

SUPREME COURT OF ARKANSAS

No. 11-1130

CANCUN CYBER CAFÉ AND
BUSINESS CENTER, INC.

APPELLANT

V.

CITY OF NORTH LITTLE ROCK,
ARKANSAS; LARRY JEGLEY, Pulaski
County Prosecuting Attorney, in his official
capacity; and DANNY BRADLEY, North
Little Rock Chief of Police, in his official
capacity

APPELLEES

Opinion Delivered April 12, 2012APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CV2011-4545]HONORABLE CHRISTOPHER
CHARLES PIAZZA, JUDGEAFFIRMED.**JIM HANNAH, Chief Justice**

Appellant Cancun Cyber Café and Business Center, Inc. (“Cancun”), appeals the circuit court’s order dismissing with prejudice Cancun’s complaint for emergency declaratory and injunctive relief and denying as moot Cancun’s petition for temporary restraining order and preliminary injunction. We affirm the circuit court.

Cancun, an internet café and business center that opened in August 2011, sold computer time, provided printing, faxing, and copying services, and operated a “sweepstakes promotion,” whereby Cancun’s customers could play casino-style video games to learn whether they had won prizes through the sweepstakes promotion. On September 6, 2011, Cancun “temporarily shut down to protect itself, its customers, and its employees from the threats of seizure of property, arrest, and prosecution.” Thereafter, Cancun filed a complaint

for emergency declaratory and injunctive relief and a motion for temporary restraining order and preliminary injunction against appellees the City of North Little Rock, North Little Rock Chief of Police Danny Bradley, in his official capacity, and Pulaski County Prosecuting Attorney Larry Jegley, in his official capacity. Cancun sought declarations that (1) Cancun's business and sweepstakes promotion was lawful and did not violate any lottery, gaming, or gambling law of the State of Arkansas, including article 19, section 14 of the Arkansas Constitution or Arkansas Code Annotated section 5-66-101 *et seq.*; (2) the criminal arrest or prosecution of Cancun would be an unconstitutional restraint on free speech under the First Amendment to the United States Constitution and article 2, section 6 of the Arkansas Constitution because Cancun uses the sweepstakes to communicate to its customers; (3) the criminal arrest or prosecution of Cancun would be unconstitutional under the equal protection clauses of the United States Constitution and the Arkansas Constitution because Cancun is being treated differently than other businesses that use sweepstakes; and (4) the criminal arrest or prosecution of Cancun would be unconstitutional under the due process clauses of the United States Constitution and the Arkansas Constitution because Arkansas's gambling laws are void for vagueness. Cancun sought injunctive relief to prohibit any prosecution or other law-enforcement action against Cancun.

Jegley filed a motion to dismiss Cancun's complaint pursuant to Arkansas Rule of Civil Procedure 12(b)(6) and asserted that Cancun lacked standing to seek declaratory relief because there was no justiciable controversy between the parties, and Cancun could not initiate a lawsuit in order to seek an advisory opinion holding that Cancun's business

operation is lawful. Alternatively, Jegley asserted that, even if there were a justiciable controversy, declaratory judgment would not resolve any dispute between the parties. Jegley also asserted that Cancun lacked standing to request injunctive relief and that, pursuant to this court's holding in *Dickey v. Signal Peak Enterprises*, 340 Ark. 276, 9 S.W.3d 517 (2000), the circuit court lacked subject-matter jurisdiction to grant injunctive relief enjoining criminal prosecution.

In response, Cancun contended that, because it was under the threat of imminent prosecution, there was a justiciable controversy warranting declaratory relief; that it had standing pursuant to this court's holding in *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002); and that Arkansas's gambling laws, if applied to Cancun, would be unconstitutional because enforcement of these laws would violate Cancun's rights, privileges, and immunities under the First and Fourteenth Amendments of the United States Constitution and article 2, sections 6, 8, 13, and 19 of the Arkansas Constitution. Cancun also contended that, based on this court's decision in *Picado*, the circuit court had subject-matter jurisdiction to issue injunctive relief. Finally, Cancun asserted that *Dickey* was not controlling because the general rule that courts of this state do not have jurisdiction to enjoin a criminal prosecution is not applicable when an injunction is sought to protect a lawful business.

At a hearing on the motion to dismiss, Jegley argued that Cancun did not have standing to request declaratory relief because there was neither an existing criminal prosecution of Cancun nor a legitimate threat of criminal prosecution. Jegley contended that Cancun's situation was different from the situation in *Picado* because the plaintiffs in *Picado*

admitted that they were violating the statute, admitted that they would continue to violate the statute, and argued that the statute itself was unconstitutional. Jegley also contended that Cancun had consistently argued that it was not in violation of any Arkansas law and had not alleged that the gambling laws of Arkansas were unconstitutional. In addition, citing *Dickey*, Jegley maintained that Cancun could not use a civil lawsuit to interfere with prosecutorial discretion and enjoin a hypothetical criminal prosecution. Cancun responded that “[t]he threat of prosecution is real,” because another business that had run a similar sweepstakes was prosecuted under the state’s gambling laws.

The circuit court found *Dickey* to be persuasive. The circuit court also found that the facts in the instant case were distinguishable from the facts in *Picado* because Cancun had not admitted to violating any gambling laws and had not contended that the gambling laws were unconstitutional. In an order entered on October 14, 2011, the circuit court granted Jegley’s motion to dismiss and denied as moot Cancun’s motion for temporary restraining order and preliminary injunction. Cancun appeals.

In reviewing a circuit court’s decision on a motion to dismiss, we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *E.g.*, *McNeil v. Weiss*, 2011 Ark. 46, ___ S.W.3d ___. 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 pleadings are to be liberally construed. *Id.* However, our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.* Our standard of review for the

granting of a motion to dismiss is whether the circuit court abused its discretion. *E.g.*, *Doe v. Weiss*, 2010 Ark. 150.

Cancun maintains on appeal that it is entitled to declaratory relief. Declaratory judgments are used to determine the rights and liabilities of respective parties. *Stilley v. James*, 345 Ark. 362, 48 S.W.3d 521 (2001). Pursuant to our declaratory-judgment statute,

[a]ny person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Ark. Code Ann. § 16-111-104 (Repl. 2006). The purpose of the declaratory-judgment statutory scheme “is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” *Id.* § 16-111-102(b). In *Nelson v. Arkansas Rural Medical Practice Loan and Scholarship Board*, we stated,

The Declaratory Judgment Statute is applicable only where there is a present actual controversy, and all interested persons are made parties, and only where justiciable issues are presented. It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent or uncertain. A declaratory judgment will not be granted unless the danger or dilemma of the plaintiff is present, not contingent on the happening of hypothetical future events; the prejudice to his position must be actual and genuine and not merely possible, speculative, contingent, or remote.

2011 Ark. 491, at 12, ___ S.W.3d ___, ___ (quoting *Cummings v. City of Fayetteville*, 294 Ark. 151, 154–55, 741 S.W.2d 638, 639–40 (1987)).

We have observed that, in order to obtain declaratory relief, the precedent facts or conditions generally held to be required include:

(1) a justiciable controversy; that is to say, a controversy in which a claim of right is

asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; in other words, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Ark. Dep't of Human Servs. v. Civitan Ctr., Inc., 2012 Ark. 40, at 9, ___ S.W.3d ___, ___.

To support its contention that it has shown the existence of a justiciable controversy, Cancun cites *Picado*. In that case, the appellant argued that the appellees could not seek a declaratory judgment of the constitutionality of the sodomy statute because they had not shown the existence of a justiciable controversy by way of a credible threat of imminent prosecution. The appellees responded by arguing that, because they engage in and will continue to engage in behavior criminalized by the statute, they face a real and ongoing threat that they will be prosecuted as members of a class specifically targeted by the statute.

This court agreed that the appellees' admitted, ongoing conduct was in direct violation of the statute they were challenging as unconstitutional and that they faced a daily dilemma due to the existence of the statute. This court noted that it has "not always required prosecution or a specific threat of prosecution as a prerequisite for challenging a statute," *see Picado*, 349 Ark. at 618, 80 S.W.3d at 341, and concluded that, under the facts of the case, the appellees met the justiciability requirement for declaratory judgment:

Appellees are precisely the individuals against whom section § 5-14-122 [the sodomy statute] is intended to operate. As they admit to presently engaging in behavior that violates the statute and intending to engage in future behavior that violates the law, and as the State has not disavowed any intention of invoking the criminal-penalty provisions of Ark. Code Ann. § 5-14-122, we cannot say that appellees are without some reason to fear prosecution for violation of the sodomy statute. To hold otherwise would leave appellees trapped in a veritable Catch-22. As long as Arkansas prosecutors exercise their discretion and fail to prosecute those individuals who violate

the sodomy statute through consensual, private behavior, appellees and those similarly affected by the statute would have no choice but to suffer the brand of criminal impressed upon them by a potentially unconstitutional law. The discretionary acts of the State's prosecutors could effectively bar shut the courthouse doors and protect the sodomy statute from constitutional challenge. We cannot allow this to happen.

Picado, 349 Ark. at 621–22, 80 S.W.3d at 343 (internal citations omitted).

We disagree with Cancun's contention that, like the appellees in *Picado*, it has presented a justiciable controversy. In *Picado*, the appellees sought a declaration that a statute criminalizing their admitted conduct was unconstitutional. Here, Cancun sought a declaration that its conduct is legal and not subject to prosecution. It is apparent to us that, in its request for declaratory relief, Cancun was seeking an advisory opinion rather than the resolution of an actual controversy. We have long held that courts do not sit for the purpose of determining speculative and abstract questions of law or laying down rules for future conduct. *E.g.*, *City of Pine Bluff v. Jones*, 370 Ark. 173, 258 S.W.3d 361 (2007). Because there is no existing legal controversy in this case, the circuit court did not err in concluding that Cancun was not entitled to declaratory relief. It follows that Cancun was not entitled to injunctive relief, which was dependent on the grant of declaratory judgment. We hold that the circuit court did not abuse its discretion in granting Jegley's motion to dismiss and denying as moot Cancun's motion for temporary restraining order and preliminary injunction.

Affirmed.