suspended corporate charter in Oklahoma. Woodlands does not contest that its corporate charter in Oklahoma was suspended for nonpayment of franchise taxes from April 2015 to April 2019. It is also uncontested that the original complaint and the three amended complaints were filed during that time. But, it argues, it cured its suspension in Oklahoma and should have been allowed to proceed with its suit in Arkansas.

Woodlands cites both Oklahoma and Arkansas law in support. In *Williams v. Smith & Nephew, Inc.*, 212 P.3d 484 (Okla. 2009), the Oklahoma Supreme Court held that a medical-device distributor was not barred from suing a manufacturer on causes of action that arose during a period of suspension of the distributor's corporate charter after reinstatement of the distributor's charter. The supreme court explained that the "relation-back" component of corporate-charter reinstatement provides that

> reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its certificate of incorporation by the corporation, its officers and agents during the time when its certificate of incorporation was forfeited and that, upon reinstatement, a corporation suspended for nonpayment of taxes is revived and renewed as if its certificate never had become forfeited.

Id. at 488. And in *Omni Holding & Development Corp. v. CAG Investments, Inc.*, 370 Ark. 220, 258 S.W.3d 374 (2007), our supreme court held that in accordance with the express terms of Arkansas's reinstatement statute, the reinstatement of a creditor's corporate charter was retroactive to the date of its revocation. *See* Ark. Code Ann. § 26-54-112(a)(1)(A)(ii) (Repl. 2020). Consequently, the creditor (a foreign corporation), had standing to bring an unlawful-detainer action against a debtor despite the revocation of its charter at the time it filed suit.

Woodlands says that it cured its suspension in Oklahoma, which vested it with continuous existence as though the revocation had never occurred, and that it is, and always has been throughout the pendency of this case, in good standing with the Arkansas Secretary of State. In response, DeQueen's somewhat murky argument repeatedly refers to Woodlands as a "non-existent" party. DeQueen also denies that Woodlands has cured its status in Oklahoma because there is no evidence that its board of directors voted to revive the corporation. DeQueen claims that "the Record below *conclusively establishes that no such meeting of its Board of Directors ever happened*." (Emphasis in original.)

First, DeQueen's board-of-directors argument was never mentioned in circuit court, much less was it developed to some meaningful degree. Moreover, there is no evidence in the record—one way or another—of whether such a meeting occurred.

Regarding what was developed, we hold that the circuit court erred by finding that Woodlands' corporate status in Oklahoma mandated a dismissal. The case law cited by Woodlands makes clear that reinstatement is retroactive, and in its response to the motion to dismiss, Woodlands provided proof of good standing in Oklahoma. To the extent DeQueen appears to raise concern with the corporation's name, this was also not developed or ruled on below. Beyond this, Ark. Code Ann. § 4-27-1506 allows a foreign corporation to use a different name in this state. Finally, DeQueen has identified no authority for the proposition that the case should have been dismissed—as opposed to some other less drastic remedy—because Woodlands, in its complaint, identified as an Arkansas corporation instead of an Oklahoma corporation.

The circuit court erred on the two bases that it identified in its order as supporting a summary judgment. The judgment is therefore reversed, and the case is remanded for further proceedings.

Reversed and remanded.

VIRDEN and KLAPPENBACH, JJ., agree.

Tim Dudley; and *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellant.

Smith, Cohen & Horan, PLC, by: *Matthew T. Horan* and *Stephen C. Smith*, for appellees.