

SUPREME COURT OF ARKANSAS

No. CV-12-836

HOTFOOT LOGISTICS, LLC AND
FREIGHT AMBULANCE, LLC
APPELLANTS

V.

SHIPPING POINT MARKETING, INC.,
DAVID FISHGOLD, AND LOUIS N.
FISHGOLD

APPELLEES

Opinion Delivered June 20, 2013

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CA 12-00836]

HONORABLE TIMOTHY DAVIS FOX,
JUDGE

DISSENTING OPINION ON DENIAL
OF REHEARING.

KAREN R. BAKER, Associate Justice

Appellees Shipping Point Marketing, Inc., David Fishgold, and Louis N. Fishgold move for rehearing, asserting that this court erred as a matter of law in treating their motion to dismiss for personal jurisdiction as a motion for summary judgment. I would grant rehearing.

In this case, appellees filed a motion to dismiss based on lack of personal jurisdiction. The circuit court granted their motion. Appellants, Hotfoot Logistics, LLC, and Freight Ambulance, LLC, appealed. We held there were genuine issues of material fact relating to whether appellees had a substantial connection to Arkansas sufficient to confer personal jurisdiction over them, and reversed and remanded.

In determining the standard of review, we stated:

As a preliminary matter, while the parties treat this case as an appeal from an order granting a motion to dismiss, we note that six exhibits were attached to appellants'

amended complaint. These exhibits included Western Brokerage's rate-confirmation contract, an affidavit of David Lasater, Hotfoot's vice president, and four bill-of-lading contracts. The circuit court's order of dismissal reads that its findings were "[b]ased upon the pleadings and *all other things and matters* properly before the Court [.]” (Emphasis added.) It is well settled that when a circuit court considers matters outside the pleadings, appellate courts will treat a motion to dismiss as one for summary judgment. *Koch v. Adams*, 2010 Ark. 131, 361 S.W.3d 817. Because it is clear to this court that the circuit court considered exhibits outside the pleadings in making its ruling, the court's dismissal is converted to one for summary judgment. *Id.*

This is the correct standard of review for a motion to dismiss under Arkansas Rule of Civil Procedure 12(b)(6)(2012) when the trial judge has considered matters outside the pleadings, but it is not the correct standard of review for a motion to dismiss based on lack of personal jurisdiction under Arkansas Rule of Civil Procedure 12(b)(2)(2012). Our standard of review for motions to dismiss under Arkansas Rule of Civil Procedure 12(b)(2) requires that we look to the complaint for the relevant facts alleging jurisdiction, which are taken as true. *Davis v. St. John's Health Sys., Inc.*, 348 Ark. 17, 71 S.W.3d 55 (2002). Facts taken as true cannot leave a question of material fact unanswered. Thus, it is clear that a summary-judgment standard is not the appropriate standard for reviewing a Rule 12(b)(2) motion to dismiss on personal jurisdiction grounds.

While we converted a motion to dismiss based on a lack of jurisdiction over the person into a motion for summary judgment in *Ganey v. Kawasaki Motors Corp., U.S.A.*, 366 Ark. 238, 234 S.W.3d 838 (2006), that case included, in addition to the 12(b)(2) motion, a 12(b)(6) motion to dismiss where the circuit court reviewed affidavits and depositions. However, to the extent that *Ganey* held that a summary-judgment standard of review was the appropriate standard of review for a 12(b)(2) motion to dismiss, I believe it was in error and should be

overruled.

In this case, we erroneously reviewed the findings of the circuit court under a summary-judgment standard, stating that the circuit court reviewed matters outside the pleadings. This analysis is misplaced for two reasons.

First, the circuit court reviewed only the pleadings and attached exhibits. Rule 10(c) of the Arkansas Rules of Civil Procedure (2012) states that a copy of any written instrument which is an exhibit to the pleading is a part thereof for all purposes. A “pleading,” by definition, is “a written statement, by the parties, of the facts constituting their respective claims and defenses.” Ark. Code Ann. § 16-63-201 (Repl. 2005). Pursuant to Rule 7, a complaint is a pleading. Therefore, here, the exhibits attached to appellants’ complaint were simply part of the pleading and not outside the pleadings before the circuit court. The concurring opinion takes the position that the motion to dismiss for lack of jurisdiction, the response to the motion, and the briefs in support are also outside the pleadings citing to Rule 7 of the Arkansas Rules of Civil Procedure (2012). However, Arkansas Rule of Civil Procedure 12(b) provides that, “Every defense, in law or fact, to a claim for relief in any pleading. . . shall be asserted in the responsive pleading. . . except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person. . . .” If the concurring opinion were correct, by considering the motion to dismiss the circuit court converts the motion to a summary judgment.

Second, a Rule 12(b)(2) motion to dismiss can never be converted to a motion for summary judgment as it is the allegations in the complaint that must establish jurisdiction. *See*

Davis, supra (internal citations omitted) (“In considering the parties’ arguments surrounding a Rule 12(b)(2) motion, this court looks to the complaint for the relevant facts alleging jurisdiction, which are taken as true. If the complaint does not allege sufficient facts on which personal jurisdiction can rest, then the complaint is factually deficient.”); *see also* 2 DAVID NEWBERN, JOHN J. WATKINS & D.P. MARSHALL, JR., ARKANSAS CIVIL PRACTICE & PROCEDURE § 14:3 (5th ed. 2010) (footnote omitted) (“The court’s jurisdiction over a party is initially determined by looking to the facts stated in the complaint. If the facts stated are insufficient to demonstrate jurisdiction of the defendant, the defect is fatal to the complaint.”).

Based on the majority’s denial of rehearing, this court has reversed and remanded this case for a trial to determine whether the circuit court has jurisdiction. Instead, we should have taken the allegations in the complaint as true and determined whether the circuit court erred in finding those allegations insufficient to establish personal jurisdiction.

For these reasons, I would grant appellees’ motion for rehearing.

HART and HOOFFMAN, JJ., join in this dissent.

Cross, Gunter, Witherspoon & Galchus, P.C., by: *J. E. Jess Sweere*, for appellees.

No response.