

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION IV

CA07-558

JANUARY 23, 2008

KEITH HAMAKER

APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. PTR-06-1787]

V.

MARTIN HAMAKER, LESTER V.
HAMAKER, LESTER V. HAMAKER
AND MURPHY A. HAMAKER
REVOCABLE TRUST

APPELLEES

HON. RICHARD N. MOORE, JR.,
CIRCUIT JUDGE

AFFIRMED IN PART; REVERSED IN
PART

Appellant Keith Hamaker appeals the circuit court's order dismissing his case without prejudice for failure to obtain service of process on defendants within the time allowed by Rule 4 of the Arkansas Rules of Civil Procedure. He argues four points on appeal: (1) the circuit court had no authority to dismiss this case for lack of service before 120 days from the date the petition was filed; (2) the trustee had no authority to file a motion to dismiss for failure to obtain service prior to the expiration of the 120-day period; (3) the trustee had no standing to represent the additional unserved parties; and (4) the circuit court had no authority to award attorney's fees. We reject appellant's arguments regarding the court's order of dismissal and affirm the order of the circuit court; however, we reverse the circuit court's award of attorney's fees.

Lester and Murphy Hamaker, husband and wife, created The Lester V. Hamaker and Murphy A. Hamaker Revocable Trust Agreement on November 4, 2003 (“the Trust”). The Hamakers had four children, whom they named as beneficiaries of the Trust in the event that both settlors died. Murphy Hamaker died on September 20, 2005. Upon her death, pursuant to the Trust, her son Martin Hamaker became the successor trustee.

This case began on October 16, 2006, when one of the children, Keith Hamaker, representing himself, filed a petition to appoint an independent trustee, alleging that Martin Hamaker, the Trustee, had committed various breaches of the Trust and had failed to report as required by Arkansas law. The Trustee filed a motion to dismiss the petition on October 31, 2006, alleging, among other things, insufficiency of process, insufficiency of service of process, and failure to join necessary parties. Appellant filed a first amended petition to appoint an independent trustee on December 4, 2006; the Trustee filed an amended motion to dismiss on December 12, 2006. On February 2, 2007, appellant filed a second amended petition to appoint an independent trustee.

On February 6, 2007, the circuit court held a hearing on the Trustee’s motion to dismiss. During the hearing, appellant admitted that none of his petitions had been properly served but claimed that he was in the process of serving all interested parties with the second amended petition. At the hearing, the circuit court indicated that there had been no proper service and that it was going to dismiss the petition. On February 14, 2007, the court entered an order dismissing appellant’s petitions for failure to obtain proper service of process as required by Rule 4 of the Arkansas Rules of Civil Procedure. The court also awarded fees

to the Trustee pursuant to Ark. Code Ann. § 16-22-309 (Repl. 1999) in the amount of \$1500. Upon appellant's request, the circuit court entered findings of fact and conclusions of law on April 24, 2007, concluding that it had dismissed appellant's petitions without prejudice for failure to properly obtain service of process. Appellant filed a timely notice of appeal.

Dismissal of Petition

Appellant's first point on appeal is that the circuit court had no authority to dismiss his petitions on February 6, 2007, because the 120-day period allowed by Rule 4 in which to serve the complaint had not yet expired. Rule 4 provides that if service is not made upon a defendant "within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative." Ark. R. Civ. P. 4(i). Appellant filed his petition on October 16, 2006. Therefore, he was required by Rule 4 to serve the petition by February 13, 2007.

The supreme court has consistently held that service requirements under this rule must be strictly construed and compliance with them must be exact. *Kangas v. Neely*, 346 Ark. 334, 336, 57 S.W.3d 694, 696 (2001). Thus, service of process under this rule must be accomplished within 120 days after the filing of the complaint unless the plaintiff has timely filed a motion to extend. *Id.* If service is not obtained within that time and no timely motion to extend is made, dismissal of the action is mandatory. *Id.*

Pursuant to Administrative Order 2(b)(2), an oral order announced from the bench does not become effective until reduced to writing and filed. *McGhee v. Arkansas Bd. of Collection Agencies*, 368 Ark. 60, ___ S.W.3d ___ (2006). While the hearing on this matter

occurred on February 6, the order dismissing this case was not filed until February 14, one day after the 120-day service period expired. Therefore, we need not address appellant's argument that the circuit court had no authority to dismiss the case before the 120-day period had expired; it did not.

Appellant's second point on appeal is that the Trustee had no authority to file a motion to dismiss for failure to obtain proper service before the 120-day period expired. First, appellant has cited no authority for this argument, and we will not address arguments that are unsupported by convincing authority. *See Shotzman v. Berumen*, 363 Ark. 215, 233, 213 S.W.3d 13, 23 (2005). Moreover, a court is required to dismiss a complaint, on its own initiative, when service has not been accomplished within 120 days of the filing of the complaint. Ark. R. Civ. P. 4(i). Thus, it is of no consequence when the Trustee's motion was filed.

Appellant also argues that the Trustee had no standing to represent the remaining beneficiaries and obtain a dismissal on their behalf. Once again, when service of process is not accomplished within 120 days after the complaint is filed and no timely motion to extend has been made, the court must dismiss the action. Ark. R. Civ. P. 4(i). It was not necessary for the additional parties to file any motions for the court to act. *Id.*

Attorney's Fees

Appellant also contends that the circuit court erred in awarding attorney's fees in this case under Ark. Code Ann. § 16-22-309 (Repl. 1999). We agree with appellant. Arkansas Code Annotated § 16-22-309 provides in pertinent part as follows:

(a)(1) In any civil action in which the court having jurisdiction finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee in an amount not to exceed five thousand dollars (\$5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party unless a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or the amended pleadings knew, or reasonably should have known, that he would not prevail.

(b) In order to find an action, claim, setoff, counterclaim, or defense to be lacking a justiciable issue of law or fact, the court must find that the action, claim, setoff, counterclaim, or defense was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the party or the party's attorney knew, or should have known, that the action, claim, setoff, counterclaim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

(d) On appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone.

The circuit court dismissed the petition for failure to properly obtain service of process as required by Ark. R. Civ. P. 4. It did not conduct a hearing on the merits of appellant's petitions, nor did it make any specific findings of fact or conclusions of law on the merits of appellant's claims. While the court did speak about some of the claims, it specifically indicated that it could not determine the merits because service had not been

properly accomplished. In its findings of fact and conclusions of law, entered on April 24, 2007, in response to appellant's request, the court did not mention the merits of any of appellant's claims but found only that the petition had not been properly served as required by Ark. R. Civ. P. 4.

Thus, we hold that it was error for the circuit court to award attorney's fees pursuant to Ark. Code Ann. § 16-22-309, which requires the circuit court to find that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney. Without a proper hearing on the merits of appellant's claims and findings by the circuit court, an award of fees is not proper under this statutory provision. Therefore, we reverse the award of attorney's fees.

Appellee's Request for Fees and Costs

Finally, pursuant to Rule 4-2(a)(8) of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas, the Trustee, the appellee in this case, has requested us to impose upon appellant the costs incurred by the Trustee in preparing the Supplemental Addendum. Rule 4-2(a)(8) provides that an appellee may provide a supplemental addendum if he considers appellant's addendum to be defective. The court may then, upon motion, impose or withhold costs, including attorney's fees, to compensate either party for the other party's noncompliance. However, the rule requires counsel to submit "a statement showing the cost of the supplemental abstract or Addendum and a certificate of counsel showing the amount of time that was devoted" to its preparation in order to recover those costs. Although

the Trustee stated in his brief that a statement of costs and certificate of counsel regarding time expended in preparation of the supplemental addendum was “filed separately herewith,” no such statement or certificate was provided. Therefore, we deny the Trustee’s request to award fees and costs.

Affirmed in part; reversed in part.

VAUGHT, J., agrees.

GLOVER, J., concurs.

GLOVER, J., concurring. Although I agree with the majority that appellant’s action must be dismissed for failure to obtain service of process within 120 days, the “gotcha” result here obtained concerns me. Appellee filed the motion to dismiss, challenging the sufficiency of service of process. The hearing on appellee’s motion to dismiss was held on the 112 day after appellant’s original petition was filed.

At the hearing, appellant did not bring to the trial court’s attention the fact that the 120-day period for service of process had not expired. Ark. R. Civ. P. 4(i). Though appearing *pro se*, appellant is charged with knowledge of the substance of the rule. Appellee, appearing through counsel, did not bring to the trial court’s attention during the hearing that appellant had eight days to complete service in compliance with the rule. On the facts presented, the trial court orally granted the dismissal at the hearing eight days before appellant’s time to get the parties served had expired. As the majority explains, the trial court’s order was not entered until the clerk marked it with the date and time and the word “filed.” Administrative Order (2)(b)(2). Of course, the order from the hearing granting

appellee's motion to dismiss was not filed until nine days later, on the 121 day after appellant had filed his original petition. Although there is nothing legally incorrect with this approach, it does leave this judge with the distinct impression that the notion of fair play was not engaged in this matter because appellant was *pro se* and did not know that he still had eight days after the trial court made its oral ruling to perfect service of process on the necessary parties. Eight days of attempted service of process by appellant were seemingly lost through appellant's ignorance of his procedural rights and the delay in the filing of the order. "Gotcha!"