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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-17-664

CASSAUNDR A HOLMES

APPELLANT

V.

FREDRICK POTTER

APPELLEE

Opinion Delivered February 7, 2018

APPEAL FROM THE SCOTT
COUNTY CIRCUIT COURT
[NO. 64CV-16-80]

HONORABLE DAVID H.
MCCORMICK, JUDGE

REVERSED AND REMANDED

N. MARK KLAPPENBACH, Judge

Appellant Cassandra Holmes appeals from an order dismissing appellee Fredrick Potter's complaint against her. Holmes contends that Potter's complaint should have been dismissed with prejudice pursuant to Arkansas Rule of Civil Procedure 41(b) because he had previously taken a voluntary nonsuit. Potter has not filed a responsive brief. We reverse and remand.

Potter filed his first complaint against Holmes in September 2013 to have her removed as trustee of his deceased wife's trust, the Betty L. Potter Revocable Trust. The complaint alleged that Holmes had breached her fiduciary duty as trustee in several respects and that she should be removed and ordered to repay the trust for assets she improperly managed. Potter eventually took a voluntary nonsuit of his complaint in September 2015. The case proceeded, however, on Holmes's counterclaim and a third-party complaint filed by two

intervenors against Potter.

Potter initiated the current action against Holmes on July 22, 2016. His complaint alleged that Holmes had improperly used trust funds to pay her personal attorney's fees for the unsuccessful litigation of her counterclaim against him. Potter requested that Holmes be ordered to reimburse the trust in the amount of \$243,165.18. Holmes filed a motion to dismiss the complaint, alleging that she had never been properly served with a summons and complaint. She claimed that the dismissal should be with prejudice because Potter had previously taken a voluntary nonsuit of his suit against her. Following a hearing, the circuit court dismissed Potter's suit for failure to properly serve Holmes but refused to find whether the dismissal was with or without prejudice "as any such finding would be advisory unless [Potter] again files another lawsuit against [Holmes]."

The sole issue on appeal is whether the July 2016 complaint should have been dismissed with prejudice. Holmes argues that Arkansas Rule of Civil Procedure 41(b) requires that this second dismissal be with prejudice. Rule 41(b) provides in part that

[a] dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.

Ark. R. Civ. P. 41(b). When a dismissal is granted for failure to obtain service and the plaintiff has previously taken a voluntary nonsuit, the second dismissal is to be with prejudice. *Bakker v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996). Holmes argues that there is no requirement that the lawsuits be identical and that here the same allegations and issues were raised in both lawsuits. While we agree with Holmes that a dismissal with prejudice is

mandatory when the rule applies, *see Evins v. Carvin*, 2013 Ark. App. 185, 426 S.W.3d 549, we cannot hold whether the rule applies to the two complaints at issue here absent a ruling from the court below.

As reflected in its bench ruling, the circuit court was under the mistaken belief that any decision on this issue would be merely advisory:

Now, the only thing that really concerns me is whether they are identical cases or not, but the thing that occurs to me is never decide more than you have to decide. Okay. It gets advisory. I think the 120 days requires dismissal of the case. Whether it's with or without prejudice, I don't think I have to get into comparing the allegations in the first suit with the allegations in the second suit. If and when it gets refiled, then I'm sure that will be raised, and I'll sit down and have to compare the two actions, but I think right now I don't think I have to get there.

The thing that occurs to us is to never put off until tomorrow what you can do today. There is no reason that the parties to this suit should have to wait and spend their time and resources on another lawsuit that may be barred when the circuit court has enough information before it now to make a decision as to whether this suit should be dismissed with or without prejudice. Judicial economy demands that this type of decision be made as soon as that information is available. Accordingly, we reverse and remand with instructions for the circuit court to decide whether the suit should be dismissed with or without prejudice.

Reversed and remanded.

VIRDEN and MURPHY, JJ., agree.

Skinner Law Firm, P.A., by: *Jack Skinner*, for appellant.

One brief only.