

Rel: October 27, 2023

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2022-0982

**Markisha Iyana Kennedy, individually and as guardian and
next friend of S.K., B.T., and R.B., minor children**

v.

Jasmine Lashay Jessie

**Appeal from Jefferson Circuit Court
(CV-21-902511)**

STEWART, Justice.

Markisha Iyana Kennedy, individually and as guardian and next friend of her three minor children, appeals from a judgment of the Jefferson Circuit Court ("the trial court") dismissing her complaint against Jasmine Lashay Jessie on the basis that it is barred by the doctrine of res judicata. For the following reasons, we affirm the trial court's judgment.

Facts and Procedural History

This case arises from a December 2019 automobile collision involving Kennedy and Jessie; at the time of the collision, Kennedy's three minor children were passengers in her vehicle. In February 2020, Kennedy, individually and as guardian and next friend of her three minor children, sued Jessie in the trial court ("the first action"), seeking to recover damages for injuries she and her children allegedly sustained in the collision with Jessie.

On May 9, 2020, following several unsuccessful attempts to serve Jessie with the summons and the complaint, a process server delivered a copy of the summons and the complaint to Jessie's mother at her mother's residence. Although Kennedy filed a return-on-service form and contended that service of process had been made in accordance with Rule

4(c)(1), Ala. R. Civ. P. (providing that an individual may be properly served by "leaving a copy of the summons and the complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein"), Jessie contested the sufficiency of the purported service of process. Specifically, on June 8, 2020, counsel for Jessie made a limited appearance and moved to dismiss the first action, specifically challenging the sufficiency of the purported service of process and asserting that Kennedy had filed a false return-on-service form. Attached to that motion to dismiss was Jessie's sworn affidavit stating that she did not reside at her mother's residence. On June 26, 2020, the trial court denied Jessie's motion to dismiss but quashed the service of process on Jessie and extended the time for Kennedy to perfect service of process until August 14, 2020.

Kennedy did not perfect service of process on Jessie until July 2, 2021. On August 2, 2021, counsel for Jessie made a second limited appearance and moved to dismiss the first action for insufficient service of process, for failure to prosecute, and for "failure to follow a court order." In her motion, Jessie argued that Kennedy's delay in perfecting service of process constituted a "failure to prosecute" and requested that the

action be dismissed "with prejudice." On August 30, 2021, the trial court entered an order finding that Kennedy had not shown good cause as to why she had failed to perfect service of process on Jessie before the August 14, 2020, deadline, and it dismissed the first action for want of prosecution. The order stated, in pertinent part:

"ORDER DISMISSING CASE FOR WANT OF PROSECUTION

"The ... court's order of June 26, 2020[,] specifically extended [the] time for [Kennedy] to perfect service on [Jessie] to ... August 14, 2020. The court file does not reflect any activity by [Kennedy] to perfect service on [Jessie] until 3/2/2021, approximately seven (7) months after the court's deadline of August 14, 2020, and approximately thirteen (13) months after the complaint was filed. The Court finds that [Kennedy] did not show good cause as to why the Court's order of 6/26/2020, extending time for [Kennedy] to perfect service on [Jessie] to August 14, 2020, should not be followed.

"It is hereby ordered that the ... case is dismissed for want of prosecution."

The trial court's order was silent on whether the dismissal was with or without prejudice. Kennedy did not appeal the trial court's dismissal of the first action.

In September 2021, Kennedy, individually and as guardian and next friend of her three minor children, commenced a second lawsuit against Jessie in the trial court ("the second action"), asserting the same

claims that she had previously asserted against Jessie in first action. After unsuccessfully attempting to serve the summons and the complaint on Jessie, Kennedy moved for service by publication pursuant to Rule 4.3, Ala. R. Civ. P. The trial court concluded that, based on the affidavits and evidence submitted with Kennedy's motion to serve Jessie by publication, Jessie had been "actively avoiding service of process." Accordingly, the trial court granted the motion, and service was perfected in accordance with Rule 4.3 on June 27, 2022. That same day, counsel for Jessie made a limited appearance and moved to dismiss the second action on res judicata grounds, arguing that the trial court's prior dismissal of the first action barred the claims in the second action. Kennedy opposed Jessie's motion to dismiss, arguing that, because the first action had been dismissed for reasons related to service of process, the trial court's dismissal of the first action was without prejudice and did not operate as a final adjudication on the merits for res judicata purposes.

On August 4, 2022, the trial court dismissed the second action for lack of subject-matter jurisdiction after concluding that, because the order dismissing the first action failed to specify whether the dismissal was with or without prejudice, that dismissal operated as an adjudication

on the merits pursuant to Rule 41(b), Ala. R. Civ. P. On September 6, 2022, Kennedy moved the trial court, under Rule 59(e), Ala. R. Civ. P., to alter, amend, or vacate its judgment dismissing the second action. The trial court denied the Rule 59(e) motion on September 15, 2022, and Kennedy timely appealed from the judgment.

Standard of Review

Whether the doctrine of res judicata applies is a question of law. Walker v. Blackwell, 800 So. 2d 582, 587 (Ala. 2001). "[O]n appeal, the ruling on a question of law carries no presumption of correctness, and this Court's review is de novo." Ex parte Graham, 702 So. 2d 1215, 1221 (Ala. 1997). Thus, we review de novo the trial court's application of the doctrine of res judicata in this case.

Analysis

The elements necessary to apply the doctrine of res judicata are "(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions." Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998). Here, elements 2 through 4 are undisputedly present. Thus, the only issue in the appeal of this case

is whether the order dismissing the first action constituted a judgment on the merits such that the second action is barred by the doctrine of res judicata.

Under Rule 4(b), Ala. R. Civ. P., an Alabama court may dismiss an action without prejudice if service of the summons and the complaint is not made upon a defendant within 120 days after the filing of the complaint or may, upon a showing of good cause, extend the 120-day period for perfecting service of process for an appropriate period. Before the adoption of Rule 4(b), however, a plaintiff's failure to timely serve a defendant was evaluated under Rule 41(b), Ala. R. Civ. P., to determine whether there had been a "failure to prosecute." Rule 41(b) provides that a dismissal for failure to prosecute, unless otherwise specified, generally "operates as an adjudication on the merits." Furthermore, courts have recognized that, even after the adoption of Rule 4(b), under certain circumstances, the failure to timely serve a defendant may result in a dismissal for failure to prosecute under Rule 41(b). Our Court of Civil Appeals has summarized the law on this issue as follows:

"Before the adoption of our current Rule 4(b), [Ala. R. Civ. P.], some Alabama cases evaluated a dismissal for insufficient service of process under Rule 41(b), Ala. R. Civ. P., which provides for the involuntary dismissal of an action

upon 'failure of the plaintiff to prosecute or to comply with [the Alabama Rules of Civil Procedure] or any order of [the] court.' See State v. Horton, 373 So. 2d 1096, 1097 (Ala. 1979) (stating that '[f]ailure to serve process within a reasonable time may amount to a failure to prosecute' and may warrant a dismissal under Rule 41(b)); Crosby v. Avon Prods., Inc., 474 So. 2d 642, 644 (Ala. 1985) (stating that failure to attempt to perfect service within a reasonable time may amount to failure to prosecute an action, warranting a dismissal); Hill v. Hawkins, 582 So. 2d 1105, 1106 (Ala. 1991) (same); Coulter v. Stewart, 726 So. 2d 726, 728 (Ala. Civ. App. 1999) (same); and Reynolds v. Reynolds, 491 So. 2d 968 (Ala. Civ. App. 1986) (affirming a judgment dismissing an action more than nine months after the complaint had been filed when the plaintiff had failed to serve the defendant).

""[A] dismissal with prejudice [under Rule 41(b) for lack of prosecution] is a harsh sanction and should be used only in extreme circumstances....

""In Alabama and many federal courts, the interest in disposing of the litigation on the merits is overcome and a dismissal may be granted when there is a clear record of delay, willful default or contumacious conduct by the plaintiff.""

Burdeshaw v. White, 585 So. 2d 842, 847 (Ala. 1991) (quoting Selby v. Money, 403 So. 2d 218, 220 (Ala. 1981)).

"With the adoption of the current Rule 4(b), if a plaintiff fails to perfect service within 120 days, a trial court may now dismiss an action without prejudice pursuant to that rule. However, in extreme circumstances, a trial court, pursuant to Rule 41(b), may dismiss with prejudice an action for failure to effect service after the 120-day window prescribed by Rule 4(b) has expired. See O'Rourke Bros. v. Nesbitt Burns, Inc., 201 F.3d 948, 953 (7th Cir. 2000) ("If the delay [in obtaining service] has been so long that it signifies failure to prosecute

-- or if the delay entails disobedience to an order to the court -- then dismissal may be with prejudice under Rule 41(b)." (quoting Powell v. Starwalt, 866 F.2d 964, 966 (7th Cir. 1989)); 4B C. Wright and A. Miller, Federal Practice and Procedure § 1137 (3d ed. 2002) (stating that, when service has not been perfected within the 120-day period and a district court has granted multiple extensions, 'a district court may well have to decide between dismissing the plaintiff's action with prejudice under Federal Rule 41(b) and dismissing it without prejudice under Federal Rule 4(m)'); and Wagner v. Ashcroft, 214 F.R.D. 78 (N.D.N.Y. 2003) (evaluating under both Rule 4(m) and Rule 41(b) whether an action should be dismissed when a greater than three-year period elapsed without the plaintiff perfecting service)."

State Farm Fire & Cas. Co. v. Smith, 39 So. 3d 1172, 1175-76 (Ala. Civ. App. 2009) (emphasis added; footnote omitted). See also Voltz v. Dyess, 148 So. 3d 425, 426 (Ala. 2014) (quoting Crosby v. Avon Prods., Inc., 474 So. 2d 642, 644 (Ala. 1985)) ("Failure of a plaintiff to attempt to obtain service over the defendant within a reasonable time may amount to a failure to prosecute the action, warranting a dismissal of the case.')."

Here, the trial court dismissed the first action for "want of prosecution" without specifying that the dismissal was without prejudice. Thus, at first blush, it appears that the text of Rule 41(b) explicitly requires us to treat that dismissal "[f]or failure ... to prosecute" as "an adjudication upon the merits." Not so fast, contends Kennedy. Rule 41(b)

provides an exception for dismissals made for "lack of jurisdiction." Rule 41(b) provides:

"(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, [Ala. R. Civ. P.,] operates as an adjudication upon the merits."

(Emphasis added.) Although the dismissal of the first action was not for lack of subject-matter or personal jurisdiction, Kennedy argues that the "lack of jurisdiction" exception in Rule 41(b) is due a broad interpretation and is applicable to the dismissal of the first action.

In support of her argument, Kennedy cites Costello v. United States, 365 U.S. 265 (1961). In Costello, a denaturalization proceeding against a defendant was dismissed because the government had failed to file a statutorily mandated affidavit of good cause with the complaint. The government then commenced a new action, with the proper affidavit, which the defendant, citing Rule 41(b), Fed. R. Civ. P., moved to dismiss on res judicata grounds. On appeal, the United States Supreme Court

held that the dismissal for failing to file the necessary affidavit fell within the "lack of jurisdiction" exception to federal Rule 41(b).

"We hold that a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b). ... It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. Failure to file the affidavit of good cause in a denaturalization proceeding falls within this category."

365 U.S. at 285 (emphasis added). Further, the Costello Court reasoned that federal Rule 41(b) did not intend to change the common-law principle that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." Id. The Court stated that, whether a dismissal reached the merits of a claim could be judged by whether the defendant was "put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits." Id. at 287.

Furthermore, in Ex parte Capstone Development Corp., 779 So. 2d 1216 (Ala. 2000), this Court, in construing Alabama's Rule 41(b), adopted

Costello's interpretation of the "lack of jurisdiction" exception.¹ In Capstone, a shareholder-derivative action against two corporations was dismissed because the shareholder plaintiff had failed to make a necessary "demand for action" before filing the complaint. The dismissal order did not specify whether it was made with or without prejudice. The plaintiff commenced a second lawsuit, and the corporations moved to dismiss on res judicata grounds, arguing that, under Rule 41(b), Ala. R. Civ. P., the dismissal of the first action had been on the merits. The trial court denied the motion to dismiss, and the corporations petitioned this Court for a writ of mandamus. In denying the writ, this Court, quoting Costello, held that a dismissal based on a preaction failure to comply with a rule fell within the "lack of jurisdiction" exception to Rule 41(b) and, thus, was not a decision on the merits.

Turning back to this case, this Court, guided by Costello and Capstone, must decide if the trial court's dismissal of the first action was

¹Because Rule 41 of the Alabama Rules of Civil Procedure is "substantially the same as the corresponding federal rule," Committee Comments on 1973 Adoption of Rule 41, Ala. R. Civ. P., federal cases construing Rule 41 of the Federal Rules of Civil Procedure are persuasive authority in construing Rule 41 of the Alabama Rules of Civil Procedure. See Ex parte Novartis Pharms. Corp., 975 So. 2d 297, 300 n.2 (Ala. 2007).

on the merits, i.e., whether Kennedy failed "'to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.'" Capstone, 779 So. 2d at 1219 (quoting Costello, 365 U.S. at 285) (emphasis omitted). Significantly, the expressed basis for the trial court's dismissal of the first action was not Kennedy's failure to perfect service of process on Jessie -- indeed, service of process on Jessie was ultimately made in the first action. Rather, the trial court's dismissal in the first action was because service of process was made on Jessie after the extended service deadline set by the court. We note that the language of Rule 4 does not state or imply that the failure to perfect service within the time specified by the court affects the validity of service perfected beyond that period or deprives a court of personal jurisdiction over the defendant.² Thus, Rule 4 does not reflect

²Rule 4(b) does not (1) provide that a summons expires if not served within the specified time directed by the court or (2) restrict the court's ability to exercise jurisdiction over a defendant who has been served outside the specified period. Furthermore, although Rules 4(i)(1)(D), 4(i)(2)(D), and 4(i)(3)(D), Ala. R. Civ. P., require that the unserved summons be returned to the clerk of court if not served within 60 days of issuance, those rules expressly provide that the failure to make service within that 60-day period does "not affect the validity of service perfected beyond that period." See also Effs v. City of Miami, No. 21-11672, Dec. 27, 2021, (11th Cir. 2021) (not reported in Federal Supplement) (concluding that a plaintiff's failure to perfect service on a defendant by

that the effectuation of service within a specified period is a "precondition requisite to the [c]ourt's going forward to determine the merits of [the plaintiff's] substantive claim" that, if not satisfied, deprives the trial court of jurisdiction even if service of process is actually subsequently perfected. Costello, 365 U.S. at 285. In other words, because Kennedy had actually served Jessie, the trial court could have gone forward to consider the substantive merits of Kennedy's claims in the first action.

Nevertheless, the trial court in the first action concluded that the lengthy delay between the court-ordered extended deadline for perfecting service of process on Jessie and the date that service on Jessie was actually perfected constituted a failure to prosecute that warranted dismissal of the first action. The dismissal order further suggested that the trial court considered Kennedy's delay in perfecting service on Jessie as a failure to comply with its earlier order extending the deadline for service. The failure to prosecute an action or to comply with an order are grounds for dismissal that typically do not relate to the failure of a "precondition requisite to the [c]ourt's going forward to determine the

the court-ordered deadline "was not a defect in the process that deprived the ... court of jurisdiction").

merits of [the plaintiff's] substantive claim." Costello, 365 U.S. at 285.

As the Costello Court explained:

"All of the dismissals enumerated in Rule 41(b) which operate as adjudications on the merits -- failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law -- primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, bar a subsequent action."

365 U.S. at 286. Accordingly, a dismissal for failure to prosecute or for failure to follow a court's order would not typically be considered a dismissal for "lack of jurisdiction" under Rule 41(b).

Moreover, Kennedy has not directed this Court to any authority in which a dismissal for failure to prosecute has been construed as a dismissal for "lack of jurisdiction" under Rule 41(b). To the contrary, Alabama appellate courts have recognized that "[t]he failure of a plaintiff to attempt to serve the defendant within a reasonable time may amount to a failure to prosecute the action, warranting a dismissal of the case," Hill v. Hawkins, 582 So. 2d 1105, 1106 (Ala. 1991), and, "in extreme circumstances, a trial court, pursuant to Rule 41(b), may dismiss with

prejudice an action for failure to effect service after the 120-day window prescribed by Rule 4(b) has expired." State Farm, 39 So. 3d at 1176. Other courts have also concluded that a court may dismiss an action with prejudice for failure to prosecute under Federal Rule 41(b) "[i]f the delay [in perfecting service] has been so long that it signifies failure to prosecute ... or ... entails disobedience to an order to the court." Powell v. Starwalt, 866 F.2d 964, 966 (7th Cir. 1989); see O'Rourke Bros. Inc. v. Nesbitt Burns, Inc., 201 F.3d 948, 953 (7th Cir. 2000) ("Once an extension of time has been granted, 'the reasons for favoring a Rule 4([m]) dismissal over a Rule 41(b) dismissal with prejudice no longer are valid.'")(citation omitted)); see also 4B Charles Alan Wright et al., Federal Practice and Procedure § 1137 (4th ed. 2015) (stating that, when a plaintiff has failed to perfect service on a defendant within the time extension granted by a court, a court "may well have to decide between dismissing the plaintiff's action with prejudice under Federal Rule 41(b) and dismissing it without prejudice under Federal Rule 4(m)"). Thus, although a Rule 41(b) dismissal is "a harsh sanction and should be used only in extreme circumstances," Selby v. Money, 403 So. 2d 218, 220 (Ala. 1981), Rule

41(b) authorizes a court to dismiss a plaintiff's action under that rule when a delay in service of process amounts to a failure to prosecute.

Finally, we emphasize that our decision today should not be understood as approving of the trial court's dismissal of the first action with prejudice. Kennedy, however, did not appeal from the dismissal order in the first action; nor did she seek postjudgment relief.³ Thus, that order became final for res judicata purposes and the correctness of that order is not before this Court. See Chapman Nursing Home, Inc. v. McDonald, 985 So. 2d 914, 921 (Ala. 2007); see also Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong").

Conclusion

³That the dismissal order in the first action constituted a final judgment should not have come as a surprise to Kennedy. Jessie's motion to dismiss the first action expressly requested that the first action be dismissed with prejudice for failure to prosecute under Rule 41(b) and set forth extensive legal arguments as to why a "with prejudice" dismissal was proper under the circumstances. The trial court's order suggested that it found those arguments persuasive, and Rule 41(b) provides that, unless otherwise specified, a dismissal for failure to prosecute operates as an adjudication upon the merits.

The order in the first action dismissed Kennedy's case for want of prosecution under Rule 41(b). As explained above, because that dismissal order does not fall within the "lack of jurisdiction" exception of Rule 41(b), the order operated as an adjudication on the merits. Accordingly, the trial court did not err in dismissing the second action on the basis that it is barred by the doctrine of res judicata, and we affirm the trial court's judgment.

AFFIRMED.

Parker, C.J., and Wise and Cook, JJ., concur.

Sellers, J., concurs in the result.