Supplemental Opinion on Rehearing
March 21, 1988

746 S.W.2d 558

1. APPEAL & ERROR — APPEALABLE ORDER — EVEN THOUGH AN ORDER DENYING A MOTION TO DISMISS IS NOT FINAL, IT IS APPEALABLE IF ENTERED MORE THAN NINETY DAYS AFTER AN EARLIER ORDER IT PURPORTS TO MODIFY. — While an order denying a motion to dismiss is not a final order, such an order is appealable, even though it does not dispose of the action, when it is entered more than ninety days after an earlier order it purports to modify.
2. TRIAL — POWER TO MODIFY OR VACATE ORDER — AFTER THE TERM OF COURT HAS EXPIRED A TRIAL COURT HAS NO AUTHORITY TO REVISE A JUDGMENT. — When the trial court failed to modify or vacate its order within ninety days it lost all power to act under ARCP Rule 60(b); a trial court has no authority after the term of court has expired to revise a judgment.
3. TRIAL — MODIFICATION OF ORDER — RESPONSIBILITY OF COUNSEL OR THE COURT TO SEE TO IT THAT ANY MODIFICATION WAS ENTERED

WITHIN NINETY DAYS. — It was the responsibility of counsel or the court itself to see to it that any modification, whether agreed to by counsel or directed by the court, was entered within ninety days of the original order.

STEELE HAYS, Justice. Our decision in this case, released on February 16, 1988, was wrong. We dismissed the appeal because we regarded it as an attempt to appeal from an order denying a motion by the defendant, Cigna, to dismiss the action. We said that because the order was not final it was not appealable. Ark. R. App. P. 2; *Heffner* v. *Harrod*, 278 Ark. 188, 644 S.W.2d 579 (1983).

[1] By petition for rehearing Cigna has pointed out that such an order is appealable, even though it does not dispose of the action, when it is entered more than ninety days after an earlier order it purports to modify. Thus, in *Schueck Steel, Inc.* v. *McCarthy Bros. Co.*, 289 Ark. 436, 711 S.W.2d 820 (1986), we recognized on rehearing that an order setting aside a default judgment, which ordinarily is not appealable because it is not final, becomes appealable when it is entered more than ninety days after the entry of the default judgment. ARCP 60. *Maxwell* v. *Maxwell*, 240 Ark. 29, 397 S.W.2d 788 (1966). The same reasoning applies to this case, and therefore we grant rehearing, reinstate the appeal and consider it on its merit.

As noted in our original opinion, on June 4, 1986, the circuit court entered an order dismissing the claim of the appellee against Cigna and Helena Hospital. Thirteen days later the appellee filed a motion to vacate or reconsider the order. A hearing was held on August 21, and on motion of appellee the hearing was continued until September 15, more than ninety days after the June 4 order. At this point Cigna asked that the motion be denied because it was not filed within ten days of the order, as required by ARCP Rule 56(b), and because the court had no power to vacate its order after ninety days except in accordance with ARCP Rule 60(c), the requirements of which were not met nor even alleged.

The motion seems to have been taken under advisement,

though we find nothing in the record to that effect. However, on February 19, 1987, the circuit court ordered the reinstatement of the action as to Cigna. Cigna has appealed, and we reverse.

To decide this case on its merits we need look no farther than the fact the trial court did not act on the motion within ninety days. In *Burgess* v. *Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985), we noted that ARCP Rule 60 was intended to retain Arkansas law in effect at the time the rules were adopted. The rule incorporates three methods for correcting a judgment, decree or order after entry. Rule 60(a) deals with clerical mistakes and errors of omission. It has no relevancy here. Rule 60(b) deals with *any* error or mistake and authorizes the court to modify or set aside a judgment or decree order on its own motion or on the motion of a party "within ninety days of its having been filed with the clerk." Rule 60(c) deals with vacating or modifying a judgment, decree or order after ninety days. There is no contention that it applies to this case.

[2] When the circuit court failed to modify or vacate its June 4 order within ninety days, it lost all power to act under ARCP Rule 60(b). *Hayden* v. *Hayden*, 291 Ark. App. 582, 726 S.W.2d 287 (1987); *Board of Equalization, Washington County* v. *Evelyn Hills Shopping Center*, 251 Ark. 1055, 476 S.W.2d 211 (1972). In *St. Louis and N. A. Ry. Co.* v. *Bratton*, 93 Ark. 234, 124 S.W. 752 (1920), we pointed out there is no authority after the term of court has expired for a trial court to revise a judgment. The term of court was later changed to ninety days and is now incorporated in ARCP Rule 60(b).

[3] We are not overlooking the finding in the February 19 order that on July 21, 1986, "defendant's attorney advised Judge Wilkinson by letter that it had no objection to the motion and agreed to modify the order of June 4, 1986." Whether counsel agreed to partial modification or to the setting aside of the order in its entirety is not explained, as the appellee has filed no brief, and the letter of July 21, 1986, is not to be found in the record. Even so, the wording of Rule 60(b) and our cases relevant to it, point plainly to the conclusion that if a change is to be made in a judgment, decree or order under Rule 60(b), it *must be done within ninety days* or not at all. Thus, it was the responsibility of counsel or the court itself to see to it that any modification of the

June 4 order, whether agreed to by counsel or simply directed by the court, was entered within ninety days.

Rehearing granted and the order appealed from is reversed.