Cite as 2023 Ark. App. 189

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-22-222

TRACY LITTLEJOHN APPELLANT.CROSS-APPELLEE	OPINION DELIVERED APRIL 5, 2023
V.	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. 17CV-19-78]
BAPTIST HEALTH REGIONAL HOSPITAL, ALSO KNOWN AS VAN BUREN HMA, LLC, AND ALSO FORMERLY KNOWN AS SPARKS MEDICAL CENTER–VAN BUREN APPELLEES/CROSS-APPELLANTS	HONORABLE MARC MCCUNE, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

This is an appeal from an order of the Crawford County Circuit Court granting summary judgment in favor of appellee Van Buren HMA, LLC ("Van Buren"), and dismissing appellant Tracy Littlejohn's ("Littlejohn's") complaint for negligence. Van Buren filed a conditional cross-appeal of the circuit court's order denying its motion to dismiss for insufficiency of service of process. We affirm the circuit court's order granting summary judgment to Van Buren.

I. *Background Facts*

Littlejohn filed her complaint against Baptist Health Regional Hospital and appellee Van Buren HMA on January 25, 2019, for an incident that purportedly occurred at Sparks

Medical Center when she was leaving the facility after she had x-rays performed following a knee replacement. Appellant alleged that when she was transported back to her vehicle, a hospital volunteer negligently pulled a wheelchair out from under her as she was getting into her vehicle. Accordingly, Littlejohn sought to hold the entities vicariously liable for the alleged negligence of the hospital employee.

In her complaint, Littlejohn styled the defendant as "Baptist Health Regional Hospitals also known as, Van Buren HMA, LLC, and also formerly known as Sparks Medical Center-Van Buren." She, however, included separate paragraphs regarding "Corporate Defendant, Baptist Health" ("Baptist Health") and "Corporate Defendant, Van Buren HMA" and had two summonses issued—one for Baptist and another for Van Buren. Baptist was served with the lawsuit and filed a timely answer.

Appellee asserts that it learned of the lawsuit informally and, as a result, moved to dismiss on the basis of insufficiency of service of process on August 12, 2019. In response, Littlejohn filed her objection to the dismissal, arguing that the motion should be treated instead as a motion for summary judgment because it contained information outside the pleadings. Furthermore, Littlejohn argued that service was valid because she addressed Van Buren's summons and complaint to an address listed on the Arkansas Secretary of State's website as appellee's principal business location, and it was accepted by someone at that address.

On October 30, 2019, the circuit court held a hearing on the motion to dismiss. The court denied Van Buren's motion, finding that Baptist's answer was also filed on behalf of

Van Buren, and because Baptist did not raise any service defenses, Van Buren also waived its right to contest service. Importantly, Baptist's answer mirrored the caption of Littlejohn's complaint as "Baptist Health Regional Hospitals, also known as, Van Buren HMA, LLC, and also formerly known as Sparks Medical Center—Van Buren." However, Baptist answered on behalf of "Separate Defendant" and used "Baptist Health" and its singular throughout its answer. Additionally, Baptist denied that "it owned or operated the entity in question during the time period of the events alleged in plaintiff's complaint or that it had any control of the premise in question, had any employees, volunteers, or other works on the premises, or was in any way involved in the alleged events giving rise to the plaintiff's complaint."[1]

The circuit court raised sue sponte the issue of Baptist's answer having been filed on behalf of Van Buren; however, Van Buren did assert at the hearing that Baptist's answer was not filed on its behalf. Nevertheless, the court held that Littlejohn was reasonable to assume that Baptist's answer was filed on behalf of Van Buren and that service was complete; therefore, the court denied Van Buren's motion to dismiss.

Before trial, Van Buren filed a motion for summary judgment arguing that it had never been served with the complaint, and because the time to do so had expired, the statute

[1]The docket sheet reflects that Baptist was dismissed from the lawsuit without prejudice on August 2, 2019. During the hearing on Van Buren's motion to dismiss, the parties explained that Baptist was dismissed because it did not own or operate the hospital when Littlejohn was treated. Rather, Van Buren owned and operated the facility at the time in question.

of limitations had run; thus, dismissal was mandatory. In support of its motion, appellee attached an affidavit of Steve Kirvan—research coordinator for Corporation Service Company ("CSC")—attesting that CSC, as registered agent of Van Buren, was never served with a copy of Littlejohn's summons and complaint. Littlejohn objected to the entry of summary judgment, arguing that Van Buren had waived its service defense because Baptist filed an answer on its behalf. Van Buren filed a reply and attached an affidavit from David P. Glover—the attorney who filed the answer on behalf of Baptist—who attested that the answer he filed was on behalf of Baptist, not Van Buren, as his firm was not retained to represent Van Buren. On the basis of the pleadings, the circuit court granted Van Buren's summary-judgment motion and, accordingly, dismissed Littlejohn's claims with prejudice.

Littlejohn filed her timely notice of appeal on January 26, 2022. Additionally, Van Buren filed a notice of cross-appeal conditioned on the circuit court's order granting summary judgment being reversed on appeal.

II. *Standard of Review*

Summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Riverdale Dev. Co. v. Ruffin Bldg. Sys., Inc.*, 356 Ark. 90, 146 S.W.3d 852 (2004); *Craighead Elec. Coop. Corp. v. Craighead Cnty.*, 352 Ark. 76, 98 S.W.3d 414 (2003); *Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a prima facie entitlement to summary judgment, the

nonmoving party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.*

On appellate review, we determine if summary judgment was appropriate by deciding whether the evidence presented by the moving party in support of its motion leaves a material fact unanswered. *George v. Jefferson Hosp. Ass'n Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999). We view the evidence in the light most favorable to the nonmoving party, resolving all doubts and inferences against the moving party. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998).

III. *Points on Appeal*

On appeal, Littlejohn argues (1) that Van Buren waived its defense of insufficiency of service; and (2) summary judgment was not the appropriate motion to raise the defense. Van Buren cross-appeals, arguing that if this court finds summary judgment was an inappropriate manner for the circuit court to dismiss the case, dismissal is still mandatory because the circuit court committed error in denying its motion to dismiss.

IV. *Discussion*

A. Waiver

First, Littlejohn argues that Van Buren waived its insufficient-service-of-process defense. To support this argument, Littlejohn cites the circuit court's initial order, which held that Baptist's answer was deemed filed on Van Buren's behalf, and because this answer did not assert any service defenses, Van Buren waived its insufficient-service-of-process defense. Furthermore, Littlejohn reiterates that Arkansas Rule of Civil Procedure 12

required Van Buren to either file a motion to dismiss or assert a service defense in its initial responsive pleading.

We find Littlejohn's argument unpersuasive because Van Buren's first responsive pleading was a motion to dismiss for insufficient service of process in accordance with Arkansas Rule of Civil Procedure 12(b). Furthermore, even if Baptist's answer had been filed on behalf of Van Buren, the circuit court's initial finding that Baptist waived service defenses is not supported by the record. Specifically, Baptist asserted in its answer that it "adopts all affirmative defenses available to it under Rule 8 and Rule 12 of the Arkansas Rules of Civil Procedure," which expressly includes the affirmative defense of insufficient service of process. Accordingly, we find that appellant's argument lacks merit.

B. Service Defenses Raised Through Summary Judgment

For her second point on appeal, Littlejohn argues that summary judgment is not an appropriate motion to raise an insufficient-service-of-process defense. Littlejohn again bases her argument on the circuit court's initial finding that Baptist's answer was filed on behalf of Van Buren. Appellant further contends that because Van Buren did not raise insufficient service of process in its initial responsive pleading but instead in a motion to dismiss—that was denied—the rules of civil procedure do not provide Van Buren any relief through summary judgment.

As stated above, Van Buren followed the proper procedure for raising an insufficient-service-of-process defense. Furthermore, while Littlejohn argues that service defenses cannot be raised through a summary-judgment motion, the supreme court has addressed service

issues in the context of summary judgment. *See Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 226 S.W.3d 757 (2006); *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997). In *Sublett*, the Arkansas Supreme Court was presented with a fact pattern similar to the one we have here wherein a defendant was never timely served, and the statute of limitations had run. The plaintiff argued that the defendant waived a defense of insufficiency of service of process under Arkansas Rule of Civil Procedure 12(h)(1) because he failed to move to dismiss the complaint on that ground and further failed to raise the defense in his answer; thus, he was not entitled to summary judgment. In rejecting that argument, our supreme court stated:

> [W]hile Rules 12(b)(5) and 12(h)(1) clearly set forth the procedure for raising an insufficiency-of-service-of-process defense, they do not set the conditions for mounting a limitations defense. The touchstone for a limitations defense to a tort action is when the cause of action was commenced. Berry raised the statute of limitations as an affirmative defense in his answer and has shown failure to commence the litigation within three years as required by our caselaw. That is all that is required.

Id. at 142–43 (citations omitted). Accordingly, the *Sublett* court held that service was not obtained within 120 days after the plaintiff filed her complaint, no extension was sought, and the statute of limitations had run on the cause of action; thus, the circuit court was correct in granting summary judgment to the defendant.

Here, it is undisputed that service was not properly obtained on Van Buren within 120 days; Littlejohn did not file for an extension of time to serve Van Buren; and the statute of limitations had run. Given these undisputed facts and pursuant to precedent, we conclude that the circuit court properly granted Van Buren's motion for summary judgment and dismissed Littlejohn's claims with prejudice.

C. Cross-Appeal

Because we affirm the circuit court's grant of summary judgment, it is unnecessary to discuss the merits of Van Buren's conditional cross-appeal.

V. *Conclusion*

We find that Van Buren is entitled to judgment as a matter of law; therefore, the order granting summary judgment is affirmed.

Affirmed.

ABRAMSON and THYER, JJ., agree.

Bryant Law Partners, LLC, by: G.*E. Bryant*, for appellant/cross-appellee.

Munson, Rowlett, Moore and Boone, P.A., by: *Tim Boone*, *Sarah Greenwood*, and *Zachary Hill*, for separate appellee/cross-appellant Van Buren HMA, LLC.