Cite as 2018 Ark. App. 182

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-17-602

	Opinion Delivered March 7, 2018
SKYRIDGE ESTATES, LLC APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04CV-16-110]
V.	HONORABLE XOLLIE DUNCAN, JUDGE
JULIE ELLIS APPELLEE	DISMISSED WITH PREJUDICE

PHILLIP T. WHITEAKER, Judge

Skyridge Estates, LLC (Skyridge), appeals a Benton County Circuit Court order denying its motion to set aside a default judgment. Because Skyridge failed to file a timely notice of appeal from that order, we dismiss the appeal with prejudice for lack of jurisdiction.

I. *Procedural History*

In June 2015, Julie Ellis injured herself when she fell in a hole while walking her dogs on the property of an apartment complex owned by Skyridge. She filed a negligence action against Skyridge, but her attempted service on Skyridge's registered agent was unsuccessful. She then attempted service by warning order. Skyridge did not answer. On July 18, 2016, Ellis obtained a default judgment against Skyridge in the amount of $350,000.

On October 17, 2016, Skyridge filed a motion to set aside the default judgment, arguing that the judgment awarded was excessive and that service was not proper. As to its

service argument, Skyridge claimed that its registered agent never physically received a copy of the complaint or summons, and because the registered agent was located in Missouri, the agent never received notice by way of warning order. Ellis responded, alleging that the address for the registered agent on file with the Secretary of State's office was a Dardanelle, Arkansas, address and that Skyridge had provided no basis for excusing its failure to answer the complaint. The court denied the motion to set aside in a November 8, 2016 order. Skyridge did not appeal that order.

On March 9, 2017, Skyridge filed a second motion to set aside, alleging that the default judgment was void ab initio due to Ellis's failure to file an affidavit of service according to Arkansas Rule of Civil Procedure 4(f)(4),[1] and a motion to dismiss pursuant to Rule 12(b)(6), alleging that the complaint failed to state facts sufficient to state a cause of action.[2] Ellis responded, arguing (1) that because the court had already denied the first motion to set aside and no appeal was taken, the judgment was final and not subject to attack; (2) that a party

[1]Rule 4(f)(4) provides:

> (4) No judgment by default shall be taken pursuant to this subdivision unless the party seeking the judgment or his or her attorney has filed with the court an affidavit stating that 30 days have elapsed since the warning order was first published as provided in paragraph (2) or posted at the courthouse pursuant to paragraph (3). If a defendant or other interested person is known to the party seeking judgment or to his or her attorney, the affidavit shall also state that 30 days have elapsed since a letter enclosing a copy of the warning order and the complaint was mailed to the defendant or other interested person as provided in this subdivision.

[2]Skyridge also filed an answer to the complaint on April 13, 2017, asserting numerous affirmative defenses including insufficiency of process and failure to state facts upon which relief can be granted. It later amended its answer on April 25, 2017, to specifically include Ellis's failure to file an affidavit pursuant to Rule 4(f).

cannot make multiple attacks on the validity of service; and (3) that arguments regarding the insufficiency of service of process and the sufficiency of the complaint can be waived if not brought in a timely manner. Ellis did not contest her failure to file an affidavit of service pursuant to Rule 4(f)(4).

The court conducted a hearing on the motions to set aside and to dismiss on April 13, 2017. After hearing arguments of counsel, the court indicated that it had concerns. The court was troubled by the notion of enforcing a void judgment. However, it was more concerned by its authority to entertain multiple motions to set aside a default judgment when the issue could have been raised in the first instance, especially when the initial denial had not been appealed. The court then took the matter under advisement so it could further review the case law. Given the court's concern, Skyridge requested an opportunity to present supplemental briefing to the court on the issues. The court granted the request. Skyridge filed its supplemental brief on April 26, 2017; Ellis filed hers on May 1, 2017.

On May 8, 2017, Skyridge filed its notice of appeal from "the denial of its Motion to Set Aside Default Judgment and Motion to Dismiss filed March 9, 2017, which was deemed denied April 8, 2017 pursuant to Rule 4 of the Arkansas Rules of Appellate Procedure." On May 25, 2017, the trial court entered a formal, written order denying the motion to set aside. Skyridge did not file an amended notice of appeal.

II. *Analysis*

Based on the recited procedural history, we hold that Skyridge failed to file a timely notice of appeal, which deprives us of jurisdiction. As a result, we do not reach the merits of

the arguments raised by Skyridge on appeal.

Skyridge filed its notice of appeal on May 8, 2017. It argues that the notice is timely because it appeals the deemed denial of its motions to set aside and dismiss effective April 8, 2017. We find Skyridge's arguments unpersuasive.

Skyridge filed its notice of appeal under the provisions of Rule 4 of the Arkansas Rules of Appellate Procedure. Rule 4 provides that a motion to vacate, alter, or amend a judgment will be deemed denied after thirty days only if the motion is "made no later than ten days after entry of judgment." Ark. R. App. P.–Civ. 4(b)(1). Here, Ellis obtained her judgment on July 18, 2016. Skyridge's motions to set aside and dismiss were filed on March 9, 2017—234 days after judgment was entered; thus Rule 4(b)(1) does not apply, *Eliasnik v. Y & S Pine Bluff, LLC*, 2018 Ark. App. 138, 546 S.W.3d 497. Because the motions to set aside and dismiss could not be deemed denied under Rule 4(b)(1), the May 25, 2017 written order was the final order from which an appeal could have been made.

Next, we consider whether Skyridge's notice of appeal was timely under Rule 4(a). Rule 4(a) provides that "a notice of appeal filed *after the circuit court announces a decision* but before entry of the judgment, decree, or order shall be treated as filed on the day after the judgment, decree or order is entered." (Emphasis added.) Skyridge filed its notice of appeal on May 8, 2017—before entry of the final order and while the trial court still held the matter under advisement. When Skyridge filed its notice of appeal, the court had not yet announced its decision. Therefore, Skyridge's notice of appeal was filed before any actual ruling by the court, and based on the plain language of the rule, the notice of appeal in this case cannot be

treated as filed the day after the court's May 25, 2017 order. As a result, the May 8, 2017 notice of appeal was of no effect, because Skyridge had no right to appeal at that time. *See Jewell v. Moser*, 2012 Ark. 267. Skyridge failed to file a timely notice of appeal from the trial court's written order denying its motions or amend its previous notice of appeal. Because a timely notice of appeal is jurisdictional, we must dismiss this appeal with prejudice.

Dismissed with prejudice.

GRUBER, C.J., and HIXSON, J., agree.

Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., by: *Curtis E. Hogue* and *M. Scott Hall*, for appellant.

Nolan, Cadell & Reynolds, P.A., by: *Bill G. Horton*; and *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellee.