

SUPREME COURT OF ARKANSAS

No. 11-961

FRANK B. WHITBECK;
FIRETHORNE, LLC; BELLE MEADE,
LLC; THE GARDENS, LLC;
BUTTERFIELD GARDENS, LLC;
H.F.R., LLC; and WINROCK GRASS
FARM, INC.

APPELLANTS

V.

JAY BRADFORD, SUCCESSOR IN
INTEREST TO MIKE PICKENS,
INSURANCE COMMISSIONER FOR
THE STATE OF ARKANSAS, and IN
HIS CAPACITY AS RECEIVER FOR
SIGNATURE LIFE INSURANCE
COMPANY OF AMERICA

APPELLEES

Opinion Delivered November 29, 2012

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CV04-5233]

HONORABLE JAY MOODY, JUDGE

AFFIRMED.**JIM HANNAH, Chief Justice**

Frank B. Whitbeck appeals an order of the circuit court dismissing his complaint for declaratory judgment and an order denying his motion for relief from denial of objection to confirmation of sale. We affirm the decisions of the circuit court. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(1).

This matter began in early 2004 when, during a scheduled financial examination of Signature Life Insurance Company of America, the State auditor discovered that Whitbeck, sole shareholder and sole director of Signature Life, had obtained loans from Signature Life resulting in a \$3.6 million insolvency for the company. On May 5, 2004, Mike Pickens, as

Insurance Commissioner for the State of Arkansas, filed a petition for receivership against Signature Life. With Whitbeck's agreement, Commissioner Pickens was appointed receiver and began attempting to rehabilitate Signature Life, pursuant to Arkansas Code Annotated section 23-68-101 (Repl. 2001), the Uniform Insurers Liquidation Act.

On June 7, 2005, Julie Benafield Bowman, as successor to Commissioner Pickens, filed a complaint in this same action naming as defendants Whitbeck, Firethorne, LLC; Belle Meade, LLC; The Gardens, LLC, Butterfield Gardens, LLC; and H.F.R., LLC. All the defendant limited-liability companies are owned by Whitbeck. The complaint alleged fraud, constructive fraud, breach of fiduciary duties, constructive trust or foreclosure, and conversion.¹ Whitbeck answered and defended, asserting, among other defenses, unclean hands, estoppel, and breach of the duty of good faith and fair dealing. This action was settled. The order of liquidation filed February 1, 2010, states, "On or about October 4, 2006, the Receiver, Whitbeck, and FBW, LC settled the Civil Litigation and agreed to a rehabilitation plan for Signature by executing a document entitled Rehabilitation Plan and Settlement Agreement." Whitbeck agreed to the Rehabilitation Plan. The circuit court approved it in an order filed November 1, 2006.

Due to Whitbeck's failure to perform under the Rehabilitation Plan, appellee Receiver filed on December 15, 2009, a Petition for Order to Show Cause, for Order to Terminate Rehabilitation, for Order Of Liquidation, and for Foreclosure and Replevin.

¹It was alleged that the limited liability companies received disbursements under loans made by Signature Life.

Whitbeck responded, arguing that the receiver had failed to act properly and that he had not taken the required action to protect the interests of Signature Life's policyholders and shareholders. Whitbeck also alleged that he was not provided with reports and that the time for him to perform had been extended. Whitbeck requested a full hearing and the right to "pre-hearing discovery of the Receiver." The circuit court disagreed and on February 18, 2010 entered an order of liquidation under the Uniform Act permitting the receiver to liquidate Signature Life's assets. Adjudication regarding the prosecution and enforcement of assignment, mortgage, and other rights in real property was reserved for later adjudication. That matter was heard on October 4, 2010, and a Foreclosure And Replevin Decree entered November 5, 2010 against Whitbeck ordered the sale of the real property. Confirmation of sale was entered December 16, 2010.

On December 30, 2010, Whitbeck filed his complaint for declaratory judgment in conjunction with an objection to confirmation of sale. Whitbeck sought a declaration that the receiver's alleged malfeasance and nonfeasance extinguished and released the defendants "from any further liability." The Circuit Court dismissed his complaint and Whitbeck now appeals.

When reviewing a dismissal under Arkansas Rule of Civil Procedure 12(b), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Cancun Cyber Cafe and Business Ctr., Inc. v. City of North Little Rock*, 2012 Ark. 154, at 4. In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to

be liberally construed. *Id.*²

Appellee argues that res judicata bars Whitbeck's action, not only the claims that Whitbeck made prior to settlement, but also any claims he might have made. *See Crockett v. C.A.G. Invs., Inc.*, 2011 Ark. 208, at 8–9, ___ S.W.3d ___, ___. The conduct alleged occurred before settlement. Assertions of alleged misconduct by the receiver were made in 2009. Whitbeck could have, and should have, litigated his claims in the earlier action. His claims are barred by the claim preclusion facet of res judicata. The circuit court did not err in dismissing Whitbeck's action.

Whitbeck further alleges that the circuit court erred in denying his objection to confirmation of sale. Confirmation of sale was filed December 16, 2010. The order denying Whitbeck's objection to the sale was filed April 21, 2011. The notice of appeal was filed July 1, 2011. While this is in the context of a receivership, the law is clear that confirmation of sale is a final order from which an appeal may be taken. *See Nat'l Home Ctrs., Inc. v. First Ark. Valley Bank*, 366 Ark. 522, 526, 237 S.W.3d 60, 63 (2006).

In *National Home Ctrs.*, no notice of appeal was ever filed. Whitbeck filed his notice of

²Whitbeck characterized his complaint as an action for declaratory judgment, while appellee contended that the action was a counter claim. Appellee is correct. A declaratory judgment action seeks to avoid uncertainty and insecurity with respect to rights, status, and other legal relations. *Wilmans v. Sears, Roebuck & Co.*, 355 Ark. 668, 672, 144 S.W.3d 245, 247 (2004). It is not a substitute for an ordinary cause of action and is not a proper means of trying a case. *Id.*, 144 S.W.3d at 247. In *Wilmans*, the plaintiff asked the circuit court "to declare her obligation under her credit agreement with Sears for charges on which she did not sign a charge slip." *Id.*, 144 S.W.3d at 247. Whitbeck did not ask the circuit court to declare obligations or rights under the Rehabilitation Agreement; rather, he alleged causes of action based on negligence and intentional misconduct. As such, it was not a proper declaratory-judgment action.

appeal too late. He did not file his notice of appeal until July 1, 2011, 197 days later. The timely filing of a notice of appeal is jurisdictional. *Jewell v. Moser*, 2012 Ark. 267, at 4. This court lacks jurisdiction to hear this issue.

Affirmed.

BROWN, J., not participating.

Eichenbaum Liles P.A., by: *James H. Penick, III*, for appellants.

Niswanger Law Firm PLC, by: *Stephen B. Niswanger* and *A. Cale Block*, for appellee.