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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 09-1164

LEE DAVIS APPELLANT V. ARKANSAS BLUE CROSS & BLUE SHIELD, USABLE LIFE CORPORATION, AND HMO PARTNERS, INC. APPELLEES	**Opinion Delivered** April 21, 2010 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CV-09-297-2] HONORABLE ROBERT H. WYATT, JR., JUDGE DISMISSED

COURTNEY HUDSON HENRY, Judge

Appellant Lee Davis appeals the order entered by the Jefferson County Circuit Court denying his motion to set aside a previous order. For reversal, appellant argues that the trial court erred in ruling that binding arbitration was his exclusive remedy and that it did not have jurisdiction over his petition for a temporary and permanent injunction. We lack jurisdiction to decide these issues due to appellant's failure to file a timely notice of appeal. Consequently, we must dismiss the appeal.

Appellant is a cardiologist who was a participating physician in the health-benefit plans organized by appellees Arkansas Blue Cross and Blue Shield, and its affiliates USAble Life Corporation, and HMO Partners, Inc., pursuant to network participation agreements

appellant entered into with each of them. In July 2007, Jefferson Regional Medical Center suspended appellant's privileges indefinitely, based on findings made by the hospital's peer review committee that appellant's patients undergoing a certain procedure had a much higher mortality rate than the patients of other physicians. The peer review committee also identified other deficiencies in appellant's professional performance, including over-utilization, failure to appropriately manage his patients, failure to timely and accurately complete charting on his patients in the hospital, and unprofessional conduct.

Appellees learned of appellant's loss of privileges a year later, and in August 2008, appellees notified appellant of his immediate termination from their networks. Appellees terminated appellant because the network participation agreement specified that the loss of privileges was grounds for termination and because the agreements also required appellant to give notice of any suspension of hospital privileges within three business days. Appellant appealed pursuant to internal procedures, but on December 5, 2008, the appeals committee upheld appellant's termination. On December 18, 2008, appellant's attorney composed a letter to the networks' representative requesting arbitration of the dispute as provided in the network agreements. On February 27, 2009, appellant's attorney wrote to appellees' counsel again advising that appellant was proceeding with arbitration, and with this letter, appellant's attorney enclosed a check for the filing fee. On March 3, 2009, appellees' attorney responded that he would take the necessary steps to set the arbitration process in motion.

On March 12, 2009, appellant filed the instant action for a temporary and permanent injunction seeking to maintain the status of a participating provider in the networks. On March 13, 2009, the trial court granted appellant's petition for a temporary injunction and set a hearing for April 1, 2009. Appellees answered the petition on March 26, 2009, and pled affirmatively that the trial court should compel arbitration and dismiss appellant's petition. At the April 1 hearing, appellant conceded that the network agreements required the arbitration of disputes, but he argued that he was entitled to an injunction to maintain his participation in the networks during the arbitration process under the Patient Protection Act. The trial court agreed with appellees and ruled that appellant invoked the arbitration process, that arbitration was his exclusive remedy, and that the court lacked jurisdiction to entertain appellant's petition for an injunction. The trial court entered an order to that effect dismissing appellant's petition on April 14, 2009.

Later in the day on April 14, 2009, appellant filed a motion to set aside the court's dismissal order. In this motion, appellant argued that the arbitration provisions in the network agreements were unenforceable due to lack of mutuality because another provision contained in the network agreements allowed appellees to pursue "any rights or remedies available under applicable law" in resolving disputes concerning overpayments. On April 27, 2009, appellant amended his petition for injunctive relief, bolstering his allegation that an injunction was necessary to maintain the status quo and adding claims that appellees

breached the implied covenant of good faith and fair dealing and that certain provisions of the agreements were unconscionable. Appellees responded to these filings, and the court held a hearing on June 30, 2009. At this hearing, appellant maintained that the trial court had jurisdiction because the arbitration provisions were not enforceable as there was no mutuality of obligation in the network agreements. Appellant asserted, alternatively, that engaging in arbitration and seeking an injunction were consistent remedies that he was allowed to pursue. Appellees responded that appellant had stated no grounds for relief pursuant to Rule 60 of the Arkansas Rules of Civil Procedure and that the network agreements did not suffer from a lack of mutuality. The trial court took the matter under advisement, and on July 31, 2009, the court entered an order denying appellant's motion to set aside the April 14, 2009, order. Appellant filed his notice of appeal on August 21, 2009.

The timely filing of a notice of appeal is an issue affecting the jurisdiction of this court to decide the appeal. *See Stacks v. Marks*, 354 Ark. 594, 127 S.W.3d 483 (2003); *Hausman v. Throesch*, 104 Ark. App. 113, 289 S.W.3d 493 (2008). Rule 4(b)(1) of the Rules of Appellate Procedure–Civil governs the time in which a notice of appeal is to be filed following the filing of posttrial motions. It provides:

> (b) *Extension of time for filing notice of appeal.*
> (1) Upon timely filing in the circuit court of a motion for judgment notwithstanding the verdict under Rule 50(b) of the Arkansas Rules of Civil Procedure, a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), a motion for a new trial under Rule 59(a), or any other motion to vacate, alter, or amend the judgment made no later than 10

> days after judgment, the time for filing a notice of appeal shall be extended for all parties. The notice of appeal shall be filed within thirty (30) days from the entry of the order disposing of the last motion outstanding. However, if the circuit court neither grants nor denies the motion within thirty (30) days of its filing, the motion shall be deemed denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty (30) days from that date.

Although appellant did not specify whether his motion to set aside was brought under Rule 59 or Rule 60 of the Arkansas Rules of Civil Procedure, appellant's motion was one to vacate the trial court's dismissal order, and it was filed within ten days after the entry of judgment.[1] Therefore, appellant's motion falls within the deemed-denied provision of Rule 4(b)(1). *Murchison v. Safeco Ins. Co. of Ill.*, 367 Ark. 166, 238 S.W.3d 11 (2006) (holding that 2001 amendment to the rule encompasses any motion to vacate, alter, or amend the judgment made no later than ten days after entry of judgment, including Rule 60 motions). *See also City of Centerton v. City of Bentonville*, 375 Ark. 8, 289 S.W.3d 53 (2008). Appellant filed his motion to set aside on April 14, 2009. According to the rule, the motion was deemed-denied in thirty days (May 15, 2009), and appellant had thirty days thereafter to file his notice of appeal (June 14, 2009). Appellant did not file his notice of

[1] We note that, in the motion to set aside, appellant raised the new argument that the arbitration provisions in the network agreements were unenforceable. Neither Rule 59 nor Rule 60 are proper mechanisms for advancing arguments that could have been but were not raised prior to the entry of judgment. *Chavis v. Brackenbury*, 375 Ark. 457, 291 S.W.3d 570 (2009) (holding that an objection made for the first time in a motion for a new trial is not timely); *Office of Child Support Enforcement v. Pyron*, 363 Ark. 521, 215 S.W.3d 637 (2005) (holding that a trial court does not abuse its discretion in denying a Rule 60 motion where the argument made in the motion was not raised prior to the entry of judgment).

appeal until August 21, 2009, which is well beyond the time allowed. Consequently, we must dismiss the appeal because the notice of appeal was untimely. Although the trial court entered its order on July 31, 2009, the court did not have jurisdiction to do so because the court's failure to act within thirty days after the motion was filed deprived the court of jurisdiction to act on the motion. *Murchison*, *supra*.

Dismissed.

GLADWIN and BROWN, JJ., agree.