Cite as 2011 Ark. App. 651

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA11-324

	Opinion Delivered November 2, 2011
KENYGHATTA DAVIS APPELLANT	APPEAL FROM THE MISSISSIPPI COUNTY CIRCUIT COURT, CHICKASAWBA DISTRICT [NO. CV-10-297]
V.	HONORABLE DAVID N. LASER, JUDGE
CITY OF BLYTHEVILLE and its Water Department APPELLEES	AFFIRMED IN PART; REVERSED AND REMANDED IN PART

JOHN MAUZY PITTMAN, Judge

Appellant Kenyghatta Davis filed a class-action suit against the City of Blytheville and its water department, alleging that she and others similarly situated were entitled to interest on customer security deposits; that the City's mosquito-control fees were illegal; and that the City's late fees and penalties imposed for overdue payments were usurious, unreasonable, and unconscionable. The circuit court dismissed the suit pursuant to Ark. R. Civ. P. 12(b)(6) (2011). We affirm in part and reverse and remand in part.

A circuit court's decision to grant a motion to dismiss will not be reversed absent an abuse of discretion. *Passmore v. Hinchey*, 2010 Ark. App. 581, ___ S.W.3d ___. We judge a complaint by its content. *See Big A Warehouse Distributors v. Rye Auto Supply*, 19 Ark. App. 286, 719 S.W.2d 716 (1986). The complaint must contain a statement, in ordinary and concise language, of facts showing that the pleader is entitled to relief. Ark. R. Civ. P. 8(a)

(2011). 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. *Dockery v. Morgan*, 2011 Ark. 94, ___ S.W.3d ___. Only the facts are treated as true, not the plaintiff's theories, speculation, or statutory interpretation. *Id*. All reasonable inferences must be resolved in favor of the complaint, and the pleading must be liberally construed. *Id*. If, however, the complaint fails to state facts upon which relief can be granted, it is subject to dismissal. Ark. R. Civ. P. 12(b)(6) (2011).

With these standards in mind, we address the sufficiency of the allegations in appellant's complaint. We first consider her claims involving the City's mosquito-control services and customer security deposits. The pertinent allegations are scattered throughout the complaint but may be paraphrased as follows. The City provides mosquito-control services to its water-department customers, and the customers cannot decline the services. Each customer is charged a separate, flat fee that exceeds the cost of the service by approximately fifty cents per customer. The charges are asserted to be illegal in that they have generated $210,000 in profits over the past five years, and the City is not allowed to profit from its services. The complaint also alleges that the City requires all first-time customers, and perhaps others, to post a seventy-five-dollar security deposit for water services. Approximately $500,000 in deposits have been collected over the past five years and have been commingled with general revenues. A deposit is not refunded until a customer cancels his contract. Before that time, the City uses the deposits "as it pleases, free of charge," and does not pay interest on the deposits, in violation of its obligation as a "trustee" to provide a reasonable return on investment.

Viewing the above allegations in the light most favorable to appellant, we conclude that the circuit court did not abuse its discretion in dismissing these counts. A complaint must state facts "showing that the pleader is entitled to relief." Ark. R. Civ. P. 8(a). A plaintiff must therefore show, beyond mere conclusions and beliefs, that the facts in the complaint sound in a cause of action. *See, e.g.*, *Harvey v. Eastman Kodak*, 271 Ark. 783, 610 S.W.2d 582 (1981). In David Newbern, John Watkins, & D.P. Marshall, *Civil Practice & Procedure* § 11:5, at 277 (5th ed. 2010), the authors state:

> Conceptually, a claim for relief [under Rule 8(a)]—more commonly called a cause of action in Arkansas practice—consists of two components: a body of substantive law and a set of facts which, taken together, entitle the pleader to relief. The substantive law determines the elements of the cause of action, which form the framework for the complaint or other pleading. This framework must be fleshed out with facts corresponding to each element.

Here, appellant's complaint pled facts and described the situations that existed with regard to mosquito-control services and customer deposits. However, appellant failed to show that those facts entitled her to relief. Her complaint referenced no common-law cause of action or statutory or constitutional violation in connection with her allegations but merely concluded that the City's actions were unlawful or improper. The complaint was therefore correctly dismissed under Rule 12(b)(6).

In her brief, appellant contends that a state constitutional provision and several statutes offer support for her claims. These authorities either bear no significance to the matter at hand or constitute an attempt to buttress appellant's complaint by belatedly setting forth a legal cause of action. The complaint is to be judged by its content. *Big A Warehouse Distributors*, *supra*. The fact remains that this complaint sets forth no statutory violation or

other known cause of action deriving from its factual recitations. We therefore affirm the circuit court's dismissal of this portion of the complaint.[1]

The third count is a different matter. Appellant's complaint asserts the following. The City's water department imposes a ten-percent late fee on customers whose payments are at least one day past due and an additional twenty-dollar penalty when payments are fifteen days past due. The City initiates no independent efforts to collect late payments until the fifteen-day mark and therefore incurs no collection costs until that time. The late fees and penalties collected totaled over $320,000 between August 2008 and July 2010. That amount exceeds the City's actual collection costs and has been used for the water department's day-to-day operations. No ordinance authorized the late fees and penalties until March 17, 2009, and no state statute authorizes the fees and penalties. Further, the late fees and penalties constitute interest because they are used as part of the water department's operating budget rather than to offset the cost of collecting delinquent accounts. As such, the ten-percent late fee, which may be imposed even if a customer's payment is only one day late, is usurious in that it exceeds the maximum interest rate allowed by the Arkansas Constitution. The late fees and penalties are also unreasonable and unconscionable because they bear no rational relationship to the City's costs and expenses incurred in collecting delinquent accounts.

[1]The court dismissed appellant's complaint without prejudice, giving her the option to plead further. By choosing to appeal, appellant has foregone that option. We therefore dismiss these counts with prejudice. *See Sluder v. Steak & Ale of Little Rock, Inc.*, 368 Ark. 293, 245 S.W.3d 115 (2006).

Here, appellant's complaint moved beyond mere conclusory statements of illegality or impropriety and linked her factual allegations to cognizable causes of action for relief. *See Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995) (holding that a city's unauthorized action was ultra vires); *Tackett v. First Savings of Arkansas*, 306 Ark. 15, 810 S.W.2d 927 (1991) (recognizing that a charge that is labeled a penalty but is really a subterfuge for interest may render a transaction usurious); *Coffelt v. Arkansas Power & Light*, 248 Ark. 313, 451 S.W.2d 881 (1970) (implying that a legitimate late charge may be imposed in order to require delinquent ratepayers to bear the exact collection costs that result from their tardiness in paying their bills). Appellant's allegations on this count were therefore sufficient to withstand a Rule 12(b)(6) motion to dismiss. Accordingly, we reverse and remand this portion of the dismissal. In doing so, we hold only that appellant's pleading was sufficient. We offer no comment on whether her claim will prove successful or unsuccessful when subjected to further legal scrutiny.

Affirmed in part; reversed and remanded in part.

ABRAMSON and HOOFMAN, JJ., agree.