

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL 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

v. 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

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY
JUDGMENT**

After remand to this Court, Defendants did not timely plead in response to the Complaint. Defendants therefore admitted the factual averments of the Complaint. Ark. R. Civ. P. 8(d) (“Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied.”). As this Court has already determined, Defendants “fail[ed] to plead at their own peril.” (Order of August 25, 2022 at 2). This motion addresses the consequences of Defendants’ failure to plead.

Because the facts in the Complaint are admitted as a matter of law pursuant to Rule 8(d), Rule 56(d) allows this Court to determine that those facts are uncontroverted and therefore established for purposes of trial. Based on those established facts, the Court should award partial summary judgment in favor of Plaintiffs.

I. Defendants failed to timely respond to Plaintiffs' Complaint.

Plaintiffs filed their Complaint on March 21, 2022, and Defendants had multiple opportunities after then to timely file a responsive pleading. They could have answered prior to wrongfully removing this action to federal court or after remand in accordance with Rule 12(a)(3). But they did not do so. The Rule is unambiguous: “[a]ny adverse party shall have 30 days from the receipt of [plaintiff’s] notice [of remand] within which to file an answer or a motion permitted under [Rule 12].” Ark. R. Civ. P. 12(a)(3). Defendants did not.

Instead, Defendants took the remarkable—and thoroughly incorrect—position that Plaintiffs were required to respond to their federal motion to dismiss in state court—even though the motion was never filed in this Court—in accordance with a timeline set forth in a federal court order issued during the federal proceedings. At the outset, that motion became irrelevant for purposes of this litigation when the federal court remanded to this Court. *NCS Healthcare of Ark., Inc. v. W.P. Malone, Inc.*, 350 Ark. 520, 526, 88 S.W.3d 852, 856 (2002) (“After remand from federal court, a case stands as if it had never been removed from state court, and what happened in federal court has no bearing on the proceeding in state court.”) Moreover, this Court expressly confirmed that the federal court “does not consider any motions in that docket to be outstanding.” (Order of August 25, 2022 at 2). Defendants had the opportunity and the obligation to respond to the Complaint in this Court. As this Court previously recognized, they ignored that opportunity and obligation at their peril. (*Id.*)

Defendants’ federal motion to dismiss prevents a default judgment, but it does not substitute for a state-court answer to the Complaint. Rule 55(f) prevents default judgment against a party that filed an answer or motion in federal court. *See* Ark. R. Civ. P. 55, Addition to Reporter’s Notes, 2004 Amendment (“2004 Notes”) (“[I]f the defendant responded to the

complaint in federal court ... Rule 55(f) prohibits *entry of judgment by default* upon remand . . . [T]he defendant need not respond again in circuit court ... to avoid *such a judgment.*”) (emphasis added). Plaintiffs do not seek default judgment; Rule 55(f) therefore does not apply.¹ Instead, Plaintiffs move to establish the unanswered factual averments of the Complaint for purposes of trial under Rule 56(d).

II. Partial summary judgment is appropriate here.

Rule 56 allows Plaintiffs to seek summary judgment upon a claim “or any part thereof.” Ark. R. Civ. P. 56(a). Here, Plaintiffs seek partial summary judgment to establish the factual averments of their complaint for trial under Ark. R. Civ. P. 56(d), which provides that in ruling on a motion for summary judgment, the Court “shall” specify what facts are uncontroverted, and “the facts so specified shall be deemed established, and the trial shall be conducted accordingly.” *Id.* § 56(d) (emphasis added). Under Rule 8(d), the facts “are admitted when not denied.” Because Defendants failed to timely deny the averments in the Complaint, this Court should determine that the facts averred in the Complaint are established for purposes of trial.²

Where a party fails to appropriately respond, the facts may be treated as established in a motion for summary judgment. *See Phillips v. DeLage Landen Fin. Servs.*, 2019 Ark. App. 44, *8,

¹ Defendants claim that “[a] judgment entered because the defendant answered late is a default judgment.” (Resp. at 4) (citing *Triple T Farms P’ship v. Union Bank & Tr. Co.*, 2015 Ark. App. 174, *5, 458 S.W.3d 258, 261). But Defendants misread the case they cite in support, which in fact supports Plaintiffs’ position. In *Triple T Farms*, the Court of Appeals noted that “[w]hen a judgment is based on evidence presented to the court at a trial, as opposed to being based on the failure of a party to appear or attend, the judgment is *not* a default judgment, and Arkansas Rule of Civil Procedure Rule 55, which applies to default judgments, does not apply.” *Id.*, at 5 (emphasis added). Here, Defendants have not failed to appear or attend. The problem Defendants face is their failure to timely deny Plaintiffs’ factual averments.

² After failing to plead in response to the Complaint, thereby admitting the facts alleged in the Complaint, and hours after Plaintiffs filed this motion for partial summary judgment to establish

571 S.W.3d 512, 516 (failure to respond to complaint and requests for admission). Indeed, when the facts in a complaint are admitted by failure to answer and damages are admitted by failure to respond to requests for admission, the Court may grant summary judgment for the relief sought in the complaint. *Phillips, supra*; *Gen-Kal Pipe & Steel Corp. v. M.S. Wholesale Plumbing, Inc.*, 2019 Ark. App. 117, 573 S.W.3d 1. Here, Plaintiffs seek only to establish the facts averred in the Complaint for purposes of trial under Rule 56(d).

Defendants complain this is “really a request for default judgment.” Br. in Opp. at 1. They are wrong: default judgment is fundamentally different from summary judgment. A default judgment awards “judgment for affirmative relief” to the plaintiff due to the defendant’s failure to appear and defend. Ark. R. Civ. P. 55(a). “There is a clear distinction between summary judgment under Rule 56 and a default judgment under Rule 55. Rule 55(a) provides that a default judgment may be entered when a party against whom a judgment is sought has failed to plead or otherwise defend as provided by the rules.” *Phillips*, 2019 Ark. App. 44, at *8, 571 S.W.3d at 516 (quoting *Citibank, N.A. v. Carruth*, 2015 Ark. App. 704, at 10-11).

Plaintiffs do not ask this Court to award the relief sought in the Complaint because of Defendants’ failure to timely answer; this is therefore not a motion for default under Rule 55. Plaintiffs instead move that the facts in the Complaint be established for trial on the merits by partial summary judgment under Rule 56(d). Just as in *Triple T Farms P’ship v. Union Bank & Tr.*

the admitted facts for trial, Defendants filed an untimely and legally ineffective answer. That ineffective answer is a nullity and should be ignored for purposes of this motion. Defendants misleadingly state the sequence of events leading up to their ineffective answer in the first two sentences of their Brief in opposition to this motion. The docket reflects the truth: Defendants failed to respond to the complaint in the time period required under the Arkansas Rule of Civil Procedure 12(a)(3).

Co., 2015 Ark. App. 174, at *5, 458 S.W.3d at 261, this Court’s eventual judgment in this action will be “based on evidence presented to the court at a trial.”

Even with the facts in the Complaint established, the parties still must present evidence and arguments bearing on Plaintiffs’ entitlement to the relief they seek. Defendants have the right to present evidence in defense of the requested relief. The Court will decide whether and what to grant as affirmative relief. This is a far cry from a default judgment.

CONCLUSION

Despite ample opportunity to do so, Defendants failed to timely respond to Plaintiffs’ complaint after remand. This Court should thus grant Plaintiffs’ motion for partial summary judgment and enter an order finding the factual averments of Plaintiffs’ complaint are established for trial. *See* Ark. R. Civ. P. 56(d). Then, the bench trial should be conducted to resolve all other outstanding issues so that the Court may determine the availability, nature, and scope of the declaratory and injunctive relief to which Plaintiffs may be entitled.

Respectfully submitted,

/s/ Jess Askew III

Jess Askew III, Ark. Bar No. 86005
McKenzie L. Raub, Ark. Bar No. 2019142
KUTAK ROCK LLP
124 West Capitol Avenue, Suite 2000
Little Rock, AR 72201-3740
Tel: (501) 975-3141
Fax: (501) 975-3001
jess.askew@kutakrock.com
mckenzie.raub@kutakrock.com

Alexander T. Jones, Ark. Bar No. 2015246
200 West Capitol Avenue, Suite 2300
Little Rock, AR 72201-3699
Tel: (501) 212-1241
Fax: (501) 376-9442
alexandertaylorjones@gmail.com

Aria Branch*
Justin Baxenberg*
Aaron M. Mukerjee*
Marilyn Gabriela Robb*
Spencer Klein**
ELIAS LAW GROUP LLP
10 G. Street NE, Suite 600
Washington, DC 20002
Tel: (202) 968-4654
Fax: (202) 968-4498
abbranch@elias.law
jbaxenberg@elias.law
amukerjee@elias.law
mrobb@elias.law
sklein@elias.law

**Admitted pro hac vice*

***Pro hac vice applications forthcoming*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties.

/s/ Jess Askew III
Jess Askew III