ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION III

CA07-210

October 31, 2007

CHARLES LEE LIGGETT, JR., M.D.
APPELLANT

APPEAL FROM THE POLK COUNTY CIRCUIT COURT [NO. CV-2005-37]

V.

HON. JERRY W. LOONEY, JUDGE

DORA SUE FREEMAN
APPELLEE

AFFIRMED AS MODIFIED

Appellant, Dr. Charles Liggett, Jr., appeals from an order dismissing without prejudice a medical malpractice complaint filed against him by appellee, Dora Sue Freeman. He contends that the trial court erred in not dismissing the complaint with prejudice. We agree and modify the dismissal.

Ms. Freeman filed a lawsuit against Dr. Liggett on July 1, 2003, arising out of events that occurred two years beforehand. Ms. Freeman took a voluntary nonsuit on March 16, 2004, and refiled the action on March 15, 2005. After obtaining extensions of time to serve Dr. Liggett that allowed service up to March 10, 2006, Ms. Freeman attempted service on appellant on November 16, 2005, by restricted-delivery certified mail, return receipt requested. The receipt was signed by Melanie Malcom. There was a box on the receipt that was to be checked if the person signing the receipt was acting as the addressee's agent.

Malcom did not check it. Ms. Freeman filed an affidavit of service on November 28, 2005. Dr. Liggett answered, expressly asserting the defenses of insufficiency of process and insufficiency of service of process as set out in Ark. R. Civ. P. 12(b)(4) and (5). He then proceeded with discovery, including interrogatories, requests for production, and correspondence regarding scheduling of depositions. On April 25, 2006, after Ms. Freeman's extension of time for service had expired, Dr. Liggett filed a motion to dismiss based on insufficient service. The trial court granted the motion in part by dismissing the complaint, but denied it in part by dismissing without prejudice pursuant to Ark. R. Civ. P. 4(i).

Appellant correctly states that the trial court had no authority to dismiss without prejudice because appellee had previously taken a nonsuit. The provision in Ark. R. Civ. P. 4(i) that dismissal shall be "without prejudice" for failure to obtain service upon a defendant within 120 days after filing the complaint is not applicable if a plaintiff had previously taken a nonsuit. *Bakker v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996). Instead, a dismissal for failure to serve a defendant shall be made with prejudice where the action has been previously dismissed. *Id*; Ark. R. Civ. P. 41(b); *see also Bodiford v. Bess*, 330 Ark. 713, 956 S.W.2d 861 (1997); *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003); *Henyan v. Peek*, 359 Ark. 486, 199 S.W.3d 51 (2004).

Nor is there any merit to Ms. Freeman's contention that Dr. Liggett waived defective service by engaging in discovery rather than immediately moving to dismiss. The determinative factor in such a case is whether the defendant seeks affirmative relief, *Farm*

Bureau Mutual Insurance Co. v. Campbell, 315 Ark. 136, 865 S.W.2d 643 (1993), and the supreme court has specifically held that a defendant does not waive the defense of defective service of process by proceeding with discovery procedures and amending its original response without reasserting its defense. *Id*. That is all that happened in this case. Although Ms. Freeman cites several foreign and federal cases that reached a different result, those cases involve situations where the defendant purposefully misled the plaintiff into believing proper service had been made until the statute of limitations expired. No such facts are present here. The restricted-delivery receipt plainly showed that service was not received by Dr. Liggett and that the person who signed the receipt was not Dr. Liggett's agent, yet Ms. Freeman filed an affidavit of service. Dr. Liggett's answer expressly asserted the defenses of insufficient process and insufficient service of process. Under these circumstances, Ms. Freeman could not reasonably have believed that proper service had been made simply because Dr. Liggett subsequently engaged in an activity specifically held to not waive the defense of defective service.

The dismissal in this case should have been granted with prejudice. As is our practice in such cases, we affirm the dismissal but modify to the extent that the dismissal is with prejudice. *Bakker v. Ralston*, *supra*.

Affirmed as modified.

GRIFFEN and MARSHALL, JJ., agree.