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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-17-287

EARVIN DAVIS, JR. APPELLANT V. SHELTER INSURANCE a/k/a SHELTER MUTUAL INSURANCE COMPANY, a/k/a SHELTER GENERAL INSURANCE COMPANY APPELLEES	**Opinion Delivered:** December 6, 2017 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72CV-15-2126] HONORABLE JOHN C. THREET, JUDGE AFFIRMED

RITA W. GRUBER, Chief Judge

Earvin Davis, Jr., appeals the Washington County Circuit Court's dismissal of his lawsuit for underinsured-motorist benefits for a January 3, 2012 motor-vehicle accident with Andrea Johnson in Springdale, Arkansas. After receiving the maximum policy limitation from Ms. Johnson's insurance carrier, USAA, Mr. Davis filed his initial suit against his own insurance carrier. On September 30, 2015, that action was nonsuited. On November 12, 2015, he filed the present action, styled "Earvin Davis, Jr. v. Shelter Insurance a/k/a Shelter Mutual Insurance Company, a/k/a Shelter General Insurance Company." On October 28, 2016, Shelter Insurance a/k/a Shelter Mutual Insurance Company, a/k/a Shelter General Insurance Company filed a motion to dismiss or, alternatively, motion for summary judgment. The motion alleged that the summons was void for lack of strict compliance with Arkansas Rule of Civil Procedure 4 and that the

attempted service was improper and insufficient pursuant to Rule 12(b)(5). On January 6, 2017, the circuit court entered its order dismissing Mr. Davis's complaint with prejudice "as against the named defendants, Shelter Insurance, Shelter Mutual Insurance Company, and Shelter General Insurance Company."

Mr. Davis now appeals. He contends that the circuit court erred in dismissing his case for three reasons: (1) the summons was not defective, and an officer of the company was properly served; (2) the court did not have jurisdiction to dismiss a nonparty; and (3) the original responsive pleading did not raise a sufficiency-of-service argument. Appellees, Shelter Mutual Insurance Company and Shelter General Insurance Company, respond that the circuit court did not err in granting the motion to dismiss. We affirm.

I. *Whether the Summons Was Defective and an Officer of the Company Was Properly Served*

Mr. Davis first contends that the summons was not defective and that an officer of the company was properly served. A circuit court acquires no jurisdiction over a defendant unless the plaintiff strictly complies with service-of-process rules. *Union Pac. R.R. Co. v. Skender*, 2016 Ark. App. 206, at 3, 489 S.W.3d 176, 178. Strict compliance specifically applies to the technical requirements of a summons, and a defendant's personal knowledge of the litigation will not cure a fatal defect in the summons. *Id.* We review a circuit court's factual conclusions regarding service of process under a clearly-erroneous standard, and when dismissal is a matter of law, conduct a de novo review of the record. *Id.*

The summons that was issued in this case reads in its entirety as follows:

THE CIRCUIT COURT OF Washington COUNTY, ARKANSAS

Civil DIVISION [Civil, Probate, etc.]

Earvin Davis
Plaintiff

v. No. CV-15-2126-5

Shelter Mutual Ins. Co.
Defendant

SUMMONS

THE STATE OF ARKANSAS TO DEFENDANT:

Shelter Ins., Rick Means [Defendant's name and address.]

1817 W. Broadway, Columbia, MO 65218-0001

A lawsuit has been filed against you. The relief demanded is stated in the attached complaint. Within 30 days after service of this summons on you (not counting the day you received it) — or 60 days if you are incarcerated in any jail, penitentiary, or other correctional facility in Arkansas — you must file with the clerk of this court a written answer to the complaint or a motion under Rule 12 of the Arkansas Rules of Civil Procedure.

The answer or motion must also be served on the plaintiff or plaintiff's attorney, whose name and address are: Ken Osborne, P.O. Box 1345, Fayetteville, AR 72702

If you fail to respond within the applicable time period, judgment by default may be entered against you for the relief demanded in the complaint.

CLERK OF COURT

Address of Clerk's Office

280 N. College Ave

Fayetteville, AR 72701

[Signature of Clerk or Deputy Clerk]

Date: 11/18/15

[SEAL]

Arkansas Rule of Civil Procedure 4, which governs the form of a summons, provides in relevant part:

> (b) *Form.* The summons shall be styled in the name of the court and shall be dated and signed by the clerk; be under the seal of the court; contain the names of the parties; be directed to the defendant; state the name and address of the plaintiff's

> attorney, if any, otherwise the address of the plaintiff; and the time within which these rules require the defendant to appear, file a pleading, and defend and shall notify him that in case of his failure to do so, judgment by default may be entered against him for the relief demanded in the complaint.

Ark. R. Civ. P. 4(b) (2017).

Rule 4(d) governs personal service inside the State of Arkansas, and Rule 4(e) allows personal delivery in the same manner for outside-of-state service that is authorized by our law and is reasonably calculated to give actual notice. A copy of the summons and complaint "shall be served together." Ark. R. Civ. P. 4(d). Service upon a domestic or foreign corporation is to be made by delivering a copy of the summons and complaint to an officer, partner other than a limited partner, managing or general agent, or any agent authorized by appointment or by law to receive service of summons. Ark. R. Civ. P. 4(d)(5).

Rule 4(b)'s technical requirements must be construed strictly, and compliance with them must be exact. *Malloy v. Smith*, 2017 Ark. App. 288, at 9, 522 S.W.3d 819, 825. The purpose of the summons is to apprise a defendant that a suit is pending against him and afford him an opportunity to be heard. *Id.* When service is not made in any manner for which Rule 4 provides, the service is void ab initio. *Dobbs v. Discover Bank*, 2012 Ark. App. 678, at 12, 425 S.W.3d 50, 57. The circuit court's interpretation of a court rule is reviewed de novo on appeal. *Earls v. Harvest Credit Mgmt. VI-B, LLC*, 2015 Ark. 175, at 5, 460 S.W.3d 795, 797–98. This court reviews a circuit court's factual conclusions regarding service of process under a clearly-erroneous standard, and when dismissal is a matter of law,

the court conducts a de novo review of the record. *Skender*, 2016 Ark. App. 206, at 4, 489 S.W.3d at 78.

In the present case, the circuit court made these findings regarding the summons issued by the clerk of the circuit court:

> • A summons was issued on or about November 12, 2015, and it was directed to "Shelter Ins., Rick Means."
>
> • Arkansas law is well settled that service of valid process is necessary to give a court jurisdiction over a defendant, and a summons is required to satisfy due-process requirements.
>
> . . . .
>
> • Within the "directed to" portion of the summons issued in this case, Rick Means is not an intended party defendant, and there is no evidence that an entity known as "Shelter Ins." exists.
>
> The "directed to" portion of the summons is not directed to a proper party and includes a nonparty. *Thus, the plaintiff has failed to obtain proper or valid service.*
>
> • In addition, there has never been a summons issued or directed to "Shelter Mutual Insurance Company" nor "Shelter General Insurance Company," and any attempt to obtain service on a defendant while leaving off the identifying portion of the defendant's name within the "directed to" portion of the summons is fatal to effective service of process.

(Emphasis added.)

Mr. Davis notes that both Arkansas and Missouri law allow a foreign or domestic corporation to be served by delivering a copy of the summons and complaint to its chief officer of the corporation. He argues that the summons was not made defective by the defendant's name being abbreviated in the "directed to" portion as Shelter Ins. Co. He

asserts that he served Shelter Mutual Insurance Company by mailing a copy of the summons and complaint via certified mail, return receipt requested, restricted delivery to Rick Means, the president and CEO of Shelter Mutual Insurance Company, and that he had used Shelter Insurance as an alias for Shelter Mutual Insurance Company throughout this litigation. He argues that the summons sufficiently apprises the defendants that a lawsuit is pending and gives them an opportunity to be heard, and that the circuit court's literal application in this case leads to absurd consequences.

Appellees do not dispute that Arkansas and Missouri laws allow a foreign or domestic corporation to be served by delivering a copy of the summons and complaint to its chief officer. Nor do they dispute that Rick Means is the president and CEO of appellee Shelter Mutual Insurance Company, a company licensed to do business in Arkansas. They assert, however, that Mr. Means is also the president and CEO of Shelter General Insurance Company and Shelter Life Insurance Company, separate entities licensed to do business in Arkansas; and that Shelter Point Insurance is yet another entity licensed in Arkansas. They present the following argument:

> The summons was NOT directed to "Shelter Mutual Insurance Company" nor "Shelter General Insurance Company," nor was there anything indicating that Rick Means was being served as "President" or "CEO," or in some other capacity for either entity. Based on the summons issued, both "Shelter Insurance" and "Rick Means" appear to be the defendants to whom the summons is directed, and, thus, the persons or entities against whom the lawsuit is pending, the persons or entities who had been served, and the defendant(s) responsible for filing an answer.

Appellees conclude that the circuit court correctly found that the summons was not directed to a proper party and includes a nonparty, and, thus, Mr. Davis failed to obtain proper or valid service.

Mr. Davis relies in part on *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004), in which the defendants were listed in the complaint as "Nucor Corporation, Roderick Warren, individually, and John Doe," but were listed in the summons as "Nucor Corporation, Et Al." 358 Ark. at 122, 186 S.W.3d at 729. Nucor argued that the summons was defective and the default judgment void because the summons did not contain the names of all parties and that the default judgment was void because the summons failed to comply exactly with Rule 4 of the Arkansas Rules of Civil Procedure. Our supreme court held that the summons was not fatally defective, reasoning as follows:

> A literal interpretation of the requirement that the summons "contain the names of the parties" would require a listing of every plaintiff and every defendant on every summons, no matter how many plaintiffs and defendants are parties to the case. We reject this interpretation of Rule 4(b). Nucor, the party at issue, was correctly identified in the summons. In no way did the form of the summons fail to apprise Nucor of the pendency of the suit and afford it an opportunity to be heard. Indeed, Nucor makes no such argument.

358 Ark. at 123, 186 S.W.3d at 729–30.

Mr. Davis argues that the summons in the present case abbreviated the defendant's name, as it did in *Nucor*, and that a literal application of the rule would lead to absurd results whereas an alternative interpretation effects the purpose of putting the defendant on notice and affording it an opportunity to be heard. He contends that Shelter Mutual Insurance Company was put on notice by his summons and was afforded an opportunity

to be heard. We find that the cases are distinguishable. The summons in *Nucor* identified the party at issue, but in this case, neither Shelter Mutual Insurance Company nor Shelter General Insurance Company was listed in the "directed to" portion of the summons that the circuit court found to be defective.

We agree with appellees that the present case is similar to *Skender*, *supra*, where we held that the circuit court did not err in finding that a summons omitting the defendant's name from the "directed to" provision was fatally defective. We found the summons in *Skender* to be distinguishable from that in *Nucor*:

> *UPRR was not correctly named in the summons. While it was listed as the sole defendant in the caption, the summons was not directed to it in the body of the document as required under our rules.* To make matters even more confusing, *its registered agent*—which was inexplicably listed as a claimant in the caption—*was listed as the defendant to whom the summons was directed in the body of the summons.* Thus, unlike Nucor who was correctly listed in both places in the summons, UPRR was incorrectly identified.

2016 Ark. App. 206, at 4–5, 489 S.W.3d at 178–79 (emphasis added).

Here, neither Shelter Mutual Insurance Company nor Shelter General Insurance Company was named in the summons's caption or in the "directed to" portion of the summons. Neither the caption nor the summons indicated that Rick Means was being served as president, CEO, or in any capacity for either entity. Thus, neither Shelter Mutual Insurance Company nor Shelter General Insurance Company was apprised on the face of the summons of the pendency of the suit against it. We hold that the circuit court correctly found that the summons was not directed to a proper party and includes a nonparty, and that Mr. Davis thus failed to obtain proper or valid service.

II. *The Circuit Court's Finding that It Did Not Have Jurisdiction to Dismiss a Nonparty*

In his second point, Mr. Davis focuses on the following finding in the circuit court's order of dismissal:

> The plaintiff has named in the complaint as the defendants "Shelter Insurance a/k/a Shelter Mutual Insurance Company, a/k/a Shelter General Insurance Company," and, by doing so, has attempted to bring suit against "Shelter Insurance," "Shelter Mutual Insurance Company," and "Shelter General Insurance Company" by identifying those separate legal entities as an "a/k/a" or "also known as" for Shelter Insurance.

Mr. Davis argues that dismissal as to Shelter Mutual Insurance Company was improper because Shelter Mutual Insurance Company has never been a party to this lawsuit and has never been sued by Mr. Davis. He asserts that "Shelter Insurance" is the only real party listed in his complaint against Shelter Insurance a/k/a Shelter Mutual Insurance Company, a/k/a Shelter General Insurance Company and that "Shelter Insurance" cannot have aliases if it does not exist. He argues that his complaint, rather than the summons, controls. He asserts that an alias to a nonexistent party cannot exist and that the circuit court had no jurisdiction to dismiss a nonparty because it was listed as an alias to a nonexistent entity. Appellees respond that Mr. Davis simply did not obtain valid or proper service on either Shelter Mutual Insurance Company or Shelter General Insurance Company.

The time limit for service is governed by Arkansas Rule of Civil Procedure 4(i):

> If service of the summons and a copy of the complaint is not made upon a defendant within 120 days after the filing of the complaint or within the time period established by an extension . . . , the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative.

Under Rule 41(b), a second dismissal based on failure to serve valid process shall be made with prejudice if the plaintiff has previously taken a voluntary nonsuit. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 712, 120 S.W.3d 525, 531 (2003).

The final finding in the circuit court's order was that Mr. Davis's complaint should be dismissed with prejudice because the time for obtaining valid service on Shelter Mutual Insurance Company or Shelter General Insurance Company had expired, and an action based on the same claim for underinsured-motorist benefits had previously been dismissed. Mr. Davis filed his complaint on November 12, 2015, meaning that the 120 days in which to obtain valid service on appellees expired on March 11, 2016. It is undisputed that no summons was ever directed to Shelter Mutual Insurance Company or Shelter General Insurance Company. Pursuant to Rule 41(b), the second dismissal was an adjudication on the merits. Accordingly, we conclude that the circuit court properly dismissed with prejudice the present action against Shelter Mutual Insurance Company or Shelter General Insurance Company.

III. *The Circuit Court's Finding that the Original Responsive Pleading Did Not Raise a Sufficiency-of-Service Argument*

Mr. Davis argues that "Shelter" waived its right to argue sufficiency of process because it failed to raise this defense in its original responsive pleading to the first lawsuit that subsequently was nonsuited. He notes that the defense of insufficiency of process or insufficiency of service of process is waived if it is neither made by motion nor included in the original responsive pleading. Ark. R. Civ. P. 12(i). He further argues that there can

only be "one original," which in this case was the first lawsuit. Appellees respond that Mr. Davis cites no statute, case, or other authority to indicate that the defenses asserted in the first case are the only defenses available to the defendants in this current matter.

When a plaintiff has suffered a nonsuit, "a *new action*" may be filed within one year of the nonsuit or within the applicable statute of limitations, whichever is longer. Ark. Code Ann. § 16-56-126(a)(1) (Repl. 2005) (emphasis added); *Prescott Sch. Dist. v. Steed*, 2017 Ark. App. 533, at 4. Here, appellees' answer is not pertinent to the new action. In the new action, appellees asserted defenses that included sufficiency of service. The circuit court correctly found that the first lawsuit no longer existed once it had been dismissed and that the present action was a new and separate matter.

Affirmed.

VIRDEN and HARRISON, JJ., agree.

Osborne Law Firm, by: *Ken Osborne*, for appellant.

Roy, Lambert, Lovelace, Bingaman & Wood, LLP, by: *James Bingaman* and *Jerry L. Lovelace*, for appellees.