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SUPREME COURT OF ARKANSAS

No. 10-1265

Opinion Delivered March 31, 2011

ERIC C. BURGIE
Appellant

v.

LARRY NORRIS, et al.
Appellee

PRO SE MOTIONS FOR EXTENSION OF BRIEF TIME AND TO AMEND MOTION FOR EXTENSION OF BRIEF TIME [APPEAL FROM JEFFERSON COUNTY CIRCUIT COURT, CV 2010-493, HON. JODI RAINES DENNIS, JUDGE]

REVERSED AND REMANDED; MOTIONS MOOT.

PER CURIAM

In December 2008, appellant Eric C. Burgie entered into a written settlement agreement in which he voluntarily dismissed a federal lawsuit that he had filed in the District Court for the Eastern District of Arkansas against several Arkansas Department of Correction ("ADC") officials. In exchange, appellant was to be transferred from the ADC Varner Supermax Unit to the ADC Tucker Maximum Security Unit within ten days of the agreement being executed by all parties, and, if appellant remained free of any disciplinary violations for sixty days once he reached Tucker, he would be transferred within Tucker from segregated custody into the general prison population.

Based on actions allegedly taken by the ADC subsequent to the execution of this settlement agreement, appellant petitioned the federal district court to set aside the settlement

agreement and reactivate his original lawsuit. The petition was denied, and the Eighth Circuit Court of Appeals affirmed the district court's decision on appeal.

Appellant subsequently sued the same ADC officials in Jefferson County Circuit Court for breach of contract. The defendants moved to dismiss the suit, arguing alternatively (1) that the suit was barred by res judicata because it had been fully litigated in federal court, (2) that the suit was barred by sovereign immunity and the trial court lacked subject-matter jurisdiction to adjudicate appellant's claims, and (3) that appellant failed to state a claim on which relief could be granted.

On September 27, 2010, appellant filed a motion to voluntarily nonsuit his action without prejudice pursuant to Arkansas Rule of Civil Procedure 41(a). The trial court did not address appellant's motion to nonsuit, however, and, instead, granted the state's motion to dismiss on October 25, 2010. Appellant then filed a motion for reconsideration of the dismissal, which was denied by written order entered November 30, 2010. Appellant timely filed an appeal from the October 25, 2010 order.

Now before us are appellant's motions for extension of time in which to file his brief and to amend the motion for extension of time. Because a plaintiff's right to a nonsuit before submission of the case for decision is an absolute right, the trial court erred in refusing to enter an order granting it. We accordingly reverse the order of dismissal and remand this matter with directions to enter an order granting the nonsuit, and appellant's motions with this court are moot.

Rule 41(a)(1) provides, in pertinent part,

> Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.

This court has been resolute in holding that the right to nonsuit, as outlined by the rule, is absolute. *White v. Perry*, 348 Ark. 675, 74 S.W.3d 628 (2002) (citing *Whetstone v. Chadduck*, 316 Ark. 330, 871 S.W.2d 583 (1994)); *see Duty v. Watkins*, 298 Ark. 437, 768 S.W.2d 526 (1989); *St. Louis, Iron Mountain & S. Ry. Co. v. Ingram*, 118 Ark. 377, 176 S.W. 692 (1915). An absolute right has been defined as one that "gives to the person in whom it inheres the uncontrolled dominion over the object at all times and for all purposes." *White*, 348 Ark. 675, 74 S.W.3d 628 (quoting Black's Law Dictionary 1324 (6th ed. 1990)). The absolute right to nonsuit may not be denied by the trial court. *Id.*

This absolute right to nonsuit exists so long as the nonsuit is requested prior to submission of the case to the jury or to the court. *See Blaylock v. Shearson Lehman Bros., Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997); *see also Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995) (Explaining that, where the nonsuit is requested prior to the final submission of the case, the voluntary nonsuit is an absolute right). We have held that a case has not been finally submitted for Rule 41(a) purposes where, even though it has come to a hearing, the argument has not yet closed. *See Duty*, 298 Ark. 437, 768 S.W.2d 526.

Here, because argument had not even begun, much less closed, appellant's motion was clearly presented to the court prior to submission of the case for decision. Accordingly,

appellant had an absolute right to a nonsuit, regardless of the merits of his case. *White*, 348 Ark. 675, 74 S.W.3d 628. Because appellant exercised his absolute right to dismiss his claim, this first voluntary dismissal is without prejudice under Rule 41(a) and is not an adjudication on the merits. *See Beverly Enters.-Arkansas, Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000). The trial court erred in not entering an order granting appellant's motion for a nonsuit without prejudice.

Furthermore, this court has repeatedly given preference to the absolute right to nonsuit over a defendant's motion to dismiss. *See White*, 348 Ark. 675, 74 S.W.3d 628; *Brown v. St. Paul Mercury Ins. Co.*, 300 Ark. 241, 778 S.W.2d 610 (1989); *Duty*, 298 Ark. 437, 768 S.W.2d 526. This is true regardless of whether the defendant's motion to dismiss would have been meritorious had appellant not moved to nonsuit. *See White*, 348 Ark. 675, 74 S.W.3d 628; *Duty*, 298 Ark. 437, 768 S.W.2d 526.

Based on the foregoing, we reverse the order of the trial court dismissing appellant's action, and we remand with directions to enter an order granting appellant's motion for voluntary nonsuit without prejudice pursuant to Rule 41(a). Appellant's pending motions to this court are moot.

Reversed and remanded; motions moot.