

Cite as 2023 Ark. App. 62
ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-22-303

MARIO GURULÉ

APPELLANT

V.

SHILIA SANDERS

APPELLEE

Opinion Delivered February 15, 2023

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
FORT SMITH DISTRICT
[NO. 66FDR-07-674]

HONORABLE SHANNON L. BLATT,
JUDGE

DISMISSED WITHOUT PREJUDICE

BART F. VIRDEN, Judge

The Sebastian County Circuit Court dismissed appellant Mario Gurulé’s motions for contempt against appellee Shilia Sanders for failure to obtain service as required by Rule 4 of the Arkansas Rules of Civil Procedure. We dismiss for lack of a final, appealable order.

I. *Background*

A paternity order from 2007 awarded primary custody of the parties’ minor child to Sanders, while Gurulé was awarded visitation and ordered to pay child support. In March 2021, Gurulé filed a motion for contempt involving counseling with the minor child and sent it by certified mail to Sanders’s attorney and the attorney ad litem on the case. Because Gurulé had failed to serve Sanders, the trial court dismissed the motion without prejudice on July 13, 2021.

On August 25, Gurulé filed another motion for contempt involving the alleged withholding of visitation with the minor child and sent it by certified mail to Sanders. Gurulé filed proof of service on September 7, and the green card indicates that the mail was signed for by “DO, CV-19, C-45” on August 28. Sanders filed a motion to strike, alleging improper service. A hearing was held at which the trial court did not hear any testimony—only arguments by Sanders’s counsel and Gurulé, who appeared pro se. The trial court entered an order of dismissal on January 4, 2022,¹ with the following findings:

3. Upon review of the return receipt it reflects the green card was signed by the postal worker in accordance with Postal Covid Policy and not by [Sanders]. This service is not in conformity of Rule 4 of the Arkansas Rules of Civil Procedure. Specifically, [Sanders] or an authorized agent of [Sanders] is required to sign for certified mail. This is pursuant to Postal Service Form 3801. No such form was executed and therefore service is invalid.

4. It has now been more than one hundred twenty (120) days since the Motion was filed and therefore this matter is dismissed for failure to obtain service. As to any issues which were raised in the Motion previously dismissed on July 12, 2021[,], such issues are dismissed with prejudice. As to any issues first raised in the Motion of August 25, 2021[,], such are dismissed without prejudice.

II. Discussion

As a preliminary matter, the trial court’s order indicates that Gurulé “refiled” the March motion for contempt; however, Gurulé had not attempted to serve that motion again, and the August 25 motion did not purport to be an amended motion incorporating both

¹Gurulé sent a letter to the trial court with an attached per curiam from the Arkansas Supreme Court, *In re Response to COVID-19 Pandemic-Amend. to Ark. R. Civ. P. 4(g)(1)(A)(ii)*, 2021 Ark. 68. The trial court did not rule on the letter, which we are treating as a posttrial motion. Gurulé filed a timely notice of appeal from the January 4 order.

the old and new allegations. We are uncertain why the trial court addressed a motion that was not before it; however, Gurulé raised no objection. Moreover, the substance of his contention on appeal does not pertain to the service in connection with the March motion.

With respect to the August 25 motion, the trial court appears to have conflated two rules of civil procedure: Rule 4, which deals with complaints, and Rule 5, which deals with motions. Sanders conflated these rules as well, given her citation to *Wine v. Chandler*, 2020 Ark. App. 412, 607 S.W.3d 522, which involved the dismissal of a complaint and an amended complaint.

To be fair, there is some overlap when there has been a final judgment and continuing jurisdiction.² The trial court, however, applied Rule 4's summons and service requirements to Gurulé's motion for contempt. Assuming, without deciding, that these requirements even apply to *motions*, we note that a plaintiff who has had his case dismissed without prejudice for the first time under Arkansas Rule of Civil Procedure 4(i) may refile those claims. *See, e.g., Saenz v. Gray*, 2022 Ark. App. 475, 655 S.W.3d 865. Because this was the first time that Gurulé's motion for contempt had been dismissed for failure to perfect service, the order he has appealed from does not appear to be final. Without a final order on the merits, this court does not have appellate jurisdiction.

Dismissed without prejudice.

HARRISON, C.J., and THYER, J., agree.

²See Ark. R. Civ. P. 5(b)(1) & (3).

Mario Gurulé, pro se appellant.

Chronister, Fields & Flake, PLLC, by: *Rex W. Chronister* and *Megen C. Prewitt*, for appellee.