

Cite as 2018 Ark. App. 415
ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-17-727

IN THE MATTER OF THE HAMILTON
LIVING TRUST DATED SEPTEMBER 22,
2003

LARRY HAMILTON

APPELLANT

V.

BANK OF THE OZARKS

APPELLEE

Opinion Delivered: September 19, 2018

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTEENTH DIVISION
[NO. 60PR-16-651]

HONORABLE RICHARD MOORE,
JUDGE

MOTION TO DISMISS DENIED;
REBRIEFING ORDERED

RITA W. GRUBER, Chief Judge

Larry Hamilton appeals from the Pulaski County Circuit Court’s denial of his challenges to the summons and complaint in this trust lawsuit. Because of deficiencies in Mr. Hamilton’s abstract, we order rebriefing.

Margaret and Frank Hamilton created the Hamilton Living Trust, dated September 22, 2003 (the “Trust”), and Bank of the Ozarks (the “Bank”) became the successor trustee of the Trust after their death.¹ Larry Hamilton and his sister, Susan Cossey, are qualified beneficiaries of the Trust. The Bank initiated this lawsuit because Mr. Hamilton had been living in a home owned by the Trust located at 207 Beckwood Drive in Little Rock without

¹Though not relevant to the issues on appeal, the Bank is no longer the trustee.

the authority or consent of the Bank. Despite the Bank's request that Mr. Hamilton vacate the property, he refused to leave. So on March 31, 2016, the Bank filed a complaint for declaration of rights with respect to administration of the Trust pursuant to Ark. Code Ann. § 28-73-201(c). The complaint's caption is *In the Matter of the Hamilton Living Trust Dated September 22, 2003*. Mr. Hamilton and Ms. Cossey were named in the complaint as qualified beneficiaries of the Trust. The Bank attached a deed showing ownership of the Beckwood Drive residence in the Trust and alleged that Mr. Hamilton was living in the residence despite the Bank's oral and written requests that he vacate the property. The Bank sought a declaratory judgment from the court that Mr. Hamilton was not entitled to reside or otherwise occupy the property, that the Bank was entitled to take reasonable steps to remove him and any other person occupying the property, and that Mr. Hamilton was to vacate the property immediately. The Bank also alleged that Mr. Hamilton intended to sell the Trust's personal property located at the Beckwood Drive residence and asked the court for a temporary restraining order or a preliminary injunction to prevent Mr. Hamilton from residing in or otherwise occupying the property.

On May 4, 2016, a process server served Mr. Hamilton with a copy of the summons and complaint.² Along with an answer, Mr. Hamilton filed a "Motion for Declaration of Insufficiency of Process and Insufficiency of Service of Process," asserting that the summons was defective because it did not contain the parties' names as required by Rule

²Ms. Cossey was also served with a copy of the summons and complaint, but she did not answer or otherwise appear.

4(b) of the Arkansas Rules of Civil Procedure. Although Mr. Hamilton did not dispute that he was correctly identified on the summons, he argued that his summons failed to name Ms. Cossey and that it improperly identified the Trust rather than the Bank. The circuit court held a hearing on August 8, 2016, and stated from the bench that the summons complied with Rule 4(b) of the Arkansas Rules of Civil Procedure and that service was proper, explaining its findings in detail. On August 22, 2016, the court entered an order denying the motion “[f]or the reasons set forth by the Court on the record at the hearing.”

On September 21, 2016, Mr. Hamilton filed a motion to dismiss, arguing that the complaint failed to comply with Rule 10(a) of the Arkansas Rules of Civil Procedure because the caption does not contain the names of the parties—that is, the Bank, Mr. Hamilton, and Ms. Cossey. The court held a hearing on November 28, 2016, on the Bank’s preliminary injunction, in which Mr. Hamilton also made arguments in support of his motion to dismiss. In an order entered on December 9, 2016, the court denied the motion “for the reasons set forth by the Court on the record at the hearing.”

The court held a final hearing in the matter in April 2017 and entered an order on May 4, 2017. Mr. Hamilton filed a notice of appeal on June 5, 2017, followed by three amended notices of appeal, specifically appealing from the court’s orders of August 22 and December 9 denying his motions. The Bank has filed a motion to dismiss the appeal, arguing that neither of the orders being appealed is a final order and that Mr. Hamilton

failed to designate in his notices of appeal that he was appealing from the final order entered on May 4, 2017, and thus the intermediate orders have not been timely appealed.

I. *Motion to Dismiss Appeal*

We turn first to the Bank's motion to dismiss. It is important to note that Mr. Hamilton's challenges on appeal concern the court's denial of his motions and not the court's final order. His notice of appeal clearly designates these two intermediate orders—that is, the orders dated August 22 and December 9, 2016. Although the notice of appeal is timely from the circuit court's final order entered on May 4, 2017, it does not specifically state that the appeal is from that order.

Rule 3(e) of the Arkansas Rules of Appellate Procedure–Civil provides that the notice of appeal shall “designate the judgment, decree, order or part thereof appealed from.” Ark. R. App. P.–Civ. 3(e)(ii) (2017). Our supreme court has made it clear, however, that while filing a notice of appeal is jurisdictional, only substantial compliance with the procedural steps set forth in Rule 3(e) is required. *Emis v. Emis*, 2017 Ark. 52, at 3, 508 S.W.3d 886, 887. Quoting its opinion in *Mann v. Pierce*, 2016 Ark. 418, at 4, 505 S.W.3d 150, 153, the court recognized in *Emis* that a notice of appeal that failed to designate the final order nonetheless substantially complied with Rule 3(e):

Here, the notice of appeal is technically deficient because it does not designate the final judgment that awarded monetary damages to appellees, which is the only final, appealable order in the record, as the order appealed from. Although the notice of appeal states that Mann is appealing from the order granting partial summary judgment, which was entered over a year before the notice of appeal was filed, and does not reference the final judgment, the summary-judgment order was not a final, appealable order, and no appeal could be taken from that order until the final

judgment was entered by the circuit court. The notice of appeal was filed within thirty days of entry of the final judgment. We hold that the notice of appeal substantially complies with Rule 3(e), as appellant appealed from the summary judgment order at the first available opportunity, filed a notice that was timely as to the final judgment, and there was no prejudice to appellees due to the failure of the notice to reference the final judgment.

Emis, 2017 Ark. 52, at 3-4, 508 S.W.3d at 888 (quoting *Mann*, 2016 Ark. 418, at 4, 505 S.W.3d at 153). Further, in determining whether there has been substantial compliance, our supreme court also considers the lack of prejudice to the appellee when the notice of appeal fails to reference the final judgment. *Id.* Because the notice of appeal in this case was timely filed and there was no prejudice to the Bank from the notice of appeal's failure to reference the final order, we deny the Bank's motion to dismiss the appeal.

II. *Appeal*

Arkansas Supreme Court Rule 4-2(a)(5) provides that the appellant shall create an abstract of the material parts of all the transcripts in the record. Information in a transcript is material if the information is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. Ark. Sup. Ct. R. 4-2(a)(5) (2017). The abstract shall be an impartial condensation, without comment or emphasis, of the transcript. Ark. Sup. Ct. R. 4-2(a)(5)(B). In this case, Mr. Hamilton appeals from the circuit court's denial of two motions, both of which were denied in written orders "for the reasons set forth by the Court on the record at the hearing." The circuit court's rulings and explanations from each hearing are several pages long. The abstract completely omits the

court's rulings. We also note that the parties' arguments are significantly abbreviated in many cases.

We order Mr. Hamilton to file a substituted abstract, brief, and addendum that complies with Ark. Sup. Ct. R. 4-2 within fifteen days of the date of this opinion. Ark. Sup. Ct. R. 4-2(b)(3). Failure to file a complying brief within that time may result in the judgment being affirmed for noncompliance with the rules. *Id.* The deficiencies highlighted are not an exhaustive list, and we urge counsel to carefully review the record and the rules before resubmitting a brief.

Motion to dismiss denied; rebriefing ordered.

WHITEAKER and BROWN, JJ., agree.

Larry Hamilton, pro se appellant.

Rose Law Firm, a Professional Association, by: *Dan C. Young* and *Amanda K. Wofford*,
for appellee.