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SUPREME COURT OF ARKANSAS

No. 10-762

Opinion Delivered March 3, 2011

CONRAY CARROLL
Appellant

v.

DAWN BAKER
Appellee

PRO SE MOTIONS FOR APPOINTMENT OF COUNSEL, EXTENSION OF TIME TO FILE BRIEF, AND TO COMPEL MORE DEFINITE STATEMENT [APPEAL FROM JEFFERSON COUNTY CIRCUIT COURT, CV 2010-5, HON. JODI RAINES DENNIS, JUDGE]

APPEAL DISMISSED; MOTIONS MOOT

PER CURIAM

Appellant Conray Carroll pleaded guilty to rape in 1997 in Pulaski County Circuit Court and was sentenced as a habitual offender to 720 months' incarceration in the Arkansas Department of Correction. In 2009, appellant filed in the trial court a pro se petition to correct sentence pursuant to Arkansas Code Annotated § 16-90-111 (Repl. 2006), which was denied. Appellant timely filed a notice of appeal, but he did not tender the record to this court within ninety days of the date of his notice of appeal as required by Arkansas Rule of Appellate Procedure–Criminal 4(b) (2009). Appellant then filed a motion for belated appeal, which we treated as a motion for rule on clerk. Because we determined that he could not prevail even if his appeal were allowed to proceed, we did not consider appellant's reasons for why he had failed to tender the record; rather, we dismissed the appeal and the motion for

rule on clerk was mooted. *Carroll v. State*, 2010 Ark. 33, ___ S.W.3d ___ (per curiam) (citing *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam)).

On January 7, 2010, appellant filed in Jefferson County Circuit Court a civil complaint seeking declaratory relief and punitive damages against Dawn Baker, a deputy clerk in the Pulaski County Circuit Clerk's office. Appellant alleged that Ms. Baker had violated his due-process rights by failing to complete the trial transcript until appellant paid certain fees, which prevented the record on appeal from being lodged with this court in a timely manner. Appellant filed a number of motions in this case, none of which appears to have been acted upon by the circuit court, but service was apparently never made on Ms. Baker. On May 13, 2010, 126 days after appellant's action was filed, the circuit court dismissed the case without prejudice pursuant to Arkansas Rule of Civil Procedure 4(i) (2010). Appellant timely filed his notice of appeal from the circuit court's order of dismissal.

Now before us in appellant's pending appeal are his pro se motions for appointment of counsel, extension of time to file his brief, and "to compel more definite statement pursuant to oaths of office (Title 28 U.S.C. 453) (and) motion for declaratory judgment in pursuant to Ar. [sic] R. Civ. P. Rule 57." We need not rule on those motions, however, because we find that a dismissal without prejudice under Rule of Civil Procedure 4(i) is not a final, appealable order within the meaning of Arkansas Rule of Appellate Procedure–Civil 2 (2010). Accordingly, we dismiss the appeal, and appellant's motions are moot.

With some exceptions, none of which is applicable in the instant case, our rules of appellate procedure allow for an appeal to be taken from a circuit court to this court only

where the order is a final judgment on the merits. *See* Ark. R. App. P.–Civ. 2(a)(1). We have held that, for an order to be final and appealable, it must terminate the action, end the litigation, and conclude the parties' rights to the matter in controversy. *Beverly Enterprises-Arkansas, Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000) (citing *Petrus v. Nature Conservancy*, 330 Ark. 722, 725, 957 S.W.2d 688, 689 (1997)). The order must be of such a nature as to not only decide the rights of the parties, but also put the court's directive into execution, ending the litigation or a separable part of it. *Petrus*, 330 Ark. at 725, 957 S.W.2d at 689 (citing *Doe v. Union Pac. R.R. Co.*, 323 Ark. 237, 914 S.W.2d 312 (1996)). The question of whether an order is final and subject to appeal is a jurisdictional question that the court will raise on its own. *Moses v. Hanna's Candle Co.*, 353 Ark. 101, 110 S.W.3d 725 (2003); *see Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008).

In the context of dismissal without prejudice when a plaintiff voluntarily nonsuits his claims under Rule of Civil Procedure 41(a), we have held that, because a party may refile his nonsuited claims, the order granting a motion to nonsuit is not a final, appealable order. *See, e.g.*, *Beverly Enterprises-Arkansas, Inc.*, 341 Ark. 1, 14 S.W.3d 487; *Bevans*, 373 Ark. 105, 281 S.W.3d 740.

Similarly, we have held that a summary judgment order was not a final, appealable order where the order did not dispose of the complaint against one of the defendants. *See Hodges v. Huckabee*, 333 Ark. 247, 968 S.W.2d 619 (1998). Perhaps most importantly, we have held that Rule of Civil Procedure 41(b) requires that a dismissal under Rule 4(i) for failure to serve a

defendant subsequent to a voluntary nonsuit of those same claims operates as an adjudication on the merits. *See Jordan v. Circuit Court of Lee County*, 366 Ark. 326, 235 S.W.3d 487 (2006).

Rule 4(i) is mandatory; where service is not made on a defendant within 120 days of the filing of the complaint, a circuit court must dismiss the action without prejudice to refiling those claims. *See Jordan*, 366 Ark. 326, 235 S.W.3d 487. Because a plaintiff who has his case dismissed without prejudice under Rule 4(i) may refile those claims, his position after the dismissal is no different than that of a plaintiff who voluntarily nonsuits his claims. It therefore logically follows from our rationale in *Jordan* that a first dismissal under Rule 4(i) does not function as an adjudication on the merits, and the order dismissing a plaintiff's claims without prejudice under 4(i) would not be a final appealable order based on a logical extension of our reasoning in *Beverly Enterprises-Arkansas, Inc.*

Because the instant appeal was not taken from a final, appealable order, this court lacks the jurisdiction to hear the appeal. *See, e.g.*, *Arkansas Best Corp. v. General Elec. Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994) (citing *Widmer v. Touhey*, 297 Ark. 85, 759 S.W.2d 562 (1988)). The appeal is therefore dismissed, and appellant's pending motions are accordingly moot.

Appeal dismissed; motions moot.