IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

DEBORAH SPRINGER SUTTLAR, JUDY GREEN, FRED LOVE, in his individual and official capacity as State Representative, KWAMI ABDUL-BEY, CLARICE ABDUL-BEY, and PAULA WITHERS, PLAINTIFFS

vs. CASE NO. 60CV-22-1849

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas and in his official capacity as the Chairman of the Arkansas State Board of Election Commissioners; and SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, WENDY BRANDON, JAMIE CLEMMER and JAMES HARMON SMITH III, in their official capacities as members of the Arkansas State Board of Election Commissioners, DEFENDANTS

BRIEF IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

A month ago, Plaintiffs filed a motion asking the Court to compel Defendants to answer their complaint. Yet the same day Defendants filed an answer, Plaintiffs filed a motion asking the Court to treat the factual allegations in their complaint as true. They've styled this motion as seeking "partial summary judgment." But summary judgment lets courts resolve *legal* claims, not facts. Instead, Plaintiffs' motion is really a request for default judgment—which Plaintiffs admit, and this Court has agreed, is not an option here.

The Court should reject this procedural gamesmanship and proceed to the merits of Plaintiffs' claims. Defendants' motion for judgment on the pleadings will soon be ripe, and as explained in that motion, Plaintiffs' complaint should be dismissed.

BACKGROUND

This case involves a challenge to Arkansas's congressional districts.[1] Following removal to federal court, Defendants responded to Plaintiffs' complaint by moving to dismiss under Rule 12(b). *See* Motion to Dismiss for Failure to State a Claim, *Suttlar* (Apr. 29, 2022). More than four months later, Plaintiffs have yet to respond to those arguments. On remand they sought to avoid having to altogether. Instead of asking this Court for an extension to respond or a briefing schedule on Defendants' motion to dismiss, they asked the Court to direct Defendants to file an answer to their complaint. While the Court declined that request, it also (without waiting for a response from Defendants) stated that it would not consider Defendants' motion to dismiss. *See* Order (Aug. 25, 2022).[2] It also correctly noted that Rule 55(f) prohibits an entry of default in cases like this where a defendant responds to a complaint (whether by answer or motion) in federal court. Seven days later Defendants filed an answer. *Cf.* Ark. R. Civ. P. 12(a)(2)(A) (requiring an answer to "be filed within 10 days after" the denial of a motion to dismiss under Rule 12).

The same day, Plaintiffs filed this motion seeking what they refer to as "partial summary judgment." But that is not the relief they actually seek. Where previously they asked the Court to direct Defendants to file an answer, now that Defendants have done so Plaintiffs claim that it shouldn't count. Instead, they claim they are entitled to an order establishing their account of the facts as true. *See* Motion for Summary Judgment ¶ 12; Ark. R. Civ. P. 8(d).

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[1] For a discussion of Plaintiffs' claims and a more in-depth discussion of the procedural history, *see* Defendants' Brief in Support of Motion for Judgment on the Pleadings.

[2] As explained in Defendants' brief in support of its motion for judgment on the pleadings, that decision was incorrect. Br. at 8-9.

Though styled as a motion for summary judgement, what Plaintiffs ask for in their motion is actually a default judgment. And this court has already acknowledged that it may not enter a default judgment against Defendants. *See* Order (Aug. 25, 2022). Besides, Defendants answered well with the deadlines set by the Rules. The Court should therefore deny Plaintiffs' motion.

ARGUMENT

A. Plaintiffs Cannot Move for Summary Judgment to Simply Establish Facts

Plaintiffs misunderstand summary judgment. Summary judgment lets a circuit court enter "judgment as a matter of *law*" when "there is no genuine issue as to any material fact." Ark. R. Civ. P. 56(c)(2) (emphasis added). In other words, summary judgment lets a court resolve legal issues when there are no factual issues to resolve at trial. *See, e.g.*, *Fegans v. Norris*, 351 Ark. 200, 205, 89 S.W.3d 919, 923 (2002) ("Summary judgment is appropriate when . . . the moving party is entitled to judgment as a matter of *law*. (emphasis added)); *Spears v. City of Fordyce*, 351 Ark. 305, 309, 92 S.W.3d 38, 41 (2002) (same).

Yet Plaintiffs seek the reverse: they want this Court to decide the facts and leave the legal questions for a later date. Plaintiffs' Br. at 7. This is improper. Summary judgment, like any other judgment, determines "the rights of the parties in an action." *Clark v. Farmers Exchange, Inc.*, 347 Ark. 81, 86, 61 S.W.3d 140, 144 (2001); *see also* Ark. R. Civ. P. 54(a). Thus, it resolves whether a plaintiff should prevail on his legal claims. *Melton v. St. Louis, I.M. & S.R. Co.*, 99 Ark. 433, 139 S.W. 289, 291 (1911).

In entering judgment, a court may make factual findings. Indeed, a court granting summary judgment must decide whether facts essential to a cause of action have been plead and are undisputed. *See* Ark. R. Civ. P. 56(c)(2). But those factual findings are not themselves

judgments; nor are they "conclusive" prior to a legal ruling. *Thomas v. McElroy*, 243 Ark. 465, 469, 420 S.W.2d 530, 533 (1967). "They merely form the bases" for an eventual judgment. *Id.* Thus, it is impossible for a court to grant summary judgment on facts without resolving the necessary legal issues

Rule 56's allowance for "partial summary judgment" is not to the contrary. Partial summary judgment lets courts whittle down the number of *legal* claims that get to trial. *See, e.g.*, *Scottsdale Ins. Co. v. Morrowland Valley Co., LLC*, 20121 Ark. 247, *4, 411 S.W.3d 184, 187 (2012) (granting partial summary judgment on a duty-to-defend claim but not duty-to-indemnify or bad-faith ones). It does not permit a court to resolve a few fact issues but leave others (plus legal questions) for trial. To the contrary, doing so would directly contravene Rule 56's command that summary judgment is appropriate only when no factual questions remain and legal entitlement is clear. So because Plaintiffs ask for a legal impossibility, this Court should deny their motion.

B. Plaintiffs Cannot Disguise Default Judgment as Summary Judgment

To the extent that Plaintiffs do seek something that could be labeled a "judgment," it is instead a default judgment. Summary judgment asks whether, on the facts established, the plaintiff is entitled to "judgment as a matter of law." Ark. R. Civ. P. 56(c)(2). In other words, ruling on summary judgment requires courts to grapple with the merits of a plaintiff's legal claims. But Plaintiffs here do not want this court to touch the merits. Plaintiffs' Br. at 7; Mot. ¶ 18. They ask that it enter judgment simply because, they claim, Defendants failed to answer on time. *Id.* ¶ 12.

A judgment entered because the defendant answered late is a default judgment. *See Triple T Farms P'ship v. Union Bank & Tr. Co.*, 2015 Ark. App. 174, *5, 458 S.W.3d 258, 261 (2015)

(defining a default judgment as "based on the failure of a party to appear or attend" rather than "on evidence"). Indeed, default judgments are sometimes punishment for late answers, should a court decline to excuse the delay. *See Layman v. Bone*, 333 Ark. 121, 125, 967 S.W.2d 561, 564 (1998). Even though Plaintiffs do not label their request as a motion for a default judgment, the effect is the same. *See Nucor Corp. v. Kilman*, 358 Ark. 107, 127 (2004) ("A default admits . . . th[e] facts alleged in the complaint.").

That Plaintiffs style their request under Rule 8(d), rather than Rule 55, does not change what they ask for. Rule 8(d) and Rule 55 are for the most part two sides of the same coin. For example, Rule 8(d) discusses allegations in a pleading being admitted when not denied, except "those as to the amount of damages." And Rule 55(b) similarly recognizes that a default judgment does not establish "the amount of damages." *See Rice v. Kroeck*, 2 Ark. App. 223, 225–26 (1981) (recognizing that "a default establishes liability but not the extent of damages"). That similarity exists because Rule 8(d) applies when an answer is filed but does not deny a specific factual allegation, while Rule 55 applies where a party "has failed to plead or otherwise defend," and thus admits all factual allegations, which is what Plaintiffs say happened here. Ark. R. Civ. R. 55(a). Of course, that is not what happened. As the Court recognizes, Defendants responded to Plaintiffs' Complaint in federal court.

The remedy Plaintiffs request functions exactly as a default judgment. Whereas the traditional default judgment establishes the facts undergirding liability, but not damages, Plaintiffs seek to establish the facts undergirding the constitutional violations they allege, but not the ultimate remedy. Pls.' Br. at 7. Plaintiffs claim that this is "not a request for a default judgment" because "if granted" it "would not be a final judgment." Br. at 7. But that admission simply recognizes that a court may not "rend[er] . . . a default judgment on a complaint which

fails to state facts sufficient to state a cause of action." *Nucor*, 358 Ar. At 127. In other words, Plaintiffs' legal claims must still be valid in order to support a default judgment. The "judgment" Plaintiffs seek cannot be final until the Court resolves the merits of their legal theories. A true request for summary judgment would resolve Plaintiffs' legal claims; the default judgment they seek here would not.

In any case, as Plaintiffs and this Court both recognize, a default judgment is not available here. Mot. ¶ 13; Order at 2 (Aug. 25, 2022). That is because Defendants moved to dismiss while in federal court, and the Arkansas Rules proscribe courts from using default judgment as a punishment for late answers if the defendant moved while in federal court. Ark. R. Civ. P. 55(f). *See JurisDictionUSA, Inc. v. Loislaw.com*, *Inc.*, 357 Ark. 403, 412-13 (2004) (holding that the defendant "was not required to refile an answer in state court after the case was remanded from federal court" and reversing default judgment); *Convent Corp. v. City of N. Little Rock*, 2021 Ark. 7, 24 (2021) ("The comments to Rule 12(a)(3) and Rule 55(f) both indicate that a party does not have to refile an answer within thirty days to avoid a default judgment if the party filed an answer or a Rule 12 motion in federal court.").

Instead, the post-2004 Rule 55(f) leaves circuit courts with the discretion to "direct[] the defendant to revise his or her answer to conform to the Arkansas pleading rules" if it chooses to do so. *See* Ark. R. Civ. P. 55(f) reporter's notes; *Green v. Mills*, 339 Ark. 200, 206, 4 S.W.3d 493, 496 (1999) ("Reporter's Notes are not precedent for this court but may offer some guidance as to a rule's meaning."). Rule 12(a)(3) thus applies only when a defendant has not filed any answer or motion in federal court. If they have, the rule restarts the clock to respond to the complaint. It does not create a new obligation to do so once again, which would contravene Rule 55(f).

Thus, the Court cannot ignore Defendants' answer and hold Defendants as admitting to all Plaintiffs' factual allegations. This Court should not let Plaintiffs skirt the rules by slapping an incorrect "summary judgment" label on their motion instead of the default judgment they actually request.

C. Defendants Filed a Timely Answer to the Complaint

If the Court entertains Plaintiffs' disguised default judgment motion, it should be denied. For starters, it would be highly improper to impute the sort of ill intent to the General Assembly—who are not parties to this lawsuit—that Plaintiffs allege in their Complaint *see, e.g.*, Pls.' Br. at 4-5, based on technical pleading requirements. *See JurisDictionUSA,* 357 Ark. at 411 ("We have repeatedly held that default judgments are not favorites of the law and should be avoided when possible."). In any case, Defendants' answer was not late.

Plaintiffs say Defendants should have answered their complaint upon remand. Br. at 4. They are wrong. When a case is remanded, motions pending in federal court are carried over to state court. *See Addition to Reporter's Notes, 2004 Amendment*, Ark. R. Civ. P. 55. Here, Defendants had moved to dismiss. *See* Motion to Dismiss for Failure to State a Claim, *Suttlar* (Apr. 29, 2022). And the federal district court had ordered Plaintiffs to respond to that motion fourteen days after it remanded the case. Order, *Suttlar* (May 12, 2022). This court did not abrogate that deadline. So Defendants' motion to dismiss remained pending before this Court.

True, that was not always the rule. Plaintiffs cite a string of precedent treating remanded cases like a blank slate. *See* Br. at 2-3 (quoting *NCS Healthcare of Ark., Inc. v. W.P. Malone, Inc.*, 88 S.W.3d 852, 856 (Ark. 2002) and earlier cases). Those cases reasoned that, because federal and state pleadings standards may not match up, defendants should promptly refile any answers or motions already filed in federal court. *NCS Healthcare*, 88 S.W.3d at 856.

But nearly two decades ago, the rule was amended. Now, courts must "give effect to pleadings filed in federal court before remand." *Laguna Village, Inc. v. Laborers' Int'l Union of N. Am.*, 672 882, 885 (Cal. 1983) (cited approvingly in the Arkansas *Reporter's Notes*); *see also Banks v. Allstate Indem. CO.*, 757 N.E.2d 776, 778 (Ohio Ct. App. 2001) (same); *Jontra Holdings Pty Ltd. V. Gas Sensing Tech. Corp.*, 479 P.3d 1222, 1234 & n.7 (Wy. 2021) (recognizing the effect of Arkansas's new rule).[3] So Defendants' motion to dismiss carried over to this court.

This court never formally ruled on Defendants' motion to dismiss. But on August 25, it indicated that it considered the motion dealt with. *See* Order at 2. Construing that order as a denial, Defendants had ten days to file an answer. *See* Ark. R. Civ. P. 12(a)(2)(A), 6(a). Defendants answered on September 1—well within that deadline. So Plaintiffs cannot say that Defendants failed to respond.

Plaintiffs have gotten what they asked for when the case was remanded—Defendants filing an answer—and the case should now move forward.

[3] True, the Arkansas Supreme Court did not acknowledge the rule change in *Nat'l Enterprises, Inc. v. Kessler*, 213 S.W.3d 597 (Ark. 2005), decided one year later. But the *Kessler* court had no occasion to do so; it was enough to decide that circuit courts could consider evidence gathered while the case was in federal court, even under the old rule. Thus, its citations to the old rule do not suggest that it retains operative force.

Conclusion

Plaintiffs' motion, which seeks a default judgment, should be denied.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

Dylan L. Jacobs (2016167)
Deputy Solicitor General
Hannah Templin (2021277)
Assistant Solicitor General
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Ph: (501) 682-2007
Fax: (501) 682-2591
Email: Dylan.Jacobs@ArkansasAG.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I, Dylan L. Jacobs, hereby certify that on September 19, 2022, I electronically filed the foregoing with the Clerk of the Court using the Court's eflex system, which shall advise all counsel of record.

/s/ Dylan L. Jacobs
Dylan L. Jacobs