

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

KENNETH WAYNE REED,) 1 CA-CV 11-0561
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA ATTORNEY GENERAL'S OFFICE,) Rule 28, Arizona Rules of
et al,) Civil Appellate Procedure)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV201001365

The Honorable Mark W. Reeves, Judge

AFFIRMED

Kenneth W. Reed ADOC 108264
In Propria Persona

San Luis

Thomas C. Horne, Attorney General
By Wanda E. Hofmann, Assistant Attorney General
Attorneys for State Defendants/Appellees

Phoenix
Tucson

K E S S L E R, Judge

¶1 Kenneth Wayne Reed ("Reed") appeals from an order denying his request to compel discovery and to authorize service of process and waive the corresponding fees, precluding him from

pursuing claims against two unserved defendants. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

¶2 Reed is an inmate in the custody of the Arizona Department of Corrections (the "ADOC"). This action arises out of his unsuccessful federal habeas corpus lawsuit against former ADOC Director Dora B. Schriro ("Schriro") in 2004. See *Reed v. Schriro*, Cause No. CV-04-02755-PHX-JAT. Philip Seplow ("Seplow") represented Reed during that litigation, and former Arizona Attorney General Terry Goddard ("Goddard") and Assistant Attorney General Jim D. Nielsen ("Nielsen") represented Schriro. Reed's habeas case was dismissed and judgment was entered in Schriro's favor in February, 2007.

¶3 In October 2010, Reed filed this lawsuit asserting 42 U.S.C. § 1983 claims for damages arising out of the alleged mishandling of his habeas case naming Nielsen, Goddard, the Office of the Attorney General, Schriro, and Seplow as defendants. According to Reed, the defendants violated his due process rights, committed fraud, professional negligence, and constitutional tort, and conspired to deny his civil rights.

¶4 Reed filed the complaint in Yuma County Superior Court on October 26, 2010.¹ Goddard, Nielsen, and the Attorney General's Office waived service on February 7, 2011, and entered appearances. The 120-day period for service expired on February 23, 2011. See Ariz. R. Civ. P. 4(i). Reed never succeeded in serving Seplow and Schriro.

¶5 On February 28, 2011, Reed executed two affidavits averring that he had unsuccessfully attempted to obtain Seplow's voluntary acceptance of service. Reed filed at least one of these affidavits with the Yuma County Superior Court by March 1, 2011, along with a motion to direct service by the Maricopa County Sheriff and waive costs.² Meanwhile, Reed claimed to have mailed an interrogatory to Goddard on December 8, 2010 requesting Schriro's out-of-state address. On March 4, 2011,

¹ Reed dated the complaint October 18, 2010. However, Reed stated in his March 4, 2011 motion to extend time for service that he submitted his complaint to prison authorities on October 26, 2010. The superior court did not file the complaint until November 8, 2010. Both Reed, in his March 2011 motion, and Appellees, in their answering brief, claim the complaint should be deemed as filed on October 26, 2010 pursuant to the "prison mailbox rule." See *Mayer v. State*, 184 Ariz. 242, 243-44, 908 P.2d 56, 57-58 (App. 1995) (holding "a notice of appeal by a pro se prisoner is deemed filed when it is properly addressed and delivered to prison authorities"). Accordingly, we consider Reed's complaint and his other motions as filed on the dates they were properly submitted to prison authorities.

² The superior court had previously rejected Reed's application for deferral of fees and costs, including fees for service of process, based upon inadequate documentation. It ordered the ADOC to withhold funds from Reed's prison account to cover the filing fee.

Reed moved for an additional sixty days to complete service upon Schriro and Seplow.

¶6 Goddard never responded to the interrogatory, and in February 2011, he joined Nielsen and the Attorney General's Office in moving to dismiss Reed's complaint. On April 25, 2011, Goddard, Nielsen, and the Attorney General's Office filed a motion to stay discovery pending their motion to dismiss. Reed responded to the motion to dismiss, and on April 28, 2011, he filed a motion to compel Goddard to answer the interrogatory.

¶7 On May 2, 2011, the superior court granted the defendants' motion to dismiss "with prejudice as to all claims against all of the named Arizona Defendants in the Complaint" without addressing Reed's pending motions to compel discovery and to waive costs and order service of process to Seplow. Reed then wrote an ex parte letter to the presiding judge of the Yuma County Superior Court regarding the court's failure to rule on his motions. On June 28, 2011, the superior court entered a signed order denying any and all of Reed's pending motions:

IT IS FURTHER ORDERED denying any and all of Plaintiff's Motions, including deferring costs and authorizing and directing the Sheriff of Maricopa County to serve process on Plaintiff's behalf and Enlargement of Time to accomplish service attendant thereto because the matter is deemed moot based on the Court's Order dated May 2, 2011, dismissing the matter with prejudice as set forth herein.

Reed timely appeals from this order.³ We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2011).

DISCUSSION

I. Reed's Application for Deferral of Costs and Request for Service of Process

¶8 Reed claims that the superior court erred in denying his request to authorize service of process upon Seplow and to waive or defer the corresponding fees. We consider Reed's arguments concerning the refusal to waive or defer his filing fees under A.R.S. § 12-302 (Supp. 2011). With some exceptions, "an inmate who is confined to a correctional facility operated by the state department of corrections and who initiates a civil action or proceeding" is "responsible for the full payment of actual court fees and costs." A.R.S. § 12-302(E); *see generally Ford v. State*, 194 Ariz. 197, 200, ¶ 11, 979 P.2d 10, 13 (App. 1999). Under A.R.S. § 12-302(H), certain "fees and costs may be deferred or waived," including:

5. Sheriff, marshal, constable and law enforcement fees for service of process if . . . :

(a) The applicant established by affidavit that the applicant has attempted

³ Reed does not challenge the court's May 2, 2011 order dismissal of his complaint. On appeal, Reed challenges only the court's July 28, 2011 order, which he claims prevented him from fully and fairly adjudicating all of his claims.

without success to obtain voluntary acceptance of service of process.

We review the superior court's decision to require fees for abuse of discretion. See *Tripati v. Tucker*, 222 Ariz. 372, 375, ¶ 11, 214 P.3d 1013, 1016 (App. 2009).

¶9 Pursuant to A.R.S. § 12-302(H)(5)(a), Reed had the burden to prove by affidavit that he had attempted without success to obtain Seplow's voluntary acceptance of service of process. The record reflects that Reed did not execute, let alone file, affidavits establishing his inability to obtain voluntary acceptance of service until February 28, 2011.⁴ Furthermore, he waited until March 4, 2011 to file his application for waiver of fees, his motion for order authorizing service, and his motion to enlarge time to accomplish service. By that time, the 120-day deadline for service had expired. See Ariz. R. Civ. P. 4(i). In light of this record, we hold that the superior court did not abuse its discretion in denying Reed's requests to waive or defer these costs and to direct service by the Maricopa County Sheriff.

¶10 We likewise reject Reed's argument that the superior court denied his rights to due process and to equal protection. See *Beck v. Symington*, 972 F. Supp. 532, 536 (D. Ariz. 1997).

⁴ Reed's November 8, 2010 application for deferral of court fees and costs did not allege an inability to obtain voluntary acceptance.

In *Beck*, the District Court held Arizona's statutes requiring inmates to pay court costs did not burden inmates' access to the courts and 1) are rationally related to the legislature's desire to limit frivolous prisoner lawsuits, 2) do not violate fundamental rights, and 3) do not single out a suspect class for disparate treatment. *Id.*

II. Reed's Motion to Compel Discovery

¶11 Reed argues that the court's refusal to compel Goddard to comply with his discovery request denied him the opportunity to petition the court for redress and of his right to due process. Reed claims that because prisoners do not have access to the Internet, his only source of information regarding the whereabouts of Schriro was from her co-defendant, Goddard, through discovery. We review a court's ruling on a discovery motion for an abuse of discretion. *Brown v. Superior Court*, 137 Ariz. 327, 331-32, 670 P.2d 725, 729-30 (1983). See also *State ex rel. Babbitt v. Arnold*, 26 Ariz. App. 333, 334, 548 P.2d 426, 427 (1976) (holding "[t]he trial court is vested with wide discretion concerning discovery").

¶12 We find no abuse of discretion in denying Reed's motion to compel discovery because requiring Goddard to comply would have been futile. Reed did not file his motion to compel discovery until April 22, 2011, two months after the deadline for service on Shriro. Thus, even if the court had granted

Reed's motion and compelled Goddard to provide Shriro's address to Reed, the time for service would have already expired.

CONCLUSION

¶13 For the foregoing reasons, we affirm the court's July 28, 2011 ruling denying Reed's motion to compel and motion to authorize service and waive fees.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

ANN A. SCOTT TIMMER, Presiding Judge

/S/

PATRICIA K. NORRIS, Judge