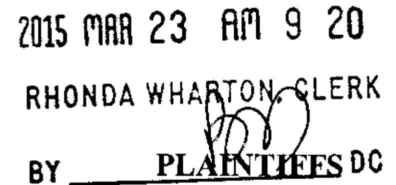
IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
FIFTH DIVISION



ROSEY PERKINS and RHONDA COPPAK,
Individually and as Co-Administratrixes
And Personal Representatives of the
Estate of Martha Bull, Deceased

vs. **Case No. 23CV-14-862**

MICHAEL MAGGIO, Individually and
In His Official Capacity; MICHAEL MORTON;
GILBERT BAKER; And JOHN DOES 1-5 **DEFENDANTS**

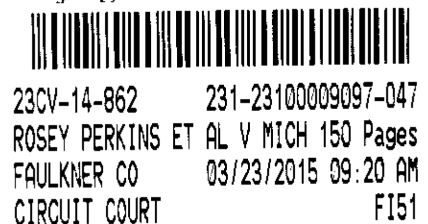
BRIEF IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS
FILED ON BEHALF OF DEFENDANTS
MICHAEL MORTON AND GILBERT BAKER

Comes now separate defendants, Michael Morton and Gilbert Baker, and respectfully submit this brief in support of their Motion for Judgment on the Pleadings filed pursuant to Rule 12(c) of the Arkansas Rules of Civil Procedure.

I. FACTUAL ALLEGATIONS

Plaintiffs are the Co-Administratitrixes and Personal Representatives of the Estate of Martha Bull. On February 8, 2012, plaintiffs brought a lawsuit against Greenbrier Nursing and Rehabilitation Center ("Greenbrier") for negligence, medical negligence, and deprivation of Martha Bull's statutory resident's rights (the *"Bull"* case). On May 16, 2013, a Faulkner County jury, Judge Michael Maggio presiding, returned a unanimous verdict in plaintiffs' favor against Greenbrier and awarded plaintiffs damages in the amount of $5.2 million. A judgment on the jury's verdict was entered on June 6, 2013. Greenbrier subsequently filed a motion for remittitur.

On July 10, 2013, Judge Maggio granted Greenbrier's motion for remittitur and ordered the amount of damages reduced to $1 million. On August 14, 2013, an amended judgment was entered.



Approximately one year later, on September 11, 2014, Judge Maggio was removed from office by the Arkansas Supreme Court for judicial misconduct.[1]

On November 18, 2014, plaintiffs filed this case asserting claims for abuse of public trust, breach of fiduciary duty, violations of civil rights laws, civil conspiracy and acting in concert. Specifically, plaintiffs allege that defendants Morton and Baker conspired to corrupt the judicial process by making campaign contributions to Maggio with the intent that Maggio would favorably rule on the motion for remittitur in the *Bull* case. (*See* Complaint at ¶ 46). Plaintiffs allege that defendants' actions denied plaintiffs their "unanimous jury verdict and judgment of $5.2 million." (*Id.* at ¶ 47). In other words, plaintiffs essentially argue that, but for defendants' fraudulent actions, the motion for remittitur would have been denied and the $5.2 million judgment would have become final. Plaintiffs' complaint constitutes a collateral attack on the judgment entered in *Bull*.

As set forth below, plaintiffs cannot collaterally attack the judgment entered in *Bull* because Judge Maggio had the power to enter judgment and, absent a lack of power, the court's judgment is invulnerable to collateral attack. The only remedy for plaintiffs' allegations is to file a direct attack against the judgment by filing a motion to set aside the judgment under Rule 60 of the Arkansas Rules of Civil Procedure. Therefore, plaintiffs' complaint must be dismissed.

II. STANDARD OF REVIEW

Rule 12(c) of the Arkansas Rules of Civil Procedure provides, in relevant part, that "[a]fter the pleadings are closed, but within such time as not to delay the trial, any party may move for

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[1] Judge Maggio's removal from office was unrelated to the allegations in this case. Plaintiffs did lodge a complaint against Maggio based on the rulings he made in the *Bull* case, but the Arkansas Supreme Court issued a "no finding" with respect to those allegations and found plaintiffs' complaint moot given the Court's removal of Maggio from office. *See In re Maggio*, No. D-14-671, per curium Order entered September 11, 2014.

judgment on the pleadings." Here, the "pleadings" in this case consist of the complaint and the answers filed by the defendants. Once the pleadings have been filed, a motion for judgment on the pleadings is timely. *See Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 610, 210 S.W.3d 101, 111 (2005)[2]. A judgment on the pleadings should be entered if the pleadings show on their face that judgment for a party is proper. *See LandsnPulaski, LLC v. Arkansas Dept. of Corrections*, 372 Ark. 40, 42, 269 S.W.3d 793, 795 (2007). When considering the motion, the court must view the facts in the complaint as true and in the light most favorable to the opposing party. *See id.*

III. LEGAL ARGUMENT

A. A collateral attack on the judgment in the *Bull* case cannot succeed because Judge Maggio had the power to enter judgment.

The Arkansas Supreme Court has held that "[j]udgments may not be collaterally attacked unless the judgment is void on the face of the record or the issuing court did not have proper jurisdiction." *Council of Co-Owners for Lakeshore Resort and Yacht Club Horizontal Property Regime v. Glyneu, LLC,* 367 Ark. 397, 405, 240 S.W.3d 600, 607 (2006). Further, the court has said that "[a]bsent allegations of fraud or lack of jurisdiction, a judgment entered by a circuit court bears presumptive verity and may not be questioned by collateral attack." *Council*, 367 Ark. at 405, 240 S.W.3d at 607 (*citing Powers v. Bryant*, 309 Ark. 568, 571, 832 S.W.2d 232, 233 (1992)). Such collateral attacks "will be successful ***only upon showing a lack of power***." *Powers,* 309 Ark. at 571, 832 S.W.2d at 233 (emphasis added) (*citing Pinkston v. Schuman*, 210 Ark. 896, 198 S.W.2d 66 (1946)).

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[2] A copy of all cases cited herein are attached hereto for the Court's reference.

The Arkansas Supreme Court has defined a collateral attack as an action that "has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success . . ." *Powers,* 309 Ark. at 571, 832 S.W.2d at 233. A direct attack, on the other hand, is an attempt to amend, correct, reform or vacate a judgment. *See Council*, 367 Ark. at 405, 240 S.W.3d at 607 (internal citations omitted).

Clearly, plaintiffs' complaint in this case is a collateral attack on the judgment entered in *Bull* as they seek damages for a judgment that they claim was entered as a result of fraud and overturning that judgment, or at least a determination that it was entered without a legal or factual basis, will be important if not necessary to the success of their claims in this case. Thus, plaintiffs' complaint can only be successful upon a showing of "a lack of power." *Powers*, 309 Ark. at 571, 832 S.W.2d at 233. There is no allegation in this case that Judge Maggio lacked jurisdiction or judicial power to enter judgment in the *Bull* case. More importantly, there could not be any such allegation. According to the Arkansas Constitution, Amendment 80, §1 "[t]he judicial power is vested in the Judicial Department of state government, consisting of a Supreme Court and other courts established by this Constitution." At the time the judgment was entered in the *Bull* case, Judge Maggio was an elected circuit court judge who had subject matter jurisdiction over the *Bull* case and the power to enter judgment in the *Bull* case. As such, plaintiffs simply cannot collaterally attack the judgment through the complaint filed in this case.

B. The only direct attack on the judgment in the *Bull* case must be brought pursuant to Rule 60.

Rule 60(c) of the Arkansas Rules of Civil Procedure sets forth the grounds on which a judgment, other than a default judgment, may be set aside by virtue of a direct attack on the

judgment. Specifically, Rule 60(c)(4) provides that a court may set aside a judgment "[f]or misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party." Rule 60(c)(4) has no time limitation. Thus, a motion to set aside a judgment for fraud may be filed at any time.

As set forth above, plaintiffs allege that defendants conspired to corrupt the judicial process by making campaign contributions to Maggio with the intent that Maggio rule favorably on the motion for remittitur in the *Bull* case. In other words, plaintiffs allege that the defendants bribed Maggio and, as a result, the remittitur and resulting judgment entered in *Bull* were obtained through fraud.

The Arkansas Supreme Court has recognized that "there is an adequate legal remedy for a judgment obtained by fraud . . . Arkansas Rules of Civil Procedure 60(b) and (c)(4)." *Wilson v. Wilson*, 939 S.W.2d 287, 289, 327 Ark. 386, 390 (1997) (holding that chancery court had no jurisdiction to vacate an order entered by a probate court and the sole remedy for the plaintiff's was to ask the probate court to set aside the judgment under Rule 60). Thus, even if plaintiffs' allegations are viewed as true and in the light most favorable to them, their only remedy is a Rule 60 motion to set aside the verdict.

Other state courts that have addressed this issue have similarly held that when a plaintiff believes that a judgment was obtained by fraud the proper remedy is to seek a motion for relief from the judgment, not file a collateral attack on the judgment. *See, e.g., Thyne v. GMAC Mortg. Corp.*, No. 3:09-cv-377, 2010 WL 3075185 *4 (S.D. Ohio Aug. 4, 2010) ("If [the plaintiff] believes the . . . judgment was obtained by fraud on that court, her remedy is by way of a motion for relief from judgment under Ohio R. Civ. P. 60(b), not by way of a collateral attack on that court's judgment.");

Selkirk Seed Co. v Forney, 996 P.2d 798, 805, 134 Idaho 98, 105 (1999) (holding "the proper remedy for fraud upon the court is setting aside the judgment obtained by the fraud in question."); *Starns v. Avent*, 96 B.R. 620, 634 (M.D. La. 1989) (holding "sole remedy" to contest a judgment for fraud on the court was under Rule 60(b)); *The Friendly Home, Inc. v. The Shareholders and Creditors of Royal Homstead Land Co.,* 477 A.2d 934, 938 (R.I. 1984) (holding proper remedy for judgment obtained through fraud upon the court was a motion to vacate the judgment under Rule 60(b)).

As the court in *Starns*, *supra,* stated, "[t]here are strong policy reasons for concluding that Rule 60(b) is the sole means of attack on final civil judgments –finality of judgments." *Id.*, 96 B.R. at 633. Final judgments should only be reopened and reconsidered under proceedings brought under Rule 60, not by way of collateral attacks like the complaint filed in this case.

Indeed, Rule 60 has certain procedures that must be followed in order to set aside a judgment for fraud. Specifically, to vacate a judgment for fraud, the party seeking relief must make at least a prima facie showing of a valid defense to the action in which the judgment was obtained. *See* Ark.R.Civ.P. 60(d); *Quigley v. Hammond*, 104 Ark. 449, 148 S.W. 275, 278 (1912). Further, a party seeking to set aside a judgment for fraud must prove the fraud by clear, cogent and convincing evidence. *See Grubbs v. Hall*, 999 S.W.2d 693, 694, 67 Ark. App. 329, 331 (1999). Thus, in the present case, in order to set aside the judgment in *Bull*, plaintiffs must show that the remittitur was not proper under Arkansas case law, and that defendants perpetrated a fraud by clear, cogent and convincing evidence. Further, "[w]hether the procurement of a judgment amounts to a fraud upon the court is a question of law." *Id.* (*citing Hardin v. Hardin*, 237 Ark. 237, 372 S.W.2d 260, 262 (1963)).

Plaintiffs' complaint should be dismissed because their remedy is under Rule 60 of the Arkansas Rules of Civil Procedure. Whether the judgment entered in the *Bull* case was obtained through fraud must be proven by clear and convincing evidence and is a question of law for the court to decide in an action to set aside the judgment, not in a collateral action seeking damages like the case plaintiffs have filed.

C. In the alternative, plaintiffs may file an independent action to obtain relief from the judgment under Rule 60(k).

Rule 60(k) provides that a court has the power to "entertain an independent action to relieve a party from a judgment . . . for fraud upon the court." Thus, plaintiffs could also have filed an independent action to set aside the judgment under Rule 60(k) as well, though such action would have been governed by the same standards as one brought pursuant to Rule 60(c)(4) to set aside a verdict for fraud. Regardless, plaintiffs' collateral attack is not the appropriate vehicle with which to attack the judgment.

IV. CONCLUSION

For the reasons set forth above, defendants Morton and Baker respectfully request that the Court dismiss plaintiffs' complaint and enter judgment in their favor pursuant to Rule 12(c) of the Arkansas Rules of Civil Procedure.

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CERTIFICATE OF SERVICE

I, John C. Everett, one of the attorneys for the separate defendant herein, hereby certify that I have caused to be deposited in the United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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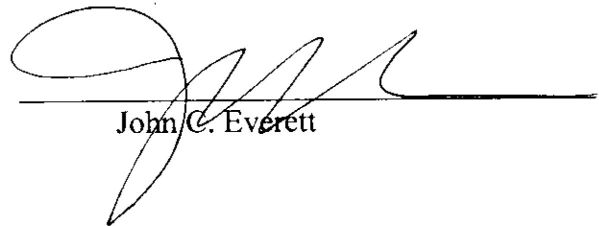
on this 19th day of March, 2015.



John C. Everett

Cite as 2014 Ark. 366

SUPREME COURT OF ARKANSAS

No. D-14-671

JUDICIAL DISCIPLINE AND DISABILITY COMMISSION PETITIONER V. MICHAEL MAGGIO, CIRCUIT JUDGE RESPONDENT	**Opinion Delivered** September 11, 2014 PETITIONER'S REPORT OF UNCONTESTED SANCTION

PER CURIAM

Petitioner Arkansas Judicial Discipline and Disability Commission (Commission) has filed with this court its report of uncontested sanction, pursuant to Arkansas Judicial Discipline and Disability Commission Rule 12(D) (2013), with regard to complaints lodged against the Honorable Michael Maggio of the Twentieth Judicial District, Second Division, of the State of Arkansas. Based on certain misconduct, the Commission recommends that this court suspend Judge Maggio from his duties with pay from the date of this court's mandate until the end of his current term. For other misconduct, the Commission recommends the removal of Judge Maggio from judicial office, effective at the close of business on December 31, 2014.

Judge Maggio has been a circuit judge since January 2001, and he has presided over criminal, civil, probate, and domestic-relations cases during the course of his thirteen-year tenure. The report of uncontested sanction arises from a complaint filed with the

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Commission by the executive director, David Sachar, concerning comments made in a public electronic forum called "www.tigerdroppings.com/" by an author using the screen name "geauxjudge." Judge Maggio has admitted that he is the author of these posts. The complaint also concerns the judge's personal involvement in a hot-check case.

These matters were resolved without a formal disciplinary hearing. On advice of counsel, Judge Maggio has agreed that the sanctions of suspension and removal are appropriate for his actions. The investigation panel unanimously approved the disposition, and the regular members of the Commission voted 8–0 to approve the recommendations of suspension and removal.

The issue before us is whether to accept the Commission's proposed findings and recommendations of suspension and removal. Based upon a review of the entire record, this court is to file a written opinion and judgment directing such disciplinary action as it finds just and proper. *See* Ark. Jud. Discipline & Disability Comm'n R. 12(E) (2012). We may accept, reject, or modify in whole or in part, the findings and recommendation of the Commission. *Id.*; *Judicial Discipline & Disability Comm'n v. Simes*, 2009 Ark. 543, 354 S.W.3d 72. This is a matter requiring de novo review, and we will not reverse the Commission's findings unless they are clearly erroneous. *Judicial Discipline & Disability Comm'n v. Proctor*, 2010 Ark. 38, 360 S.W.3d 61.

After a full review of the record, we accept the Commission's findings of fact and the

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recommendation of removal from office.[1] However, we reject the Commission's recommendation to suspend Judge Maggio from his duties with pay from the date of this court's mandate until the end of his current term. By order of Chief Justice Jim Hannah, pursuant to amendment 80, sections 4 and 13(C) of the Arkansas Constitution, Judge Maggio has been relieved of his duties as circuit judge since March 24, 2014. From that time forward, Judge Maggio has nonetheless received compensation as a judge, while others have performed the functions of his office. Consequently, we deem any further suspension with pay to be inappropriate. Instead, this court concludes that immediate removal is the just and proper sanction for the judge's conduct. Therefore, we order the removal of Judge Maggio from judicial office, effective as of the date of this opinion. By this order, Judge Maggio is henceforth prohibited from holding any judicial office in the State of Arkansas.

Order of removal from judicial office.

Order for the immediate issuance of the mandate.

It is so ordered.

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[1]In addition to the complaint initiated by the executive director, four other individuals filed complaints containing similar allegations concerning Judge Maggio's postings. As recommended by the Commission, these files are considered closed and merged into the findings in this case. There also was a sixth complaint lodged against Judge Maggio, based on rulings he made in a case styled *Estate of Martha Bull v. Greenbrier Nursing and Rehabilitation Center*, and also involving certain campaign contributions and campaign activities of the judge. As recommended by the Commission, this matter is concluded with a "no finding" in that the complaint is now moot, given the disposition of this case.

Supreme Court of Arkansas.
SERVEWELL PLUMBING, LLC, Appellant,
v.
SUMMIT CONTRACTORS, INC. and The Gables of Maumelle Limited Partnership, Appellees.

No. 04-1306.
June 16, 2005.

Background: Subcontractor brought breach of contract and unjust enrichment action against developer and general contractor, alleging nonpayment for work completed on apartment building project, and asserting that work was subject to a materialmen's lien. The Circuit Court, Pulaski County, No. CV 2003-1287,Alice Gray, J., granted general contractor's motion to dismiss and developer's motion for judgment on the pleadings, and reserved ruling on unjust enrichment claim. Subcontractor appealed.

Holdings: The Supreme Court, Tom Glaze, J., held that:
(1) subcontractor failed to perfect materialman's lien;
(2) forum-selection clause was enforceable;
(3) subcontractor's failure to respond to allegation that lien was untimely filed warranted summary judgment;
(4) surety bond rendered mechanic's lien claim moot;
(5) express contract barred unjust enrichment claim; and
(6) subcontractor waived option of voluntary nonsuit and refiling in Florida.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚷919

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k919 k. Striking out or dismissal. Most Cited Cases

In reviewing a trial court's decision on a motion to dismiss under the rule governing the presentation of defenses and objections, the Supreme Court treats the facts alleged in the complaint as true and views them in the light most favorable to the plaintiff. Rules Civ.Proc., Rule 12(b).

[2] Pretrial Procedure 307A ⚷679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of pleadings. Most Cited Cases

In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. Rules Civ.Proc., Rule 12(b).

[3] Courts 106 ⚷24

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k22 Consent of Parties as to Jurisdiction
106k24 k. Of cause of action or subject-matter. Most Cited Cases

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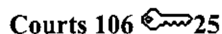
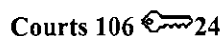
Courts 106  25

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k22 Consent of Parties as to Jurisdiction
106k25 k. Of the person. Most Cited Cases

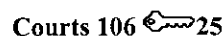
Parties may by agreement consent to personal jurisdiction in a given court, but subject-matter jurisdiction cannot be conferred merely by agreement of the parties.

[4] Contracts 95 206

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal remedies and proceedings. Most Cited Cases

Courts 106  24

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k22 Consent of Parties as to Jurisdiction
106k24 k. Of cause of action or subject-matter. Most Cited Cases

Courts 106  25

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k22 Consent of Parties as to Jurisdiction
106k25 k. Of the person. Most Cited Cases

While a forum-selection clause implies consent as to personal jurisdiction, it cannot confer subject-matter jurisdiction over in rem proceedings.

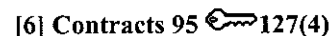
[5] Mechanics' Liens 257 132(4)

257 Mechanics' Liens
257III Proceedings to Perfect
257k132 Time for Filing Claim or Statement
257k132(4) k. Completion of contract in general. Most Cited Cases

Mechanics' Liens 257 245(3)

257 Mechanics' Liens
257XI Enforcement
257k245 Nature and Form of Remedy in General
257k245(3) k. Personal or in rem. Most Cited Cases

Subcontractor failed to perfect materialman's lien when it filed affidavit of account more than 120 days after the last day on which it provided labor and materials for apartment building project, and thus subcontractor's action against general contractor and apartment building developer, alleging nonpayment for work performed, was not an in rem action arising out of its efforts to enforce materialmen's lien. West's A.C.A. § 18–44–117.

[6] Contracts 95  127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court

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95k127(4) k. Agreement as to place of bringing suit; forum selection clauses. Most Cited Cases

Forum-selection clause in agreement between general contractor and subcontractor, providing that subcontractor agreed to be subject to personal jurisdiction of state of Florida, was enforceable in breach-of-contract and unjust enrichment action brought by subcontractor against contractor and developer, given that subcontractor's action was not an in rem proceeding, and thus did not require forum court to have geographic jurisdiction over the property at issue, and parties contemplated any inconvenience of chosen forum when they entered into the agreement.

[7] Mechanics' Liens 257 ⚷5

257 Mechanics' Liens
257I Nature, Grounds, and Subject-Matter in General
257k5 k. Construction of lien laws in general. Most Cited Cases

The Arkansas lien statute is construed strictly because it is an extraordinary remedy not available to every merchant or worker.

[8] Contracts 95 ⚷127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to place of bringing suit; forum selection clauses. Most Cited Cases

For a forum clause to be unreasonable or unfair, it must do more than inconvenience a party; it must effectively deprive the party of its day in court.

[9] Contracts 95 ⚷127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to place of bringing suit; forum selection clauses. Most Cited Cases

Forum-selection clause in agreement between general contractor and subcontractor, providing that subcontractor agreed to be subject to personal jurisdiction of state of Florida, was enforceable under laws of Florida, in subcontractor's breach of contract and unjust enrichment action against contractor and developer, where general contractor was a Florida corporation, such that Florida had personal jurisdiction over general contractor, and subcontractor did not allege that clause was tainted by fraud or was a product of overwhelming bargaining power of one party.

[10] Appeal and Error 30 ⚷863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In general. Most Cited Cases

Trial court looked to matters outside of the pleadings when it granted developer's motion for judgment on the pleadings on the basis that general contractor had posted an adequate bond against subcontractor's claim, such that lien was null and void, and thus Supreme Court would review case as it would an appeal from an order granting summary judgment.

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Rules Civ.Proc., Rule 12(c).

[11] Judgment 228 ⚷181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of issue of fact. Most Cited Cases

Summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law.

[12] Judgment 228 ⚷185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and burden of proof. Most Cited Cases

The burden of sustaining a motion for summary judgment is the responsibility of the moving party.

[13] Judgment 228 ⚷185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and burden of proof. Most Cited Cases

Once the moving party has established a prima facie entitlement to summary judgment, the non-moving party must meet proof with proof and demonstrate the existence of a material issue of fact.

[14] Judgment 228 ⚷185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and burden of proof. Most Cited Cases

When a party fails to meet proof with proof and does not demonstrate that a material issue of fact exists, summary judgment is appropriate.

[15] Judgment 228 ⚷185.2(9)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.2 Use of Affidavits
228k185.2(9) k. Effect of failure to file affidavit. Most Cited Cases

Subcontractor failed to respond to developer's allegation that subcontractor's lien was untimely filed, and thus summary judgment in favor of developer on mechanic's lien issue was warranted, where subcontractor did not respond to the allegation that its lien was not timely perfected until it filed a motion to reconsider, after the hearing on the motion for judgment on the pleadings.

[16] Mechanics' Liens 257 ⚷226

257 Mechanics' Liens
257VII Bond or Deposit to Prevent or Discharge Lien
257k226 k. Operation and effect of bond or deposit. Most Cited Cases

General contractor's filing of surety bond in double amount of lien claimed by plumbing subcontractor

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rendered subcontractors' mechanic's lien claim against developer moot, under statute providing that three days after filing of the bond, if the person claiming the lien did not question sufficiency of the bond, lien was discharged and lien claimant had recourse only against bond principal and surety. West's A.C.A. § 18–44–118(a)(1).

[17] Implied and Constructive Contracts 205H ⚷60.1

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(D) Effect of Express Contract
205Hk60 Contract for Services
205Hk60.1 k. In general. Most Cited Cases

Existence of express contract between subcontractor and general contractor barred subcontractor's unjust enrichment claim against developer of apartment buildings arising from alleged failure to pay subcontractor for enhancements to property, where unjust enrichment claim arose from subject matter governed by the contract, developer had not agreed to pay general contractor's debt, and circumstances did not otherwise give rise to an obligation to pay on part of developer.

[18] Implied and Constructive Contracts 205H ⚷3

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(A) In General
205Hk2 Constructive or Quasi Contracts
205Hk3 k. Unjust enrichment. Most Cited Cases

Unjust enrichment is an equitable doctrine.

[19] Implied and Constructive Contracts 205H ⚷3

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(A) In General
205Hk2 Constructive or Quasi Contracts
205Hk3 k. Unjust enrichment. Most Cited Cases

"Unjust enrichment" is the principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.

[20] Implied and Constructive Contracts 205H ⚷55

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(D) Effect of Express Contract
205Hk55 k. In general. Most Cited Cases

The concept of unjust enrichment has no application when an express written contract exists.

[21] Appeal and Error 30 ⚷1145

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(B) Affirmance
30k1145 k. Effect of affirmance. Most Cited Cases

Subcontractor waived its option to take voluntary nonsuit and refile its breach of contract and unjust enrichment action against general contractor and de-

veloper in Florida courts when it opted to appeal trial court's ruling, rather than to take voluntary nonsuit, and thus Court of Appeals' affirmance of trial court's decision was not without prejudice, although decision was decided primarily on the basis of the forum-selection clause.

[22] Appeal and Error 30 **1145**

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(B) Affirmance
30k1145 k. Effect of affirmance. Most Cited Cases

When a plaintiff elects to appeal rather than plead further where both options are available, then the option to plead further is waived in the event of affirmance by the appellate court.

****104** Rieves, Rubens & Mayton, by: Kent J. Rubens and Lawrence W. Jackson, West Memphis, for appellant.

Wright, Lindsey & Jennings, LLP, by: Stephen R. Lancaster and Colin R. Jorgensen, Little Rock, for appellee Summit Contractors, Inc.

Gill, Elrod, Ragon, Owen & Sherman, P.A., by: Roger H. Fitzgibbon, Jr., Little Rock, for appellee The Gables of Maumelle Ltd. P'ship.

TOM GLAZE, Justice.

***601** This case arose out of a contract dispute between Servewell Plumbing, LLC, and the general contractor and owner of a development project. The Gables of Maumelle ("the Gables"), one of the appellees in this case, was developing an apartment complex in Maumelle. Appellee Summit Contractors was the prime contractor for the job, and Summit hired Servewell as the plumbing subcontractor on the project. On February 10, 2003, Servewell filed a complaint in Pulaski County Circuit Court, alleging that Summit and the Gables had breached the contract with Servewell by refusing to pay for work done on the project. Servewell asserted that the property on which it had completed work was subject to a materialmen's lien, although Servewell had not yet perfected the lien. Servewell also alleged that the Gables had been unjustly enriched by Servewell's performance.[FN1]

FN1. Servewell filed a first amended complaint on April 22, 2003, alleging for the first time that it had perfected its lien.

In its answer, Summit objected to jurisdiction and venue, and moved to dismiss the complaint on the basis of a forum-selection clause in the contract designating Duval County, Florida, as the exclusive venue for any judicial proceedings. The Gables later filed an amended answer incorporating a motion to dismiss on the pleadings, asserting that Servewell's lien was untimely and void.

On June 12, 2003, while still disputing the validity of the lien, Summit posted a Labor and Material Payment Bond with the Pulaski County Circuit Court in the amount of $5,847,000, well over twice the amount Servewell's complaint sought. Later in June, Summit filed a motion to dismiss pursuant to Ark. R. Civ. P. 12(b)(3), contending that the forum-selection clause rendered venue improper in the Pulaski County Circuit Court. Servewell responded, arguing that the forum-selection clause was unenforceable under either Florida or Arkansas law.

On July 11, 2003, Summit filed a motion seeking to dismiss the Gables from the suit, arguing that Servewell's alleged lien was filed outside of the statutory time period, and that the bond posted by Summit caused Servewell's lien to be discharged. Servewell ***602** responded that, regardless of the bond, it still had an unjust enrichment claim against the Gables.

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The trial court held a hearing on the motions to dismiss and on the Gables' motion for judgment on the pleadings on December 2, 2003. After the hearing, the trial court granted Summit's motion to dismiss on venue grounds, citing the forum-selection clause in the contract. In addition, ****105** the court granted the Gables' motion for judgment on the pleadings, finding that Servewell had defaulted by not filing a separate response to the motion, and alternatively finding that the posting of the bond mooted the lien claim. The court, however, reserved ruling on Servewell's unjust enrichment claim.

Servewell filed a second amended complaint on January 7, 2004, specifically alleging that the lien was timely because its affidavit of account had been filed within 120 days of the last date Servewell supplied labor and material. The Gables and Summit again moved to dismiss the complaint; Summit once more raised the issue of the forum-selection clause. The trial court granted Summit's motion to dismiss Servewell's second amended complaint on May 11, 2004.[FN2] On appeal, Servewell raises four points for reversal.

FN2. Servewell initially filed a notice of appeal on May 19, 2004, seeking review of both the May 11, 2004, and December 31, 2003, orders. When Servewell tendered the record to the clerk's office on November 24, 2004, the clerk's office rejected it, finding that the notice of appeal was untimely. Servewell filed a motion for rule on the clerk, arguing that its notice of appeal from the May 11, 2004, order was timely. This court granted the motion, agreeing that the May 19, 2004, notice of appeal was timely, because the December 31, 2003, order had not been a final, appealable order, and had Servewell appealed from that order, the appeal would have been dismissed. *See Servewell Plumbing, LLC v. Summit Contractors, Inc.,* 360 Ark. 521, 202 S.W.3d 525 (2005) (*per curiam*).

In its first argument on appeal, Servewell argues that the trial court erred in granting Summit's motion to dismiss and enforcing the choice-of-forum clause. Servewell asserts that the clause was unenforceable under either Arkansas or Florida law, and that the court erred in failing to apply Florida law. The clause at issue in the contract between Servewell and Summit provided as follows:

ARTICLE 23: CHOICE OF LAW AND VENUE

This Subcontract shall be construed in accordance with the laws of the State of Florida. [Servewell] expressly agrees to be subject to ***603** personal jurisdiction in the State of Florida and further waives any right to venue in any action brought under this Subcontract Agreement or against any bond posted by [Summit]. [Servewell] acknowledges that [Summit's] bonding company is an intended third-party beneficiary of this jurisdiction and venue provision. [Summit] has the sole option to select venue in Duval County, Florida, or the site of this project, for any action it brings under the Subcontract Agreement. In any action brought against [Summit] or its bonding company under this Subcontract Agreement, jurisdiction and venue shall be in Duval County, Florida, unless and until [Summit] stipulates to jurisdiction and venue at the site of the project.

[1][2] Despite the forum-selection clause, Servewell filed suit in Pulaski County, Arkansas. In its answer, Summit specifically objected to venue in Pulaski County on the basis of the forum-selection clause, and affirmatively stated that Servewell's complaint should be dismissed for improper venue and lack of personal and subject matter jurisdiction. As noted above, the trial court granted Summit's motion to dismiss. In reviewing a trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b), this court treats the facts alleged in the complaint as true

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and views them in the light most favorable to the Plaintiff. *Wilmans v. Sears, Roebuck and Co.*, 355 Ark. 668, 144 S.W.3d 245 (2004). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the ****106** pleadings are to be liberally construed. *Id.*

[3][4] Servewell first argues that the trial court erred in applying Arkansas law in determining whether to enforce the forum-selection clause. This court has generally held that choice-of-forum clauses in contracts are binding, unless it can be shown that the enforcement of the clause would be unreasonable and unfair. *RMP Rentals v. Metroplex, Inc.*, 356 Ark. 76, 146 S.W.3d 861 (2004); *Nelms v. Morgan Portable Bldg. Corp.*, 305 Ark. 284, 808 S.W.2d 314 (1991); *SD Leasing, Inc. v. Al Spain & Assoc., Inc.*, 277 Ark. 178, 640 S.W.2d 451 (1982). Nonetheless, the determination of subject-matter jurisdiction is paramount. Parties may by agreement consent to personal jurisdiction in a given court, but subject-matter jurisdiction cannot be conferred merely by agreement of the parties. *See Hardy Construction Co., Inc. v. Arkansas State Highway & Transportation Dept.*, 324 Ark. 496, 922 S.W.2d 705 (1996). While a forum-selection clause implies consent as to personal jurisdiction, *see SD Leasing, Inc., supra,* it cannot confer subject-***604** matter jurisdiction over *in rem* proceedings. *Publix Super Markets, Inc. v. Cheesbro Roofing, Inc.*, 502 So.2d 484 (Fla.Dist.Ct.App.1987).

In connection with this latter point, Servewell relies heavily on *RMP Rentals, supra,* a case involving a materialmen's lien. RMP was a general contractor with its corporate office in Louisiana; it subcontracted with Metroplex, Inc., an electrical engineering firm located in Arkansas, to install electrical services in a post office. The contract was executed in Louisiana, and contained a forum-selection clause providing that Rapides Parish, Louisiana, would be the forum for any civil suit arising out of the contract. Metroplex filed a foreclosure complaint in Sebastian County, Arkansas, alleging that RMP had failed to pay on a percentage of the work completed. RMP moved to dismiss on the basis of the forum-selection clause, but the trial court denied the motion, finding that the suit was an *in rem* proceeding on a materialmen's lien, and the property subject to the lien was located in Arkansas. *RMP Rentals*, 356 Ark. at 79, 146 S.W.3d 861.

This court affirmed, holding that, while the courts of Louisiana would have subject-matter jurisdiction over an *in personam* action, the nature of the foreclosure complaint was *in rem*. Citing *Publix Super Markets, supra,* a case involving a forum-selection clause establishing Florida as the forum for actions brought on a contract, our court noted the following:

> [P]ursuant to [Florida] statute, an agreement that has the effect of placing venue in a county, other than the one in which the land to be foreclosed is located, is ineffective because such an action requires *in rem* court jurisdiction, and only a court with geographic jurisdiction over the county where the land is located has *in rem* jurisdiction. In so holding, the [*Publix Super Markets*] court noted that foreclosure of land based on a mechanic's lien is analogous to foreclosure of a mortgage on land by seeking to judicially convert a lien interest against title to land, into a legal title to land. The result, the [Florida] court found, is that the court is required to act directly on the title to the property. *Id.* We agree. Under our statutes, a judicial proceeding on a materialmen's lien as to land is an *in rem* proceeding.

RMP Rentals, 356 Ark. at 81, 146 S.W.3d 861. Because Metroplex had specifically filed a foreclosure complaint on its materialmen's lien, this court held that the suit was an *in rem* proceeding, and Arkansas courts, not Louisiana courts, had jurisdiction to enforce the lien.

****107 *605** Servewell relies on *RMP Rentals* as well as several cases from Florida for its argument

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that, because it sued on its lien, venue should remain in Arkansas. *See Miller & Solomon General Contractors, Inc., v. Brennan's Glass Co., Inc.,* 837 So.2d 1182 (Fla.Dist.Ct.App.2003) (despite venue selection clause to the contrary, venue for a lien action and bond is in the county where the property is located); *Carlson–Southeast Corp. v. Geolithic, Inc.,* 530 So.2d 1069 (Fla.Dist.Ct.App.1988) (parties to a contract may agree as to venue and such agreements will be enforced, unless the action is *in rem*); *Halls Ceramic Tile, Inc. v. Tiede–Zoeller Tile Corp.,* 522 So.2d 111 (Fla.Dist.Ct.App.1988) (in litigation involving improvements to real property where bonds have been posted to exempt the property from foreclosure of mechanics' liens, the proper forum to settle all such actions is the court where the real property is located and the security is posted). Servewell insists that its action is an *in rem* proceeding, and therefore, the trial court erred in granting Summit's motion to dismiss on the basis of the forum-selection clause.

[5][6] Thus, the first question this court must address is whether Servewell's complaint was an *in rem* proceeding. In its original complaint, filed on February 10, 2003, Servewell asserted that the property on which it had performed work was "subject to [Servewell's] lien, although [the] lien is not yet perfected." In its first amended complaint, filed April 22, 2003, Servewell removed the assertion that the lien had not been perfected, alleging instead that the property was subject to Servewell's lien. However, the original complaint never alleged that Servewell was attempting to enforce its lien; instead, the only claims Servewell initially pursued were for breach of contract and unjust enrichment. It was not until Servewell's first amended complaint that Servewell mentioned enforcement of its lien, contending for the first time that it was pursuing an *in rem* proceeding.

Under Ark.Code Ann. § 18–44–117 (Repl.2003), a person seeking to enforce a materialmen's lien must "file, with the clerk of the circuit court of the county in which the ... improvement to be charged with the lien is situated and *within one hundred twenty (120) days after the ... work or labor done or performed,* a just and true account of the demand due or owing to him or her after allowing all credits." (Emphasis added.) Servewell's complaint and first amended complaint alleged that it had provided labor and materials for the project through November 8, 2002. One hundred twenty days from that date would have been March 8, 2003. However, ***606** Servewell's affidavit of account was not filed with the Pulaski County Circuit Clerk until March 12, 2003.

[7] The Arkansas lien statute is construed strictly because it is an extraordinary remedy not available to every merchant or worker. *Christy v. Nabholz Supply Co., Inc.,* 261 Ark. 127, 546 S.W.2d 425 (1977). This court has held that a lien filed outside the statutory time period is not effective or enforceable. *See, e. g., Arkansas Louisiana Gas Co. v. Moffitt,* 245 Ark. 992, 436 S.W.2d 91 (1969); *Smith v. Grandbush,* 233 Ark. 806, 348 S.W.2d 880 (1961). Here, because Servewell's affidavit of account was filed outside of the 120 days allowed by statute, the lien was not perfected. Therefore, Servewell's complaint could not have been an *in rem* action to enforce its lien; only Servewell's breach-of-contract and unjust enrichment claims remain, and they are not *in rem* proceedings. As such, the forum-selection clause can be enforced.

We return, then, to the question of whether the trial court properly enforced ****108** the forum-selection clause and dismissed the case in favor of the Florida courts. As mentioned above, this court has held that choice of forum clauses in contracts will generally be held binding, unless it can be shown that the enforcement of the forum-selection clause would be unreasonable and unfair. *Nelms, supra* (citing *M/S Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). The modern trend among courts is to respect the enforceability of contracts containing clauses limiting judicial jurisdiction, if there is nothing unfair or unreasonable about them. *Id.*

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[8] Traditionally, we have adhered to the view that an individual who subjects himself to the personal jurisdiction of a court by express agreement shall be bound by that contract, if the agreement can be determined to be fair and reasonable. *Id.; SD Leasing, Inc., supra.* Here, Summit is a Florida corporation. Servewell voluntarily entered into a contract with that Florida corporation and signed the contract by which it expressly consented to and selected the jurisdiction of the Florida courts. Servewell did not object to the presence of the forum-selection clause when it signed the contract. Despite this, Servewell argues that the forum-selection clause is unreasonable because the Florida courts are inconvenient. However, in *M/S Bremen v. Zapata Off-Shore, supra,* the United States Supreme Court specifically rejected the view that a forum clause may be unreasonable if the ***607** chosen forum is inconvenient, because the parties contemplated such inconvenience when they entered into the agreement. The Court explained:

> Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Id. at 17–18, 92 S.Ct. 1907. Thus, for a forum clause to be unreasonable or unfair, it must do more than inconvenience a party; it must effectively deprive the party of its day in court. *Manrique v. Fabbri,* 493 So.2d 437 (Fla.1986). Here, Servewell has not alleged that it would effectively be deprived of its day in court; it simply argues that it would be inconvenient and expensive to have to try its case in Florida. This is an insufficient reason for finding the forum-selection clause invalid.

[9] Servewell raises a second argument in its first point on appeal, asserting that the trial court should have applied Florida law in determining whether to enforce the forum-selection clause, because the contract expressly provided that it was governed by Florida law. Servewell contends that, under Florida law, "a forum-selection clause designating Florida as the forum cannot, standing alone and without any other connection, allow Florida to exercise personal jurisdiction over the objection of a non-resident defendant." *See McRae v. J.D./M.D., Inc.,* 511 So.2d 540 (Fla.1987); *Four Star Resorts Bahamas, Ltd. v. Allegro Resorts Mgmt. Servs., Ltd.,* 811 So.2d 809 (Fla.Dist.Ct.App.2002). In *McRae,* the Florida supreme court held that "[c]onspicuously absent from [Florida's] long-arm statute is any provision for submission to *in personam* jurisdiction merely by contractual agreement." *McRae,* 511 So.2d at 543. In sum, the *McRae* court held that there must be an independent basis for Florida to exercise jurisdiction.

****109** Servewell leans heavily on this holding to support its claim that a Florida court would find the forum-selection clause to be unreasonable and unenforceable. However, the key feature that distinguishes *McRae* and *Four Star Resorts, supra,* from the present case is that both of the Florida cases involved *non-resident plaintiffs ***608** and defendants* who had no contact with Florida other than the forum-selection clauses in their contracts. Here, on the other hand, the defendant, Summit, *is a Florida corporation.*

Our court of appeals recently addressed a nearly identical situation in *Parsons Dispatch, Inc. v. John J. Jerue Truck Broker, Inc.,* 89 Ark.App. 25, 199 S.W.3d 686 (2004). In that case, Parsons Dispatch, an Arkansas corporation, contracted with a Florida company, John J. Jerue Truck Broker, Inc. The contract contained a forum-selection clause designating Florida as the venue for all disputes. Parsons Dispatch sued Jerue in an Arkansas court for breach of contract,

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and Jerue moved to dismiss on the basis of the forum-selection clause. The trial court granted the motion to dismiss, and the court of appeals affirmed. Like Servewell in the instant case, Parsons Dispatch argued that, under Florida law, the forum-selection clause could not serve as the sole basis for the exercise of jurisdiction in Florida. The court of appeals rejected this argument, writing as follows:

> *McRae* ... [is] inapplicable in the present case because Jerue is not seeking to enforce the contract in Florida against Parsons Dispatch. Instead, Parsons Dispatch is bringing suit to recover the commissions owed by Jerue, a Florida business. If Parsons Dispatch is forced to litigate this matter in Florida, there will be no question of ... Jerue's contacts with that state arising out of activities occurring in that state. In judging "minimum contacts," the focus is on the defendant, the forum, and the litigation. *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984). *A plaintiff is not required to have minimum contacts with the forum state. Keeton, supra; Moran v. Bombardier Credit, Inc.,* 39 Ark.App. 122, 839 S.W.2d 538 (1992).

Parsons Dispatch, 89 Ark.App. at 33, 199 S.W.3d at 691 (emphasis added).

Further, under Florida law, a forum-selection clause will only be set aside where 1) the clause is tainted by fraud; 2) the clause is a product of overwhelming bargaining power of one party; or 3) the clause is the sole basis upon which to base jurisdiction. *Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n,* 874 So.2d 1231 (Fla.Dist.Ct.App.2004). Here, Servewell never alleged either of the first two bases, and it is clear that the third does not apply, because Summit is a Florida corporation, thus providing a basis other than the clause for jurisdiction in the Florida courts. In sum, even applying Florida law, we conclude that the trial court did not err in enforcing the forum-selection clause.

[10] ***609** In its second point on appeal, Servewell argues that the trial court erred in granting the Gables' motion for judgment on the pleadings. In its answer to Servewell's first amended complaint, the Gables asked the trial court to grant it judgment on the pleadings, because Servewell had failed to file its lien with the Pulaski County Circuit Clerk within the 120 days allowed by § 18–44–117. Attached to the Gables' motion for judgment on the pleadings were copies of Servewell's affidavit of account, reflecting a filing date of March 12, 2003, Servewell's "cap sheet" for the lien, and Servewell's letter to Summit and the Gables, notifying them of its intent to file the lien. Ordinarily, when ****110** matters outside of the pleadings, including affidavits, are presented to and not excluded by the court, the motion becomes a motion for summary judgment. *See* Ark. R. Civ. P. 12(c) (2005).[FN3]

> FN3. Here, although the trial court specifically ruled that it would not consider anything outside of the pleadings, the court's ruling reflected that the court granted the Gables' motion for judgment on the pleadings on two grounds: first, that Servewell did not respond to the Gables' motion, and the motion should therefore be granted by default; and second, that Summit had posted an adequate bond against Servewell's claim, and the lien was therefore null and void as against the Gables. The second basis was not argued in the Gables' motion; therefore, it is apparent that the trial court looked to matters outside of the pleading. We therefore review this case as we would an appeal from an order granting summary judgment. *See Godwin v. Churchman,* 305 Ark. 520, 810 S.W.2d 34 (1991).

[11][12][13][14] Summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the party is

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entitled to judgment as a matter of law. *Riverdale Development Co. v. Ruffin Building Systems Inc.,* 356 Ark. 90, 146 S.W.3d 852 (2004). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *Pugh v. Griggs,* 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a prima facie entitlement to summary judgment, the non-moving party must meet proof with proof and demonstrate the existence of a material issue of fact. *O'Marra v. MacKool,* 361 Ark. 32, 204 S.W.3d 49 (2005). When a party fails to meet proof with proof and does not demonstrate that a material issue of fact exists, summary judgment is appropriate. *Saine v. Comcast Cablevision of Arkansas,* 354 Ark. 492, 126 S.W.3d 339 (2003).

[15] On appeal, Servewell argues that the trial court erred with respect to both grounds on which it granted the Gables' motion. Regarding the trial court's granting of the motion by ***610** default, Servewell argues that it did, in fact, respond to the argument that its lien was untimely. However, a review of the pleadings in Servewell's Addendum reveals that Servewell actually did not respond to the Gables' motion before the time of the hearing. Servewell did not respond to the allegation that its lien was not timely perfected until it filed a "motion to reconsider" on December 11, 2003. [FN4] Servewell's failure to respond to the Gables' motion constituted a failure to meet proof with proof, and the trial court did not err in granting the Gables' motion in this respect.

FN4. Servewell claims that it responded to the motion for judgment on the pleadings in its July 25, 2003, response to Summit's motion to dismiss the Gables. However, that pleading contains only a naked assertion that Servewell "provided all notices required by law, timely filed its affidavit of lien, and commenced this lawsuit within 120 days of supplying labor and materials to the project in question." It did not support this allegation with any kind of proof. Further, Ark. R. Civ. P. 12(i) provides that responses in opposition to a motion filed under Rule 12 "shall be made as provided in Rule[ ] 6(c) ..." Rule 6(c) gives a party ten days to respond to a motion; here, the Gables' motion for judgment on the pleadings was filed on May 29, 2003. Even assuming that Servewell's response on July 25, 2003, was a response to the Gables' pleading (as opposed to a response to Summit's pleading), it was untimely under Rule 12(i).

Servewell claims further that it should have made no difference when it filed the affidavit of account, because Servewell filed suit within 120 days and alleged the existence of its lien in the complaint. Here, Servewell relies on *Wiggins v. Searcy Federal Savings & Loan Association,* 253 Ark. 407, 486 S.W.2d 900 (1972). In *Wiggins,* this court held that "the filing of a suit ... to preserve and enforce the lien ****111** within the 120–day period is a substantial compliance with the statute which cures the omission to file the account with the circuit clerk." *Wiggins,* 253 Ark. at 410, 486 S.W.2d 900. However, this argument is without merit, because Servewell's original complaint—which admittedly was filed within 120 days of its provision of work or labor on the project—was not brought as a lien foreclosure action; instead, as discussed above, the only claims raised in the original complaint were for breach of contract and unjust enrichment.

Next, Servewell contends, without citation to authority, that the motion for judgment on the pleadings was premature. This argument is also without merit. Rule 12(c) provides that a motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed, but within such time as not to delay the ***611** trial[.]" Here, the "pleadings" consisted of the complaint, first amended complaint, and the answers of Summit and the Gables. Once those pleadings had been filed, the motion for judgment on the pleadings was timely.

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In a second subpoint, Servewell argues that the trial court erred in dismissing its lien claim on the Gables' motion because there was a question of fact as to whether its affidavit of account was filed within the 120–day period. However, as discussed above, Servewell failed to respond to the Gables' contention that the lien was untimely. Therefore, Servewell's failure to meet proof with proof on this issue in a timely fashion rendered summary judgment appropriate.

[16] Finally, Servewell argues that the trial court erred in its alternative reasoning—i.e., that the filing of the lien transfer bond mooted Servewell's lien claim. Under Ark.Code Ann. § 18–44–118 (Repl.2003), a person desiring to contest a lien filed pursuant to § 18–44–117 "may file with the circuit clerk or other officer with whom the lien is filed as required by law a bond with surety, to be approved by the officer in double the amount of the lien claimed." § 18–44–118(a)(1). Further procedures are set out in the statute, as follows:

> (b)(1)(A) Upon the filing of the bond, if the circuit clerk or other officer before whom it is filed approves the surety, he or she shall give to the person claiming the lien, at his or her last known address, three (3) days' notice of the filing of the bond.
>
> * * * * * *
>
> (B) At the expiration of three (3) days, *if the person claiming the lien shall not have questioned the sufficiency of the bond or surety or if the clerk finds the same to be sufficient,* the clerk shall note the filing of the bond upon the margin of the lien record and *the lien shall thereupon be discharged and the claimant shall have recourse only against the principal and surety upon the bond.*

§ 18–44–118(b) (emphasis added).

Under the plain language of this statute, once the circuit clerk approved the bond on June 26, 2003, the lien was discharged; indeed the release of lien specifically declared that Servewell's lien was "null and void." At that point, Servewell had ***612** recourse only against the principal and surety upon the bond. In this case, the principal was Summit. Servewell was left with no claim against the Gables, and the trial court properly dismissed the Gables from the action.

[17] Servewell's third point on appeal challenges the trial court's dismissal of Servewell's unjust enrichment action against the Gables. In its complaint and amended complaints, Servewell had alleged that the value of the Gables' project and the land on which it was situated had ****112** been enhanced as a result of Servewell's improvements, and the Gables had thereby been unjustly enriched. The trial court dismissed the claim when it granted Summit's motion to dismiss Servewell's second amended complaint on May 11, 2004, on the grounds that the express contract between Servewell and Summit barred Servewell from asserting an unjust enrichment claim.

[18][19][20] Unjust enrichment is an equitable doctrine. *First Nat'l Bank of DeWitt v. Cruthis,* 360 Ark. 528, 203 S.W.3d 88 (2005). It is the principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. *Adkinson v. Kilgore,* 62 Ark.App. 247, 970 S.W.2d 327 (1998). However, the concept of unjust enrichment has no application when an express written contract exists. *Id.*

On appeal, Servewell argues that the rule barring recovery in quasi-contract where there is an express

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contract "has no application to claims against third parties." While there does not appear to be any Arkansas case law on this precise issue, the Second Circuit Court of Appeals has held that it is a "settled principle" that "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter." *See U.S. East Telecommunications, Inc. v. U.S. West Communications Services, Inc.*, 38 F.3d 1289, 1296 (2d Cir.1994). The Second Circuit also noted that a subcontractor could recover from a landowner, even when a separate contract exists between the subcontractor and general contractor, *if* the owner has agreed to pay the general contractor's debt or if the circumstances surrounding the parties' dealings can be found to have given rise to ***613** an obligation to pay. *Id.* at 1298. In the instant case, however, there is no evidence of any such agreement between Summit and the Gables; therefore, this exception is not applicable, and the general rule—that one cannot recover in quasi-contract when an express contract exists—governs the matter. As such, the trial court did not err in dismissing Servewell's unjust enrichment claim against the Gables.[FN5]

> FN5. The trial court's dismissal of the unjust enrichment claim was correct for another reason. As discussed above, once Summit posted its bond in response to Servewell's alleged lien, Servewell was left with recourse only against Summit and its surety. *See* § 18–44–118(b)(1)(B). As such, any claim Servewell might have had against the Gables disappeared.

Finally, Servewell asks this court that, in the event we affirm the trial court's rulings, we do so without prejudice to Servewell's claims. It argues that the merits of its complaint have never been heard, because the matter below was decided primarily on the basis of the venue clause. For that reason, Servewell asks that, in the event this court affirms, "such ruling be made without prejudice to Servewell's right to pursue its claims in Florida."

[21][22] However, Arkansas law is well settled that, when a plaintiff elects to appeal rather than plead further where both options are available, then the option to plead further is waived in the event of affirmance by the appellate court. *See, e. g., Cotten v. Fooks,* 346 Ark. 130, 55 S.W.3d 290 (2001) (should a plaintiff elect ****113** to appeal rather than plead further the option to plead further is waived in the event of affirmance by the appellate court); *Hunt v. Riley,* 322 Ark. 453, 909 S.W.2d 329 (1995). Here, Servewell could have taken a voluntary nonsuit prior to the trial court's dismissal of its complaint and filed the matter in Florida in accordance with the forum-selection clause. Because it elected to appeal rather than to plead the case properly in Florida, there is no basis for granting its request to make our affirmance "without prejudice."

Ark.,2005.
Servewell Plumbing, LLC v. Summit Contractors, Inc.
362 Ark. 598, 210 S.W.3d 101

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H

Supreme Court of Arkansas.
LANDSNPULASKI, LLC, Appellant,
v.
ARKANSAS DEPARTMENT OF CORRECTION, Appellees.

No. 06–1334.
Dec. 13, 2007.

Background: Plaintiff, after purchasing land at tax sale, brought quiet title action against Arkansas Department of Correction (ADC). The Circuit Court, Pulaski County, granted judgment on the pleadings to Department. Plaintiff appealed. The Supreme Court, 371 Ark. 18, 262 S.W.3d 603, ordered rebriefing.

Holdings: Thereafter, the Supreme Court, Jim Gunter, J., held that:
(1) doctrine of sovereign immunity was applicable, and
(2) State's answer did not waive sovereign immunity.

Affirmed.

West Headnotes

[1] Pleading 302 343

302 Pleading
302XVI Motions
302k342 Judgment on Pleadings
302k343 k. In General. Most Cited Cases

Motions for judgments on the pleadings are not favored by the courts.

[2] Pleading 302 345(1.3)

302 Pleading
302XVI Motions
302k342 Judgment on Pleadings
302k345 Insufficient Cause of Action or Defense
302k345(1.3) k. Answer. Most Cited Cases

A judgment on the pleadings should be entered only if the pleadings show on their face that there is no defense to the suit.

[3] Appeal and Error 30 916(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k916 In General
30k916(1) k. In General. Most Cited Cases

When considering the trial court's ruling on a motion for judgment on the pleadings, the appellate court views the facts alleged in the complaint as true and in the light most favorable to the party seeking relief.

[4] States 360 191.1

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 k. In General. Most Cited Cases

Sovereign immunity is jurisdictional immunity

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from suit.

[5] States 360 191.10

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.10 k. What Are Suits Against State or State Officers. Most Cited Cases

In determining whether the doctrine of sovereign immunity applies, the court should determine if a judgment for the plaintiff will operate to control the action of the State or subject it to liability; if so, the suit is one against the State and is barred by the doctrine of sovereign immunity.

[6] States 360 191.9(5)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(5) k. Property Interests in General. Most Cited Cases

Quiet title action brought by plaintiff, after purchasing land at tax sale, against Arkansas Department of Correction (ADC), was a suit against the State, which was barred by the doctrine of sovereign immunity; a judgment quieting title, in favor of plaintiff, would extinguish any claim that ADC had in the property, thus impacting State's assets and operating to control the actions of the State.

[7] States 360 191.9(1)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(1) k. In General. Most Cited Cases

If the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute, an action against the agency or officer is not prohibited by sovereign immunity.

[8] States 360 199

360 States
360VI Actions
360k199 k. Set-Off and Counterclaim. Most Cited Cases

An exception to total and complete sovereign immunity applies when the State is the moving party seeking specific relief, and in that instance, the State is prohibited from raising the defense of sovereign immunity as a defense to a counterclaim or offset.

[9] States 360 191.2(1)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.2 Power to Waive Immunity or Consent to Suit
360k191.2(1) k. In General. Most Cited Cases

State Constitution does not prohibit the State from waiving sovereign immunity or voluntarily entering its appearance. West's A.C.A. Const. Art. 5, § 20.

[10] States 360 191.6(1)

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360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.6 Mode and Sufficiency of Consent
360k191.6(1) k. In General. Most Cited Cases

State's answer to quiet title complaint, which answer sought "all other appropriate relief," was not a request for specific relief, as would waive sovereign immunity.

[11] States 360 ⚷191.6(1)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.6 Mode and Sufficiency of Consent
360k191.6(1) k. In General. Most Cited Cases

In order to waive sovereign immunity, the State's request for relief must be specific.

**794 Stephen E. Whitwell, North Little Rock, AR, for appellant.

Dustin McDaniel, Att'y Gen., by Patrick E. Hollingsworth, Ass't Att'y Gen., Little Rock, AR, for appellee.

JIM GUNTER, Justice.

*41 This appeal arises from an August 7, 2006, order of the Pulaski County Circuit Court, granting a motion for judgment on the pleadings filed by Appellee Arkansas Department of Correction (the ADC). Appellant LandsnPulaski, LLC, (LandsnPulaski) now brings this appeal and argues that the circuit court erred in granting the ADC's motion for judgment on the pleadings. We affirm the circuit court's ruling.

The ADC bought several parcels of land from the Virginia Alexander Family Limited Partnership on December 10, 1999. The Pulaski County Tax Collector later certified the land in question to the Commissioner of State Lands as being tax delinquent. The land was sold in a tax sale to LandsnPulaski on July 13, 2004, for $7,000. On August 18, 2004, LandsnPulaski obtained a limited warranty deed from the Commissioner of State Lands.

On December 30, 2004, LandsnPulaski filed an action against the ADC to quiet title to the property and "any person, entity or organization" claiming an interest in the property at issue. The ADC filed its answer on February 3, 2005. On February 1, 2006, the ADC filed a motion for judgment on the pleadings, arguing that (1) the property was exempt from taxation; (2) that the ADC had sovereign immunity; and (3) that the Commissioner of State Lands had no authority to convey the property to Appellant. On August 7, 2006, the circuit court granted the ADC's motion for judgment on the pleadings, finding that the ADC was immune from suit pursuant to Article 5, Section 20 of the Arkansas Constitution. The circuit court further ruled that the title under which LandsnPulaski claimed the land at issue was a tax title and therefore void as to the interest of the State under Ark.Code Ann. § 22–5–402 (Repl.2004). On August 28, 2006, LandsnPulaski filed its notice of appeal.

I. Motion for judgment on the pleadings

For its first point on appeal, LandsnPulaski argues that the circuit court erred in granting the ADC's motion for judgment on the pleadings. Specifically, LandsnPulaski asserts that (1) it stated sufficient facts for title to the property to be quieted; (2) sovereign immunity is not applicable to this case because the action to quiet title falls under the ministerial-act exception; (3) even if sovereign immunity does apply in this case, it was waived when the ADC filed an answer

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and made an appearance in this matter; and (4) the Arkansas Attorney General has a duty under ***42**Ark.Code Ann. § 22–5–401 (Repl.2004) to institute ****795** an action to quiet title to the subject property if it appears that another party is claiming ownership.

The ADC responds, arguing that the trial court correctly granted the ADC's motion for judgment on the pleadings because the complaint is barred by sovereign immunity. The ADC further argues that the ministerial-act exception to immunity does not apply in this case, and that the State has not waived its immunity.

[1][2][3] Motions for judgments on the pleadings are not favored by the courts. *Estate of Hastings v. Planters & Stockmen Bank,* 307 Ark. 34, 818 S.W.2d 239 (1991) (citing *Reid v. Karoley,* 229 Ark. 90, 313 S.W.2d 381 (1958)); *see also* 71 C.J.S. *Pleadings* §§ 424–425. Such a judgment should be entered only if the pleadings show on their face that there is no defense to the suit. *Brunson v. Little Rock Road Mach. Co.,* 251 Ark. 721, 474 S.W.2d 672 (1972). When considering the motion, we view the facts alleged in the complaint as true and in the light most favorable to the party seeking relief. *Smith v. American Greetings Corp.,* 304 Ark. 596, 804 S.W.2d 683 (1991); *Battle v. Harris,* 298 Ark. 241, 766 S.W.2d 431 (1989).

[4][5] Article 5, Section 20, of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made defendant in any of her courts." Ark. Const. art. 5, § 20. Sovereign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings. *Clowers v. Lassiter,* 363 Ark. 241, 213 S.W.3d 6 (2005) (citing *Ark. Tech Univ. v. Link,* 341 Ark. 495, 17 S.W.3d 809 (2000)). In determining whether the doctrine of sovereign immunity applies, the court should determine if a judgment for the plaintiff will operate to control the action of the State or subject it to liability. If so, the suit is one against the State and is barred by the doctrine of sovereign immunity. *Id. See also Grine v. Board of Trustees,* 338 Ark. 791, 2 S.W.3d 54 (1999); *Fireman's Ins. Co. v. Ark. State Claims Comm'n,* 301 Ark. 451, 784 S.W.2d 771 (1990); *Page v. McKinley,* 196 Ark. 331, 118 S.W.2d 235 (1938).

[6] In the present case, a judgment quieting title in LandsnPulaski would extinguish any claim the ADC has in the property, thus impacting the State's assets. Such a judgment would operate to control the actions of the State. *See Clowers, supra.* Therefore, we conclude that the suit filed by LandsnPulaski to quiet title is a suit against the State and is barred by the doctrine of sovereign immunity. *Id.* We now turn to whether any exceptions to the doctrine of sovereign immunity apply in this case.

***43** *A. Ministerial-act exception*

[7] We will first address whether the action to quiet title falls under the ministerial-act exception to sovereign immunity. If the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute, an action against the agency or officer is not prohibited. *Travelers Cas. & Surety Co. v. Ark. State Highway Comm'n,* 353 Ark. 721, 120 S.W.3d 50 (2003); *Commission on Judicial Discipline & Disability v. Digby,* 303 Ark. 24, 792 S.W.2d 594 (1990); *Federal Compress & Warehouse v. Call,* 221 Ark. 537, 254 S.W.2d 319 (1953).

In the present case, LandsnPulaski's complaint to quiet title did not plead facts or assert that the ADC acted illegally or refused to perform a purely ministerial action required by statute. Rather, the complaint asked that the circuit court foreclose "any and all claims, interests, rights, or ownership in and to the property by The State of Arkansas Department of Correction; as well as all other persons, entities,****796** or organizations claiming any right, title or interest in and to said real property; and that [LandsnPulaski] be granted all such other proper, just and equitable relief to which it might be entitled." Further, LandsnPulaski

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provides no authority or convincing argument that this case involves a purely ministerial act required by statute. Therefore, we hold that this exception to sovereign immunity does not apply in this case.

B. Affirmative-relief exception

[8] The only exception to total and complete sovereign immunity that we have recognized occurs when the state is the moving party seeking specific relief. In that instance the State is prohibited from raising the defense of sovereign immunity as a defense to a counterclaim or offset. *See Fireman's Ins., supra* (citing *Parker v. Moore,* 222 Ark. 811, 262 S.W.2d 891 (1953)). LandsnPulaski relies on *Arkansas Game & Fish Commission v. Lindsey,* 299 Ark. 249, 771 S.W.2d 769 (1989) (*Lindsey II*) and *Arkansas Game & Fish Commission v. Parker,* 248 Ark. 526, 453 S.W.2d 30 (1970) for its assertion that sovereign immunity was waived because the ADC filed an answer and made an appearance in this matter.

[9] Article 5, Section 20 does not prohibit the State from waiving immunity or voluntarily entering its appearance. *See Lindsey II, supra.* In *Lindsey II,* we stated:

> ***44** In [*Arkansas Game and Fish Commission v. Lindsey*] *Lindsey I* [292 Ark.314, 730 S.W.2d 474 (1987)] the Commission voluntarily entered its appearance and sought affirmative relief. Having entered its appearance on this matter in the Faulkner County Chancery Court proceeding the Commission cannot at this time claim sovereign immunity. We held in *Arkansas Game and Fish Commission v. Parker,* 248 Ark. 526, 453 S.W.2d 30 (1970), that the Game & Fish Commission was under no obligation to appear and defend a cause of action, but upon voluntarily doing so, it became bound by the decree of the judgment like any other person.

Id. at 251, 771 S.W.2d at 770.

[10] However, the facts in *Lindsey II* and *Parker* are distinguishable from those of the present case. In *Parker,* the Arkansas State Game and Fish Commission filed its own action to quiet title. In *Lindsey II,* we held that the State could not claim sovereign immunity, having previously entered its appearance in *Lindsey I,* where the Commission filed an answer, a compulsory counterclaim, and a third-party complaint. Clearly, in both of these cases the State was asking for affirmative relief.

[11] In the present case, the ADC simply filed an answer after being served with the summons and complaint. The filing of this answer was a purely defensive action on the part of the ADC. In its answer, the ADC clearly asserted that LandsnPulaski's complaint was barred by sovereign immunity because the ADC is an agency of Arkansas. LandsnPulaski asserts that the ADC did not merely file an answer, but sought affirmative relief from the circuit court. In its answer, the ADC requests that "the Complaint be dismissed, that title be quieted in ADC, and for all other appropriate relief." LandsnPulaski argues that the phrase "all other appropriate relief" is a request for affirmative relief that waived the ADC's sovereign immunity. However, in order to waive sovereign immunity, the request for relief must be *specific. See Fireman's Ins., supra.* Because "all other appropriate relief" is not a request for specific relief, we hold that the ADC did not waive its sovereign immunity ****797** and is therefore immune from suit. Thus, we hold that the circuit court was correct in granting the ADC's motion for judgment on the pleadings.

II. Ark.Code Ann. § 22–5–402

For its second point on appeal, LandsnPulaski argues that the circuit court erred in ruling that the LandsnPulaski's title was a tax title and therefore void as to the interest of the State pursuant to ***45** Ark.Code Ann. § 22–5–402. Because we hold that the State has sovereign immunity, we will not address this issue.

Affirmed.

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Ark.,2007.
LandsnPulaski, LLC v. Arkansas Dept. of Corrections
372 Ark. 40, 269 S.W.3d 793

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H

Supreme Court of Arkansas.
COUNCIL OF CO–OWNERS FOR the LAKESHORE RESORT AND YACHT CLUB HORIZONTAL PROPERTY REGIME, Appellants,
v.
GLYNEU, LLC, Appellee.

No. 06–354.
Oct. 5, 2006.
Rehearing Denied Nov. 9, 2006.

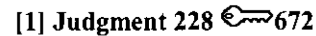
Background: Owner of time-share condominiums sued resort hotel owner, seeking declaration that prior foreclosure decree did not affect its rights for use of hotel amenities, parking, and utilities under pre-existing license agreement. Hotel owner moved to dismiss. The Circuit Court, Garland County, No. CV2005–820–IV,Vicki S. Cook, J., granted the motion. Condominium owner appealed.

Holdings: The Supreme Court, Brown, J., held that:
(1) condominium owner was not precluded from raising claim that agreement was enforceable by prior litigation;
(2) condominium owner was not collaterally estopped from suing defendant regarding validity of license agreement;
(3) trial court was bound by prior decision by stare decisis; and
(4) owner's request for reexamination of prior order was improper attempt to collaterally attack the prior order.

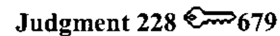
Affirmed.

See also 355 Ark. 578, 142 S.W.3d 608, and 363 Ark. 167, 213 S.W.3d 597.

West Headnotes


[1] Judgment 228 672

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k667 Parties of Record
228k672 k. Interveners and Claimants. Most Cited Cases


Judgment 228 679

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k679 k. Nature of Estate or Interest in Subject-Matter in General. Most Cited Cases

Owner of 20% interest in time-share condominium was not precluded by decision in prior suit from bringing claim against resort hotel that license agreement for owner to use hotel amenities, parking, and utilities was not invalidated by hotel foreclosure by prior suit, even though the prior suit also involved the enforceability of the agreement, given that owner was not a party in the prior suit and was not a privy of a party; owner did not acquire its interest from the party seeking to enforce the agreement in the prior suit, and owner's attempt to intervene in the prior suit was denied for being untimely.

[2] Judgment 228 540

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar

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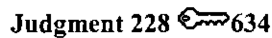
228k540 k. Nature and Requisites of Former Recovery as Bar in General. Most Cited Cases

Judgment 228  **634**

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k634 k. Nature and Requisites of Former Adjudication as Ground of Estoppel in General. Most Cited Cases

The doctrine of res judicata consists of two facets, one being issue preclusion and the other claim preclusion.

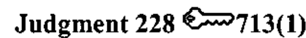
[3] Judgment 228 **540**

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k540 k. Nature and Requisites of Former Recovery as Bar in General. Most Cited Cases

Claim preclusion bars the relitigation of a subsequent suit when five elements are met: (1) the first suit resulted in a final judgment on the merits, (2) the first suit was based on proper jurisdiction, (3) the first suit was fully contested in good faith, (4) both suits involve the same claim or cause of action, and (5) both suits involve the same parties or their privies.

[4] Judgment 228 **672**

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k667 Parties of Record
228k672 k. Interveners and Claimants. Most Cited Cases

Judgment 228  **713(1)**

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(1) k. In General. Most Cited Cases

Owner of 20% interest in time-share condominiums was not collaterally estopped from seeking declaration that resort hotel remained obligated under license agreement to allow use of hotel amenities, parking, and utilities, even though prior suit brought by owner of 80% interest in condominiums included the same claims and was fully litigated, given that 20% owner was not a party to that action and did not have a full and fair opportunity to litigate the validity of the agreement after owner's attempt to intervene was denied as untimely.

[5] Judgment 228 **720**

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k716 Matters in Issue
228k720 k. Matters Actually Litigated and Determined. Most Cited Cases

Issue preclusion, or collateral estoppel, bars the relitigation of issues that were actually litigated by the parties in a previous suit.

[6] Judgment 228 **634**

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General

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228k634 k. Nature and Requisites of Former Adjudication as Ground of Estoppel in General. Most Cited Cases

In order to apply collateral estoppel, the issue must have been previously litigated and determined by a valid and final judgment, and the following four elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the judgment.

[7] Judgment 228 ⚷713(1)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(1) k. In General. Most Cited Cases

For collateral estoppel to apply, the party against whom the prior decision is being asserted must have had a full and fair opportunity to litigate the issue.

[8] Courts 106 ⚷89

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In General. Most Cited Cases

Courts are bound, as a general rule, to follow prior case law under the doctrine of stare decisis.

[9] Courts 106 ⚷90(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(1) k. In General. Most Cited Cases

Courts 106 ⚷93(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k93 Rules of Property
106k93(1) k. In General. Most Cited Cases

Under principle of stare decisis, trial court was bound by its own prior decision that license agreement, which gave owner of time-share condominiums right to use hotel amenities, parking, and utilities, did not survive prior hotel foreclosure proceeding, given that the issue presented was essentially the same as the issue decided in the prior proceeding.

[10] Judgment 228 ⚷518

228 Judgment
228XI Collateral Attack
228XI(C) Proceedings
228k518 k. Collateral Nature of Proceeding in General. Most Cited Cases

Time-share condominium owner's request for reexamination of a prior order that had stare decisis effect on its claim that a license agreement allowing it use adjacent hotel amenities, parking, and utilities was

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not invalidated by hotel foreclosure was a prohibited collateral attack on the judgment, given that there was no claim that the prior order was void on its face or that the issuing court lacked jurisdiction.

[11] Judgment 228 ⚷485

228 Judgment
228XI Collateral Attack
228XI(A) Judgments Impeachable Collaterally
228k485 k. Judgment Void on Its Face in General. Most Cited Cases

Judgment 228 ⚷489

228 Judgment
228XI Collateral Attack
228XI(B) Grounds
228k488 Want of Jurisdiction
228k489 k. In General. Most Cited Cases

Judgments may not be collaterally attacked unless the judgment is void on the face of the record or the issuing court did not have proper jurisdiction.

****602** Niswanger Law Firm, PLC, by: Stephen B. Niswanger, Little Rock, AR, for appellant.

Hardin & Grace, P.A., by: David A. Grace, Little Rock, AR, for appellee.

ROBERT L. BROWN, Justice.

***398** The appellant, Council of Co–Owners for the Lakeshore Resort and Yacht Club Horizontal Property Regime (Council), appeals from an order granting the motion to dismiss of the appellee, Glyneu, LLC. The Council raises several points for reversal. None of the points has merit, and we affirm.

The Council is an organization of condominium unit owners and was formed pursuant to the Arkansas Time Share Act and the Declaration of Horizontal Property Regime Master Deed and By–Laws for Lakeshore Resort and Yacht Club in Hot Springs. The Council owns approximately 20% of the time-share intervals in a lakefront condominium building in Hot Springs known as the Lakeshore Resort and Yacht Club Horizontal Property Regime (condominiums). The condominiums are located adjacent to a hotel now owned by Glyneu. The Council acquired its 20% ownership interest in the condominiums in 2001 from the former owners, known as the Kessler Class, in a foreclosure proceeding.

***399** The condominiums and the hotel have been the subject of multiple lawsuits and appeals to this court. As a result, a complete recitation of the facts involved in this current appeal can be found in two previous opinions by this court— *National Enterprises, Inc. v. Kessler,* 363 Ark. 167, 213 S.W.3d 597 (2005), and *National Enterprises, Inc. v. Lake Hamilton Resort, Inc.,* 355 Ark. 578, 142 S.W.3d 608 (2004). What follows is a brief summary of the facts.

In 1983, Painters Point Development Company, L.P., developed the land into the resort that now includes the hotel and condominiums. Union Planters National Bank provided the financing for the development.****603** In 1985, Painters Point conveyed the condominiums to Lakeshore Resort and Yacht Club Limited Partnership (Lakeshore Partnership), and Union Planters released its mortgage lien on the condominium property. Later in 1985, Painters Point and the Lakeshore Partnership entered into a license agreement which allowed Lakeshore Partnership and its condominium owners to use the hotel's recreational amenities and parking. A memorandum of the agreement was recorded in the real estate records.

Lakeshore Partnership then sold approximately 20% of the condominiums to a group of people now known as the Kessler Class, and 80% of the condo-

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miniums were acquired by its general partner—Hanson, Hooper & Hays, Inc. (Hansen Hooper). In 1988, Union Planters foreclosed on Painters Point's interest in the hotel, and a foreclosure decree was entered in 1990. The hotel property was purchased at the foreclosure sale and ultimately sold to Lake Hamilton Resort.

In 1993, the mortgagee's successor in interest for the Hansen Hooper purchase began foreclosure proceedings on the 80% condominium interest. National Enterprises, Inc. bought the note and mortgage. Lake Hamilton Resort offered $275,000 to National Enterprises for the note and mortgage, and National Enterprises counter offered for $1 million. Lake Hamilton Resort considered the counter offer "totally off base," and negotiations terminated.

In December 1993, Lake Hamilton Resort advised National Enterprises and the Kessler Class that they could no longer use the hotel's parking and recreational amenities and that utilities to the condominiums would be disconnected. National Enterprises, which by now had purchased the 80% interest in the condominiums, sued Lake Hamilton Resort to enforce the license agreement ***400** and easements by necessity for utility usage and ingress and egress. The trial court ruled in its 1994 order that any rights National Enterprise might have had under the license agreement were foreclosed by the 1990 foreclosure decree. The court further found that the warranty deed executed to National Enterprises's predecessor in interest did not contain any grants of easement over the hotel property and that there was no implied easement by necessity or prescriptive easement for use of the utilities.

In August 2005, Glyneu, an Arkansas limited liability company, purchased the hotel at a foreclosure sale. The Council, which had since acquired 20% of the condominiums from the Kessler Class, filed suit against Glyneu for a declaratory judgment that the Council had the right to use the hotel's recreational amenities, parking, and utilities and that the 1990 foreclosure decree did not affect those rights. The circuit court granted Glyneu's motion to dismiss, based on its prior decision in the 1994 order. The Council now appeals.

I. *DISMISSAL UNDER EITHER THE 1994 ORDER OR THE KESSLER*[FN1] *DECISION.*

FN1. *National Enterprises, Inc. v. Kessler,* 363 Ark. 167, 213 S.W.3d 597 (2005). Kessler filed a class-action suit against National Enterprises as the developer's successor in interest, seeking restitution and rescission of purchase contracts based on misrepresentation and breach of contract. The circuit court granted summary judgment for the Kessler Class. National Enterprises appealed, and this court upheld the circuit court's ruling that National Enterprises was liable to the Kessler Class as a successor in interest, among other things, and remanded on the issue of damages.

[1] The Council makes three distinct arguments under this point. First, it claims that neither the 1994 order nor the *Kessler* decision is *res judicata* as to the Council's current cause of action. It also ****604** asserts that the 1994 order has no *stare decisis* effect. Finally, it contends that the *Kessler* decision also has no *stare decisis* effect. Glyneu responds that, though it may apply, the circuit court's dismissal was not based on *res judicata.* Glyneu argues that the record clearly shows that the circuit court based its decision on the doctrine of *stare decisis* in deciding to follow its own precedent established in the 1994 order.

[2][3] The Council first contends that *res judicata* should not apply in this case because it was not a party to the 1994 order nor to the *Kessler* decision. The doctrine of *res judicata* consists of "two facets, ***401** one being issue preclusion and the other claim pre-

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clusion." *Beebe v. Fountain Lake School Dist.*, 365 Ark. 536, 231 S.W.3d 628 (2006). Claim preclusion bars the relitigation of a subsequent suit when five elements are met: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. *See id.*

Regarding the 1994 order, the first four elements are met. It was a final judgment on the merits. The action was based on proper jurisdiction. It was fully contested in good faith, and the current suit involves the same cause of action. However, there is no evidence that the fifth element has been met. The two suits do not involve the same parties or their privies. The Council did not acquire its interest in the time-share from National Enterprises. Plus, the Council did not attempt to intervene in the 1994 action until 2000. The circuit court ruled that this attempt at intervention was untimely. Accordingly, the Council was not a party to the 1994 order, and there is no evidence that the Council is in privity with any party to the prior judgment. Therefore, claim preclusion does not bar the current suit.

[4][5][6] Issue preclusion, or collateral estoppel, is the second facet of *res judicata,* and it bars the relitigation of issues that were actually litigated by the parties in a previous suit. *See Beebe, supra.* The issue must have been previously litigated and determined by a valid and final judgment, and the following four elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *See id.*

[7] Furthermore, for collateral estoppel to apply, the party against whom the prior decision is being asserted must have had a full and fair opportunity to litigate the issue. *Craven v. Fulton Sanitation Serv., Inc.*, 361 Ark. 390, 206 S.W.3d 842 (2005). In this regard, this court has abandoned the requirement for collateral estoppel that both parties to a prior judgment must be bound for either to be bound. *See Fisher v. Jones,* 311 Ark. 450, 844 S.W.2d 954 (1993). One treatise discusses this development as follows:

> At one time, the utility of issue preclusion was limited by an additional requirement known as "mutuality of estoppel." Under ***402** this concept, neither party to a lawsuit was bound by a prior judgment unless both were bound. In *Fisher v. Jones,* the Arkansas Supreme Court abolished mutuality when issue preclusion is asserted defensely, i.e., against a plaintiff who has previously litigated the same issue against a different defendant.

****605** DAVID NEWBERN & JOHN J. WATKINS, *2 Arkansas Practice Series: Civil Practice and Procedure* § 34.3 at 668 (4th ed.2006). In the instant case, though the current issue is the same as that decided in the 1994 order, the Council did not have a full and fair opportunity to litigate the issue in 1994, since it was not a party to that action. Because this criterion was not met, issue preclusion does not decide this case.

[8] The Council, however, also argues that the 1994 order has no *stare decisis* effect on the current case. We disagree. As a general rule, courts are bound to follow prior case law under this doctrine. *Low v. Insurance Co. of North America,* 364 Ark. 427, 220 S.W.3d 670 (2005). This court has said:

> We have held that there is a strong presumption of the validity of prior decisions. *Bharodia v. Pledger,* 340 Ark. 547, 11 S.W.3d 540 (2000). Although we do have the power to overrule previous decisions, it is necessary as a matter of public policy to uphold prior decisions unless great injury or injustice would result. *Id.* The policy behind *stare decisis* is to lend

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predictability and stability to the law. *Id.* In matters of practice, adherence by a court to its own decisions is necessary and proper for the regularity and uniformity of practice, and that litigants may know with certainty the rules by which they must be governed in the conducting of their cases. *Id.* Precedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable. *Id.*

Union Pacific Railroad Co. v. Barber, 356 Ark. 268, 287–88, 149 S.W.3d 325, 337 (2004).

[9] In the case at hand, the issue before the circuit court in 2006 was essentially the same as that decided by the court in 1994. Both plaintiffs asserted that they were entitled to usage of the hotel's parking, recreational amenities, and utilities. In 1994, the trial court found that the license agreement providing for condominium usage of the hotel's recreational amenities and parking did not survive the 1990 foreclosure decree and that the only easement that existed was an easement for ingress and egress to the condominiums. Because the issue presented here is essentially the same as ***403** that decided in the 1994 order, the court granted Glyneu's motion to dismiss, stating that it would not reverse its ruling in the previous order.

Moreover, we do not believe that great injury or injustice has occurred in this case. When the Council acquired the time-share intervals in 2001, it was aware of the 1994 order and knew of its effect on the condominiums. Thus, the Council cannot argue that the application of *stare decisis* is manifestly unjust when it had notice of the previous order. We hold that the circuit court correctly concluded that its decision was governed in this case by *stare decisis.*

As a final point, this court concludes that the *Kessler* decision does not have any effect on our decision today. *Kessler* involved a class-action suit against National Enterprises, as the developer's successor in interest, for rescission and restitution based on breach of contract and misrepresentation. The class was awarded money damages. The plaintiffs in *Kessler* acquired their interest in the condominiums before the license agreement for parking and recreational amenities was terminated. In the instant case, the Council does not seek money damages and has no claim for breach of contract or misrepresentation because it had notice that no easement for utility usage existed. *Kessler* is distinguishable and has no *stare decisis* effect on the current case.

****606** *II. CHANGE IN THE LAW*

The Council next maintains that the law has changed since 1994, and, therefore, the 1994 order is not *stare decisis.* To support this argument, the Council cites to the court of appeals decision, *Diener v. Ratterree,* 57 Ark.App. 314, 945 S.W.2d 406 (1997), for the proposition that an implied easement includes access to utilities that are reasonably necessary, even if those utilities are not visible to an adjoining property owner. Glyneu counters that *Diener* did not change the law with regard to implied easements. Rather, Glyneu asserts that *Diener* only reaffirmed the settled law that whether an easement is apparent and reasonably necessary are questions of fact for the fact-finder.

Diener involved a dispute between adjacent land owners concerning a septic system. The property was originally owned by one party, and a commercial building with restrooms served by an underground septic system was constructed on the land later ***404** purchased by Ratterree. Lateral leach lines extending from the septic system ran under the property later purchased by Diener. The dispute arose when Ratterree opened a restaurant in the commercial building, and the increased usage of the restrooms caused sewage to rise to the surface of Diener's property.

Diener severed the lateral leach lines, and the parties filed actions against each other. The trial court found that a permanent servitude had been created on

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Diener's property. The court of appeals affirmed and ruled that the trial court's finding that the implied easement was obvious, apparent, and reasonably necessary for Ratterree's use and enjoyment of the land was not clearly erroneous. The court of appeals stated that apparent use does not necessarily mean actual visible use. *See Diener, supra.*

The Council relies on *Diener* for its argument that the law governing implied easements has changed. However, apart from the fact that *Diener* is a court of appeals decision, it is distinguishable on its facts. Diener purchased his property with at least constructive notice that an implied easement for the septic system existed. He did not inquire as to where the leach lines were located, but he knew that the commercial property adjacent to his land had to be served by a septic system because he was aware that there were no sewer lines in the area. The court of appeals wrote, "whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty as in the case of vendor and purchaser...." *Id.* at 317, 945 S.W.2d at 408 (citing *Waller v. Dansby,* 145 Ark. 306, 306, 224 S.W. 615, 617 (1920)).

In this case, just the opposite occurred. Both the Council and Glyneu acquired their property with notice of the ruling in the 1994 order that no easement by necessity for utilities existed. The Council moved to intervene in the 1994 suit, albeit in untimely fashion. Thus, it was aware of the 1994 order and had both actual and constructive notice that no easement existed when it purchased the time-share intervals. Glyneu then purchased the hotel in reliance on the fact that no implied easement burdened the property based on the 1994 order. This is a totally different situation from what occurred in *Diener,* where the purchaser of the servient estate had constructive notice that his property was subject to an easement and the issue was whether he was bound by that notice. We conclude that the law has not changed with respect to the Council. The *Diener* facts and issues are simply different.

***405** *III. REEXAMINATION OF THE 1994 ORDER.*

For its final point, the Council urges this court to reexamine the 1994 order and give ****607** the circuit court directions upon remand. The Council asserts that in 1994, the trial court erred in its ruling pertaining to parking, recreational amenities, and utilities. The Council further contends that the trial court erred in finding that the original parties did not intend to convey permanent rights that ran with the land. The Council claims, in addition, that the trial court did not properly balance the equities of the parties in 1994.

Glyneu, on the other hand, contends that this court should not review the 1994 order because doing so would amount to a mere advisory opinion concerning its merits. Glyneu also maintains that the Council's argument concerning the fairness of the order was not raised before the circuit court and cannot now be argued on appeal.

[10] It is clear to this court that the Council's complaint is essentially a collateral attack on the 1994 order. This court has said that:

> A direct attack on a judgment is an attempt to amend it, correct, reform it, vacate it, or enjoin its execution in a proceeding instituted for that purpose. *Sewell v. Reed,* 189 Ark. 50, 71 S.W.2d 191; *Woods v. Quarles,* 178 Ark. 1158, 13 S.W.2d 617. An attack is direct where the proceeding in which it is made is brought for the purpose of impeaching or overturning the judgment, and collateral if made in any manner other than by a proceeding the very purpose of which is to impeach or overturn the judgment. *Brooks v. Baker,* 208 Ark. 654, 187 S.W.2d 169; *Wilder v. Harris,* 205 Ark. 341, 168 S.W.2d 804.

Purser v. Corpus Christi State Nat'l Bank, 256 Ark. 452, 459–60, 508 S.W.2d 549, 553 (1974).

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