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SUPREME COURT OF ARKANSAS

No. 08-144

	Opinion Delivered February 4, 2010
EDWARD K. LOVELESS APPELLANT V. ROY AGEE, DEPARTMENT OF CORRECTION KEEPER OF RECORDS, AND LARRY NORRIS, DIRECTOR, DEPARTMENT OF CORRECTION APPELLEES	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CV-2007-781-2] HON. ROBERT H. WYATT, JR., JUDGE REVERSED AND REMANDED.

JIM GUNTER, Associate Justice

Appellant appeals the circuit court's order dismissing his petition for declaratory judgment and injunctive relief. On appeal, appellant asserts that the circuit court erred in (1) not allowing him an opportunity to respond to the State's motion to dismiss, and (2) dismissing his petition under Ark. R. Civ. P. 12(b)(6). We agree that the motion to dismiss was prematurely granted; therefore, we reverse and remand.

Appellant, an inmate in the Arkansas Department of Correction, is currently serving a twenty-year sentence for possession of drug paraphernalia with intent to manufacture methamphetamine and manufacturing methamphetamine. On August 23, 2007, appellant filed a petition for declaratory judgment and writ of mandamus in Jefferson County Circuit Court.

In his petition, appellant alleged that Arkansas Code Annotated section 12-28-604 (Repl. 2008), part of the Prison Overcrowding Emergency Powers Act, established a right to discharge and release from confinement for all prisoners and that the statute's application to only certain classes of prisoners was unconstitutional. In response, appellees filed a motion to dismiss on September 20, 2007, arguing that the statute did not grant any "rights" to inmates, that appellant had failed to state facts on which relief could be granted, and that the petition should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6). The next day, on September 21, 2007, the circuit court entered an order finding that appellant had not set forth any facts upon which declaratory relief could be granted and dismissing the petition without prejudice.

On September 26, 2007, appellant filed a reply to the motion to dismiss, reiterating his arguments with regard to the statute and asserting that he had a right to attack the statute as discriminatory. Appellant also filed a motion to set aside the order dismissing the petition on October 5, 2007, arguing again that he had a right to discharge of his sentence and that the statute would apply to him if it were not being applied in a discriminatory fashion. This motion to set aside was not ruled upon, however, and was deemed denied on November 4, 2007. Appellant then filed a timely notice of appeal of the circuit court's order on November 26, 2007.

In reviewing a court's decision on a motion to dismiss, we treat the facts alleged in the complaint as true and view them in a light most favorable to the plaintiff. *Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2 (2004). In testing the sufficiency of a complaint on a motion to

dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *Id.* This court's rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. Ark. R. Civ. P. 8(a) (2009); *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (2004). The court will look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Perry*, *supra.*

For his first point on appeal, appellant argues that the circuit court erred in dismissing the petition without first allowing him time to respond to the motion to dismiss. Appellant cites Ark. R. Civ. P. 6(c), which states that "[a]ny party opposing a motion shall serve a response within 10 days after service of the motion." In response, appellees argue that because appellant failed to state a justiciable controversy for declaratory judgment, no response by him could have aided his case, and it is therefore unnecessary for this court to determine whether the circuit court should have permitted appellant to respond before issuing its order.

In *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993), this court stated:

> Although the subject of responses to motions is contemplated by the Arkansas Rules of Civil Procedure, the subject is not clearly addressed therein. There is no specific requirement of a written response to a written motion; ARCP Rule 78(b) merely requires that if a written response is to be filed, it must be done so within ten days of service of the motion. However, a trial court should either allow a written response to the motion or hold a hearing at which a response is heard.

Id. at 612–13, 864 S.W.2d at 829. In that case, because there was a hearing at which a response was heard, we found no prejudice in the court deciding a motion the day it was

filed. However, in the case at bar, it is clear that the circuit neither held a hearing nor considered the timely written response to the State's motion to dismiss that was filed by appellant. Therefore, we find that the order of dismissal was prematurely granted and reverse and remand for the court to consider appellant's written response or hold a hearing on the motion to dismiss.

Appellant has also filed a motion asking this court to issue an injunction forbidding the Arkansas Department of Correction from acting under the authority of section 12-28-604 of the Prison Overcrowding Emergency Powers Act because the statute is unconstitutional. This motion essentially asserts the merits of appellant's second point on appeal, which was not ruled upon by the circuit court and will likewise not be ruled upon by this court until the matter is properly before us. Therefore, appellant's motion for an injunction is denied.

Reversed and remanded.

Edward K. Loveless, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellee.