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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-22-394

BEN MOTAL APPELLANT V. JOHN DOE AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY APPELLEES	Opinion Delivered March 6, 2024 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, ELEVENTH DIVISION [NO. 60CV-19-6738] HONORABLE PATRICIA JAMES, JUDGE DISMISSED WITHOUT PREJUDICE

BART F. VIRDEN, Judge

Following a hit-and-run accident, appellant Ben Motal sued both the unknown individual who had been driving the car that hit him and Motal's insurer, appellee State Farm Mutual Automobile Insurance Company. Motal appeals from the Pulaski County Circuit Court's order denying his renewed motion for service by warning order on the John Doe defendant. Motal argues that the trial court misinterpreted Ark. R. Civ. P. 4(g)(4) to require service of process by certified mail to an unknown tortfeasor. Because there is no final, appealable order, we lack jurisdiction and must dismiss Motal's appeal without prejudice.

I. *Background*

In October 2018, Motal was a pedestrian walking along University Avenue in Little Rock when a gray sedan passed a city bus from an outer merging lane. The sedan sideswiped the bus, which was in the middle lane, on its right side and struck Motal's left side from behind. The sedan then moved into the middle lane in front of the bus and sped away from the scene.

Motal's automobile insurance policy with State Farm included uninsured-motorist coverage. On September 19, 2019, Motal filed a complaint against John Doe for negligence. Motal also named State Farm as a defendant in accordance with his policy because State Farm has a contractual right to contest John Doe's liability and damages in the lawsuit. Eight months later, Motal filed an affidavit for service by warning order as to John Doe, attesting that he could not determine the identity or whereabouts of the driver of the gray sedan after a diligent inquiry. State Farm moved to strike the affidavit as untimely and to dismiss the John Doe defendant for failure to serve him within the prescribed time. On the same day, Motal amended his complaint to add a civil action by a crime victim and filed a diligent-inquiry affidavit. On June 3, 2020, Motal filed a motion for service by warning order along with another diligent-inquiry affidavit. On February 23, 2021, a warning order was issued by the clerk of the circuit court.

On November 11, after no one had answered the complaint that was served by warning order, Motal moved for a default judgment against the John Doe defendant, which the trial court denied. On February 11, 2022, Motal filed a renewed motion for service by warning order as to the John Doe defendant. In its March 1 order again denying Motal's

motion, the trial court found that Ark. R. Civ. P. 4(g)(4) "maintains minimum requirements of Rule 4(g)(3)(A)-(D)" and that Motal was not able to satisfy the requirements in Rule 4(g)(3)(B)(i) for a warning order to be issued "as he does not know the identity nor whereabouts of John Doe defendant to send a copy of the complaint to the defendant to the last known address by certified mail." The trial court also struck the warning order issued by the circuit clerk because it had been issued without prior authorization from the court. Motal filed a timely notice of appeal.[1]

II. *Discussion*

An appeal may be taken from a final judgment or decree entered by the circuit court. Ark. R. App. P.–Civ. 2(a)(1). An order that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties in a case involving multiple claims, multiple parties, or both, is final and appealable if the circuit court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay and has executed the certificate required by Ark. R. Civ. P. 54(b). Ark. R. App. P.–Civ. 2(a)(11). Here, there is no Rule 54(b) certificate attached to the order denying Motal's renewed motion for service by warning order on the John Doe defendant.

[1]State Farm contends that Motal's appellate brief is "tardy." The filing deadline was August 20, 2022, which was a Saturday. Arkansas Rule of Appellate Procedure–Civil 9 provides that, whenever the last day for taking any action falls on a Saturday, Sunday, legal holiday, or other day when the clerk's office is closed, the time for such action shall be extended to the next business day. Motal filed his brief on the next business day, which was Monday, August 22. Thus, his brief was timely filed.

Motal contends that his appeal falls under Ark. R. App. P.–Civ. 2(a)(2) because the March 1 order is one "which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action." Motal characterizes his lawsuit as a dispute between him and the John Doe defendant and asserts that he has filed no claims against State Farm. Motal contends that State Farm's presence in the case is limited to contesting John Doe's liability and damages but that the issues of liability and damages *cannot* be litigated without John Doe, whom he describes as an indispensable party. Motal asserts that there is no time limit for serving a John Doe defendant pursuant to Ark. R. Civ. P. 4(i)(3) and that, until the John Doe defendant here is served, the claims cannot proceed. Motal cites *D'Arbonne Construction Company v. Foster*, 348 Ark. 375, 72 S.W.3d 862 (2002), for the proposition that a trial court does not acquire jurisdiction over claims against an unknown John Doe defendant unless and until the John Doe defendant is properly served.

Here, the trial court's order denying Motal's renewed motion for service by warning order did not discontinue the action. Indeed, the trial court proceedings continued against State Farm, and Motal participated in those proceedings. Moreover, those proceedings, which are the subject of a second appeal being decided today in *Motal v. John Doe*, 2024 Ark. App. 162, resulted in what *would have been* a final order if the trial court had not lost jurisdiction due to Motal's lodging of the record with respect to the current appeal.[2] In the

[2]In the companion case, Motal appeals from the trial court's order denying his motion for a stay and holding him in contempt and an order of dismissal with prejudice following Motal's failure to appear for a jury trial.

companion case, the trial court's entry of an order dismissing Motal's complaint with prejudice would have resulted in a dismissal of the John Doe defendant pursuant to Ark. R. Civ. P. 54(b)(5), which provides that any claim against a named but unserved defendant, including a John Doe defendant, is dismissed by the trial court's final judgment or decree. The dismissal of Motal's complaint with prejudice would have truly discontinued the action, unlike the order on appeal involving service on the John Doe defendant.

Moreover, Motal's reliance on *D'Arbonne*, *supra*, is misplaced. The supreme court held that an order was final and appealable even though John Doe defendants remained in the case caption because no issues remained to be decided given that the matter had been completely tried, and a verdict allocating 100% of the liability to two named defendants had been entered. Significantly, *D'Arbonne* was decided before the 2008 amendment to Rule 54(b) and its addition of subsection (5), which alleviates the problem created by the presence of named but unserved defendants preventing finality of an order on appeal.

To summarize, Motal's only form of relief was *not* through an appeal from the trial court's order denying his request for service by warning order on the John Doe defendant. Motal could have pursued, and possibly obtained, relief by continuing to participate in the proceedings against State Farm, proving the liability of John Doe, and seeking damages through his insurance policy's uninsured-motorist coverage. The trial court's decision involving the John Doe defendant was not a final order and was not otherwise appealable under Ark. R. App. P.–Civ. 2(a)(2) or 2(a)(11). We therefore lack jurisdiction and must dismiss this appeal without prejudice.

Dismissed without prejudice.

GLADWIN and WOOD, JJ., agree.

Ben Motal, for appellant.

Matthew, Sanders & Sayes, P.A., by: *Mel Sayes*, for appellee.