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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA10-90

	Opinion Delivered SEPTEMBER 1, 2010
J.F. VALLEY APPELLANT	APPEAL FROM THE PHILLIPS COUNTY CIRCUIT COURT, [NO. CV2007-460]
V.	HONORABLE RICHARD LEE PROCTOR, JUDGE
HELENA NATIONAL BANK APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant J.F. Valley argues, in his third challenge to the Phillips County Circuit Court's rulings in this matter, that the trial court erred when it granted summary judgment because it failed to grant a dismissal under Arkansas Rule of Civil Procedure 12(b)(8) (2010) and failed to hold that the statute of limitations had expired on the appellee Helena National Bank's breach-of-contract claim. We affirm the trial court's order.[1]

[1]Not included in the addendum are the exhibits to the motion for summary judgment that was granted and from which this appeal was taken. Those exhibits were purported evidence of the amount of the promissory note, the date of the last payment made, notice of default, and the like. Arkansas Supreme Court Rule 4-2 (2010) provides that the addendum must include all motions and exhibits thereto. Ark. Sup. Ct. R. 4-2(a)(8)(A)(i). However, because the issue here was procedural, the evidentiary items attached to the Bank's motion for summary judgment that are not included in the addendum are not essential to this court's understanding of the issues. Also note that we may go to the record to affirm. *See NCCF Support, Inc. v. Harris McHaney Real Estate Co.*, 2010 Ark. App. 384, __ S.W.3d __; *Meyer v. CDI Contractors, LLC*, 102 Ark. App. 290, 284 S.W.3d 530 (2008).

Facts

In 2003, the Bank sued Valley alleging that he had defaulted on a promissory note held by the Bank. The trial court granted a default judgment against Valley, and in Valley's first appeal to this court, we reversed the default judgment based on ineffective service. *Valley v. Helena Nat'l Bank (Valley I)*, 99 Ark. App. 270, 259 S.W.3d 461 (2007). After our mandate issued, the Bank refiled its debt case—the 2007 case—against Valley. But the first case—the 2003 case—had not yet been dismissed. Valley then moved in the 2003 case for return of money that the Bank had collected by garnishment based on the reversed judgment and for dismissal based on our mandate. At the same time, Valley moved to dismiss the 2007 case, citing Rule 12(b)(8) and arguing the continued pendency of the first case. The trial court ruled that the 2003 case "must be dismissed" under Arkansas Rule of Civil Procedure 4(i) (2009) and that it could "take no further action in said case." The trial court also ruled that the Bank "had no other remedy than to file a new suit," and therefore refused to dismiss the 2007 case, finding that Valley must seek any claim for refund or credit for garnishments in the 2007 case.

Valley appealed, and we affirmed the trial court's ruling, stating as follows:

> We hold that, on this record, the circuit court made no reversible legal error. The words of Rule of Civil Procedure 4(i) are plain. "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 upon motion or upon the court's initiative." There was no valid service on Valley in the 2003 case; that was our holding in the first appeal. The lack of good service meant that the circuit court correctly dismissed the 2003 case pursuant to this court's mandate. *Trusclair v. McGowan Working Partners*, 2009 Ark. 203, at 3-5, ___ S.W.3d ___, ___.

> Nor do we see any error in the circuit court's refusal to entertain Valley's refund motion in the 2003 case. The pendency of the 2007 case puts the refund issue in a unique context. Requiring Valley to litigate the refund issue in a second proceeding is neither unfair nor impractical. If the 2007 case did not exist, then Rule 4(i)'s command that a case of failed service "shall be dismissed" might run aground on other settled law granting a remedy to a party in Valley's circumstances. By statute and precedent, a judgment debtor can recover property lost pursuant to a reversed judgment. Ark. Code Ann. § 16-67-329 (Repl. 2005); *Peek Planting Co., Inc. v. W.H. Kennedy & Sons, Inc.*, 257 Ark. 669, 671-73, 519 S.W.2d 49, 51 (1975); *Mothershead v. Douglas*, 219 Ark. 457, 461, 243 S.W.2d 761, 763 (1951); *Dodson v. Butler*, 101 Ark. 416, 420-21, 142 S.W. 503, 505 (1912). But the pending 2007 case removes any difficult issue as far as this litigation is concerned. The 2007 case provides a new vehicle through which Valley may be made whole.
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> The Bank's partial collection on the vacated judgment through the garnishments raises other interesting issues. The Bank argued res judicata, laches, and preclusion below, contending that Valley waived the right to get his money back by not challenging the garnishments in the first appeal. We do not decide these issues. They are for the 2007 case, which is not before us. We hold only that the circuit court correctly decided that all the issues remaining between these parties could and should be pursued in an action other than the 2003 case.

Valley v. Helena Nat'l Bank (Valley II), 2009 Ark. App. 783, at 2–3.

During the pendency of *Valley II*, the 2007 case was set for trial, and the Bank filed a motion for summary judgment. Valley also filed a summary-judgment motion and a renewed motion to dismiss. The trial court granted summary judgment to the Bank and denied Valley's motions. The order in pertinent part is as follows:

> 9. From the pleadings before the Court, it is undisputed that the Defendant's [Valley's] last payment to the Plaintiff [Bank] was February 5, 2003, and a default was declared by letter of March 25, 2003. This means that the earliest date for statute of limitations to expire would be February 5, 2008, and by some arguments March 25, 2008.

10. This particular action was filed December 21, 2007, which appears to be well within the period of limitations. Therefore, the Motion for Summary Judgment filed by the Defendant [Valley] will be denied.

11. It also appears that there is no question of fact with regard to the failure by the Defendant [Valley] to pay the amounts called for under the promissory note. The only response has been a procedural response but no substantive response to the fact.

12. The Court finds that there is no genuine issue of material fact and that the moving party, the Plaintiff [Bank], is entitled to judgment as a matter of law. The moving party has established a prima facie entitlement to judgment and there has been no proof met to demonstrate the existence of a material issue of fact.

From this order, Valley timely appeals, claiming that the trial court erred in failing to grant a dismissal pursuant to Rule 12(b)(8) and in finding that the statute of limitations had not expired on the Bank's claim.

Statement of Law

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. *See, e.g.*, *Gentry v. Robinson*, 2009 Ark. 634, ___ S.W.3d ___. On appeal, this court usually 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. *Id.* 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. *Id.* However, in a case such as this one, which does not involve the question of whether factual issues exist but rather the application of legal rules, we simply determine whether the appellee was entitled to judgment as a matter

of law. *Ruth R. Remmel Revocable Trust v. Regions Fin. Corp.*, 369 Ark. 392, 255 S.W.3d 453 (2007). When there are no disputed facts, our review must focus on the trial court's application of the law to the facts. *Parker v. Southern Farm Bureau Cas. Ins. Co.*, 104 Ark. App. 301, 292 S.W.3d 311 (2009).

Discussion

Valley makes two related arguments regarding Rule 12(b)(8). First, he points out that the trial court held that the Bank had no remedy other than to file the second complaint against him. The trial court reasoned that because the 2003 case had not been served within 120 days, there was no other action that could be taken and it had no jurisdiction to do anything other than to set aside the default judgment and dismiss the case. Valley argues that finding was erroneous because Rule 12(b)(8) provides a defense where there is a pendency of another action between the same parties arising out of the same transaction or occurrence. He claims that under Rule 12(b)(8), the trial court had no choice but to dismiss the 2007 complaint because the 2003 case was still pending. *See Mark Twain Life Ins. Corp. v. Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984).

Valley contends that in *Valley II* this court specifically found that the 2003 and 2007 cases were active at the same time. He asserts that the finding of these facts is now the law of the case, and that the law-of-the-case doctrine prohibits a court from reconsidering issues of law and fact that have already been decided. *Scamardo v. Sparks Reg'l Med. Ctr.*, 375 Ark. 300, 289 S.W.3d 903 (2008). He argues that the law of the case—that both cases were active

at the same time—has been established. Therefore, Valley's second contention regarding Rule 12(b)(8) is that the law of the case requires that the 2007 case should have been dismissed.

The Bank contends that Rule 12(b)(8) does not require dismissal of the 2007 case. Citing *Allstate Insurance Company v. Redman Homes, Inc.*, 302 Ark. 335, 789 S.W.2d 454 (1990), the Bank argues that the dismissal of the 2003 case before the trial court's determination that the 2007 case was not barred by the statute of limitations was correct. In other words, because the 2003 case had been dismissed, only the 2007 case remained open and Rule 12(b)(8) did not apply. Valley replies to this argument claiming that *Allstate* can easily be distinguished because the trial court there dismissed the first case at issue prior to the hearing on the second case. Here, Valley points out that the trial court took up both cases at the same hearing. However, Valley's argument ignores this court's decision in *Valley II*, wherein we held that the 2003 case had to be dismissed because service was not obtained. Further, we have tacitly approved of the Bank's filing of the 2007 complaint. *See Valley II*.

The Bank follows this reasoning in its second argument, which is that the trial court's decision should be upheld based upon the law-of-the-case doctrine. The Bank asserts that this court had previously ruled that Rule 12(b)(8) was not an impediment to this case going forward. *See Valley II*. Therefore, the Bank argues that the trial court and this court are precluded from reconsidering that issue of law. Even though *Valley II* did not specifically rely

on Rule 12(b)(8) in its ruling, this court did not find an impediment to the 2007 case. We held:

> The lack of good service meant that the circuit court correctly dismissed the 2003 case pursuant to this court's mandate.
>
> Nor do we see any error in the circuit court's refusal to entertain Valley's refund motion in the 2003 case. The pendency of the 2007 case puts the refund issue in a unique context. Requiring Valley to litigate the refund issue in a second proceeding is neither unfair nor impractical. If the 2007 case did not exist, then Rule 4(i)'s command that a case of failed service "shall be dismissed" might run aground on other settled law granting a remedy to a party in Valley's circumstances.

Valley II, 2009 Ark. App. 783, at 2–3 (citation omitted). Thus, we agree with the Bank's argument. To hold as Valley urges would violate the law-of-the-case doctrine in that we have already held that the 2003 case was correctly dismissed and that requiring Valley to litigate the refund issue in a second proceeding is neither unfair nor impractical.

Valley's second point on appeal is that the trial court erred in finding that the statute of limitations did not bar the Bank's 2007 complaint. Arkansas Code Annotated section 16-56-111 (Repl. 2005) provides:

> (a) Actions to enforce written obligations, duties, or rights, except those to which § 4-4-111 is applicable, shall be commenced within five (5) years after the cause of action shall accrue.
>
> (b) However, partial payment or written acknowledgment of default shall toll this statute of limitations.

Valley cites *Dupree v. Twin City Bank*, 300 Ark. 188, 777 S.W.2d 856 (1989), for the proposition that the test for determining when a breach of contract action accrues is the point when the plaintiff could have first maintained the action to a successful conclusion.

Here, the Bank has alleged that Valley executed the promissory note on July 3, 2001, and that Valley made his last payment in February 2003. Leslie Seals, Executive Vice President at the Bank, testified by deposition that Valley missed a payment in January 2002. Valley claims that the essence of the trial court's ruling was that the limitations period begins to run from the date of the defendant's last payment. However, Valley contends that the Bank could have asserted its cause of action anytime following February of 2002. Because this action was instituted on December 21, 2007, Valley argues that the five-year statute of limitations bars the Bank's claim.

It has long been held that the statute of limitations to a promissory note is five years, and that part payment, before the bar attaches, forms a new point from which the statute will begin to run. *See Johnson v. Gammill*, 231 Ark. 1, 328 S.W.2d 127 (1959); *Smith v. Grimsley*, 215 Ark. 279, 220 S.W.2d 428 (1949). The Bank contends that the evidence reflects that Valley made a payment in February 2003, and that the Bank declared the note to be in default in March 2003. This action was commenced in 2007. As the trial court correctly noted, the five-year statute of limitations did not expire until either February or March of 2008. Accordingly, we hold that the trial court did not err in concluding that the 2007 case was not barred by the statute of limitations and the Bank was entitled to judgment as a matter of law.

Affirmed.

ROBBINS and BAKER, JJ., agree.