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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-19-996

SHELBIE T. MCCUE, JEREMY MCCUE, AND ASHLE WARE APPELLANTS V. MICHAEL H. DOMINGUEZ, EDUARDO CONTRERAS, AND STRATFORD INSURANCE COMPANY APPELLEES	Opinion Delivered May 11, 2022 APPEAL FROM THE ST. FRANCIS COUNTY CIRCUIT COURT [NO. 62CV-17-44] HONORABLE CHRISTOPHER W. MORLEDGE, JUDGE AFFIRMED

STEPHANIE POTTER BARRETT, Judge

This appeal arises out of a motor-vehicle accident. The questions on appeal concern whether appellants Shelbie McCue, Jeremy McCue, and Ashle Ware properly obtained serial extensions of time to serve out-of-state defendants Michael Dominguez and Eduardo Contreras and, if so, whether they effectively served those defendants by warning order. Appellants later amended their complaint to add appellee Stratford Insurance Company as a defendant, alleging that Stratford had insurance coverage for Dominguez and Contreras and was obligated to pay any judgment rendered against them. When appellants sought a default judgment against Dominguez and Contreras, Stratford filed a response opposing it. Stratford also moved to dismiss the claims against it. After a hearing, the circuit court denied the motion for default judgment, finding that appellants had not complied with Arkansas Rule

of Civil Procedure 4(i) requiring good cause to be shown to extend the time for service. The court also found that the "green card" was defective and that service by publication of warning orders violated due process. The court dismissed the case with prejudice as to all three defendants. We affirm.

On November 13, 2014, Shelbie McCue was driving westbound on Interstate 40 in St. Francis County with Jeremy McCue and Ashle Ware as passengers in the vehicle. According to the complaint, an eastbound vehicle struck the vehicle being driven by Michael Dominguez, causing the Dominguez vehicle to cross the median and collide with appellants' vehicle, injuring appellants.

Appellants filed suit on March 3, 2017, alleging several acts of negligence on the part of Dominguez. Eduardo Contreras was alleged to be liable under a respondeat superior theory as Dominguez's employer. Appellants sought unspecified damages. Appellants were alleged to be residents of Texas; Dominguez, a resident of Florida; and Contreras, a resident of Tennessee. Summonses were issued for Contreras and Dominguez the same day. The summons addressed to Contreras was returned unserved on June 8, 2017. The summons addressed to Dominguez was returned unserved on June 13. Without an extension of time, the deadline for service of process would have run on July 15, 2017.

On June 27, 2017, appellants moved for an extension of time to serve the complaint, alleging that they had been unsuccessful in serving either Contreras or Dominguez at various out-of-state locations and detailing the efforts made to effect service. On July 10, the circuit court entered an order finding good cause and extending the service deadline to October 19, 2017.

Appellants amended their complaint, adding Stratford as a defendant and seeking a declaratory judgment that Stratford was obligated to pay any judgment that may be rendered against Contreras and Dominguez. Stratford moved to dismiss appellants' claims against it. Among other things, Stratford contended that service of process on it was ineffective and that appellants failed to state facts on which relief could be granted as to Stratford.

Appellants would later file five additional motions for extensions of time to serve Contreras and Dominguez. Each motion incorporated appellants' prior pleadings. Some of the motions referenced appellants being in contact with Stratford, and others stated that the parties were negotiating a possible settlement. The circuit court granted each motion, finding good cause for the extensions without stating the good-cause basis. Cumulatively, these orders extended the time to serve Contreras and Dominguez until April 1, 2019.

On November 13, 2018, appellants' attorney filed an affidavit for warning order, stating that Dominguez and Contreras were out-of-state defendants whom appellants had been unable to serve.[1] The affidavit also asserted that appellants' attorney had made diligent efforts to ensure that Dominguez and Contreras were served, including employing process servers and private investigators to locate and serve Dominguez and Contreras, but that they could not be located and that their whereabouts were unknown. The affidavit asserted that

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[1]The Nonresident Motorist Act, Ark. Code Ann. § 16-58-121 (Repl. 2005), provides that nonresident owners or operators who drive motor vehicles on highways of this state are deemed to have appointed the Arkansas Secretary of State as the nonresident's agent for service of process in any action or proceedings against him growing out of any action or collision in which the nonresident may be involved. Since the nonresident owner's "agent" can be personally served within the state under the Act, the circuit court is able to obtain in personam jurisdiction over nonresidents by service on the Secretary of State. *See Shaffer v. Heitner*, 433 U.S. 186, 202 (1977) (citing *Hess v. Pawloski*, 274 U.S. 352 (1927)); *Renfro v. Adkins*, 323 Ark. 288, 294, 914 S.W.2d 306, 309 (1996).

service was attempted on Dominguez at two different locations and on Contreras at three different locations. Also attached to the affidavit were emails and other correspondence from various process servers who attempted to serve the defendants. It should be noted that all efforts listed in the affidavit for warning order were taken prior to the first motion for extension filed June 29, 2017. The clerk issued warning orders the same day. On January 24, 2019, appellants filed proof that the warning orders had been published in the *Forrest City Times-Herald*, a local Arkansas newspaper.

On April 15, 2019, appellants moved for default judgment against Dominguez and Contreras. The motion stated that "service has been perfected and obtained on all of these two individuals [sic] including a Warning Order, and other methods of service of process on the Defendants and they have failed to file an Answer in the case and, therefore, Plaintiffs are entitled to a default judgment against these two Defendants."

Stratford filed a response opposing a default judgment against its putative insureds. Stratford argued that service through such a warning order was not proper for cases in which the defendant must be subject to the court's personal jurisdiction. Stratford also argued that a default judgment would be improper because service by publication in a local Arkansas newspaper had no legitimate probability of providing notice to the individual defendants residing in Florida or Tennessee. Stratford further argued that the warning order was untimely in that appellants did not show good cause for granting the subsequent motions for extensions.

In their reply to Stratford's response, appellants argued Stratford lacked standing to raise an argument on behalf of Dominguez and Contreras. Appellants also argued that the warning orders complied with Arkansas Rule of Civil Procedure 4.

The circuit court held a hearing on appellants' motion for default judgment on July 25, 2019. At the conclusion of the hearing, the court ruled from the bench and denied appellants' motion for default judgment against Dominguez and Contreras. The court found that appellants had not complied with Rule 4(i) because no good cause was shown for the motions for extension of time to obtain service. The court also found that service by publication in a local newspaper in Arkansas violated due process because Dominguez and Contreras resided in Florida and Tennessee, and such action was not reasonably calculated to apprise the defendants of the lawsuit. The court dismissed appellants' complaint as to all three defendants with prejudice. When appellants objected to the circuit court's consideration of Stratford's motion to dismiss because they were not given notice that the motion would be considered at the hearing, the court stated that it was doing so on its own motion.[2]

On August 22, 2019, prior to the entry of an order, appellants filed a motion for reconsideration. Appellants argued that the warning orders constituted sufficient service upon Dominguez and Contreras and that they were entitled to a default judgment.

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[2]As part of its motion to dismiss appellants' claims against it, Stratford alleged that service of process on it was improper under Ark. R. Civ. P. 4(d)(8); that venue in St. Francis County was improper as to Stratford; that the circuit court lacked personal jurisdiction over Stratford; that the claims against Stratford were not ripe until a judgment was rendered against Stratford's putative insureds; and that appellants failed to state sufficient facts for relief against Stratford under Ark. R. Civ. P. 12(b)(6). The circuit court did not state a reason for Stratford's dismissal.

On September 3, 2019, the circuit court entered its order denying the motion for a default judgment against Dominguez and Contreras and dismissing the complaint against Dominguez, Contreras, and Stratford with prejudice.

At the conclusion of an October 3, 2019 hearing on appellants' motion for reconsideration, the circuit court ruled from the bench, denying the motion for reconsideration. On October 4, appellants filed a notice of appeal from the order denying the default judgment and dismissing their complaint. The court entered its order memorializing its bench ruling on the motion for reconsideration on October 9. Appellants timely filed a supplemental notice of appeal to include the deemed denial of their motion for reconsideration.

We must first address two procedural issues. Stratford suggests that appellants' notice of appeal is untimely and argues that appellants' posttrial motion could not extend the time for filing the notice of appeal and that appellants' notice of appeal was therefore untimely because the order had been entered thirty-one days before their first notice of appeal. We disagree.

Arkansas Rule of Appellate Procedure–Civil 4(a) provides that a notice of appeal must be filed within thirty days from the entry of the judgment, decree, or order from which an appeal is taken. *Rye v. Rye*, 2021 Ark. App. 286, 625 S.W.3d 761. If, however, a party "timely" files a motion for judgment notwithstanding the verdict under Arkansas Rule of Civil Procedure 50(b), a motion to amend findings of fact or 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 entry of judgment," the time for

filing a notice of appeal may be extended. Ark. R. App. P.–Civ. 4(b)(1); *Rye*, *supra*. Stratford contends that appellants' motion for reconsideration did not extend the time for filing the notice of appeal because that motion was filed before, not after, entry of the order appealed from.

Arkansas Rule of Appellate Procedure–Civil 4(b)(1) provides that upon the timely filing of certain specified motions, "or any other motion to vacate, alter, or amend the judgment made no later than 10 days after entry of judgment," the time for filing a notice of appeal shall be extended. Here, in substance, appellants' motion for reconsideration was actually a motion for new trial under Ark. R. Civ. P. 59 in that they claimed that the circuit court's decision regarding the showing of good cause was contrary to Arkansas law, which is a specifically enumerated ground for a new trial under Rule 59(a)(6). *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997). Thus, appellants' posttrial motion served to extend the time for filing the notice of appeal.

Furthermore, Stratford cites no authority for its interpretation of Rule 4. As this court has stated many times, arguments that are unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that the arguments are well-taken. *Boatright v. S-R Plaza, LLC*, 2021 Ark. App. 47, at 6, 617 S.W.3d 726, 730.

Next, appellants argue that Stratford does not have standing to raise arguments on behalf of Dominguez and Contreras because Stratford's attorney stated that he did not represent the two individual defendants. Although appellants raised some of these issues at the hearing on the motion for default judgment, they failed to obtain an express ruling from

the circuit court. It is an appellant's responsibility to obtain a ruling to preserve an issue for appeal, and the failure to obtain a ruling precludes our review on appeal. *TEMCO Constr., LLC v. Gann*, 2013 Ark. 202, 427 S.W.3d 651.

We now turn to the merits of the appeal. In denying appellants' motion for default judgment, the circuit court found that appellants did not show good cause when they obtained the various extensions of time to serve the complaint on Dominguez and Contreras. Appellants contend that they showed good cause for the extensions they sought by detailing their efforts to serve Dominguez and Contreras in their first motion for extension of time and then incorporating those allegations in their subsequent motions.

The Arkansas Supreme Court addressed the issue of good cause and when it must be shown in obtaining an extension of the time for service of process under Arkansas Rule of Civil Procedure 4(i)(2) in *Henyan v. Peek*, 359 Ark. 486, 493, 199 S.W.3d 51, 54 (2004). The supreme court held that the plain language of Rule 4(i)(2) dictates that the showing of good cause to extend the period for service must be made *prior* to the granting of an extension, meaning that a plaintiff seeking to extend the time to obtain service must show good cause for why that particular extension is necessary. We hold that appellants failed to make such a showing.

Here, it is undisputed that appellants properly obtained their first extension within 120 days of filing suit against Dominguez and Contreras. Stratford conceded as much. Appellants' motion alleged that they had been unsuccessful in serving either Contreras or Dominguez at various specified out-of-state locations. The motion also detailed those efforts. On July 10, 2017, the circuit court entered an order finding good cause and

extending the service deadline to October 19, 2017. However, appellants' second motion for extension of time, filed October 2, 2017, does not state any cause. It merely incorporated the allegations from the original motion and added that appellants' attorneys had been in contact with an unnamed potential insurance carrier—presumably, Stratford—for Dominguez and Contreras. The motion did not detail the efforts made since the previous extension.

Likewise, appellants' third motion also does not state good cause for an extension of time. It recounts the history of the earlier extensions, states that appellants "have continued to attempt to locate and serve the Defendants, without success, as of this time, but have added [Stratford] to the litigation," and states that they "are in the process of serving [Stratford] with the original Complaint[.]" Appellants' fourth motion for extension of time, filed on May 30, 2018, again incorporated the prior filings by reference and noted Stratford's addition as a defendant. The motion also asserted that the "parties were attempting to negotiate a settlement." The *Henyan* court held that an allegation in an extension motion that the parties were attempting to negotiate a settlement was not a showing of cause, let alone good cause, to extend the time for service under Rule 4(i). 359 Ark. at 493–94, 199 S.W.3d at 55. Appellants' 2018 fifth and sixth motions for extensions of time also do not contain any cause for the extensions. Therefore, the circuit court did not err in finding that appellants failed to show good cause for the extensions, notwithstanding the previous findings of good cause in the orders granting those extensions.

Citing *King v. Carney*, 341 Ark. 955, 20 S.W.3d 341 (2000), appellants argue that once the orders of extension were entered, they had the right to rely on them. However,

appellants have waived this issue because they never specifically argued to the circuit court that they had the right to rely on the orders of extension. It is well settled that this court will not consider arguments raised for the first time on appeal. *Henyan*, 359 Ark. at 494, 199 S.W.3d at 55. Similarly, this court has repeatedly held that a party's failure to obtain a ruling is a procedural bar to our consideration of the issue on appeal. *Id*.

This brings us to the validity of the warning orders. Stratford argues that the warning orders were invalid because they were not issued by the circuit court but, rather, by the circuit clerk. Appellants argue that the warning orders were valid and complied with Rule 4 when they were issued.

In a 2018 per curiam order, the Arkansas Supreme Court made substantial revisions to the content and organization of Arkansas Rule of Civil Procedure 4 by moving much of what had been former Rule 4(f) on warning orders to new Rule 4(g)(3). *In re Recommendations of the Comm. on Civ. Prac.*, 2018 Ark. 239 (per curiam). These changes were effective January 1, 2019. *Id*. at 1. The new, amended Rule 4(g) limited the use of warning orders issued by the clerk to situations in which a party seeks a judgment that may affect the rights of another person who does not have to be subject personally to the court's jurisdiction. Ark. R. Civ. P. 4(g)(3). If personal jurisdiction over the defendant is required, then the plaintiff cannot use a warning order from the clerk but must instead seek a court order under Rule 4(g)(4). Under the new Rule 4(g)(4), a court "may order service by any method or combination of methods reasonably calculated to apprise the defendant of the action."

When the warning orders were issued and first published, they complied with the rule then in effect. *See May v. Goodman*, 2013 Ark. 82 (explaining "straddle" cases concerning amendment of procedural rules). However, the other steps required by amended Rule 4(g) before service by warning order was effective occurred *after* the effective date of the amendments, and appellants failed to comply with those steps. For example, Rule 4(g)(3)(D) provides as follows:

> 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 or posted. The affidavit shall be accompanied by the required proof of publication or posting of the warning order. 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.

The warning orders in the present case were issued on November 13, 2018. Proof of publication was filed on January 24, 2019. Appellants filed their motion for default judgment on April 15, 2019. Although an affidavit of service was filed for Contreras, no affidavit was filed for Dominguez. However, appellants did not state in the affidavit filed with their motion for default judgment that thirty days had elapsed since the warning order was first published or that a copy of the warning order and the complaint were mailed to Dominguez, Contreras, or Stratford. These were not new requirements added when Rule 4 was amended. Rather, these requirements were previously found in former Rule 4(f)(4). *See XTO Energy, Inc. v. Thacker*, 2015 Ark. App. 203, 467 S.W.3d 161. Thus, appellants did not comply with either the version of Rule 4 in effect when the warning orders were issued or the later version as amended.

Appellants also argue that the dismissal as to Dominguez and Contreras should have been without prejudice and cite Ark. R. Civ. P. 4(i).[3] However, Rule 4(i) must be read in light of other procedural rules, such as the statute of limitations. *Bodiford v. Bess*, 330 Ark. 713, 715, 956 S.W.2d 861, 863 (1997). The dismissal-without-prejudice language in Rule 4(i) does not apply if a plaintiff's action is otherwise barred by the running of a statute of limitations. *Id*. Here, appellants filed a complaint against Dominguez and Contreras on March 3, 2017, to recover damages for personal injuries arising from a November 13, 2014 automobile accident. Under Arkansas Code Annotated section 16-56-105 (Repl. 2005), the statute of limitations for negligence actions is three years. Appellants never obtained personal service on Dominguez and Contreras within the three years. As discussed above, service of the warning orders did not strictly comply with the requirements of Rule 4 and was completed outside the three years and well past the last valid extension of time for service. Rule 4(i) also provides that the circuit court may dismiss the action as to any defendant not properly served within 120 days on the court's own initiative. Therefore, the circuit court did not err in dismissing the complaint against Dominguez and Contreras with prejudice.

Finally, appellants argue that the circuit court erred in failing to grant their motion for default judgment. They argue that the warning order was proper, that Dominguez and Contreras failed to plead or answer the complaint, and that they were entitled to a default judgment. We disagree.

Default judgments are not favorites of the law and should be avoided when possible. *B&F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). Appellants' argument

[3]Appellants did not argue that Stratford's dismissal with prejudice was in error.

ignores the discretion given to the circuit court in granting a default judgment and presupposes the validity of service of the warning orders. As discussed above, appellants never obtained valid service on Dominguez or Contreras. Arkansas courts have recognized that judgments by default rendered without valid service are judgments rendered without jurisdiction and are therefore void. *S. Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998); *XTO Energy*, *supra*; *Wright v. Viele*, 2013 Ark. App. 471, 429 S.W.3d 314. This includes default judgments based on warning orders. *XTO Energy*, *supra*. Therefore, the circuit court did not abuse its discretion in denying appellants' motion for default judgment.

Affirmed.

VAUGHT and BROWN, JJ., agree.

David A. Hodges, for appellants.

Wright, Lindsey & Jennings LLP, by: *Gregory T. Jones* and *Troy A. Price*, for separate appellee Stratford Insurance Company.