

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



DIVISION ONE
FILED: 06/20/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EDWARD GEORGE GOLDWATER,) 1 CA-CV 12-0594
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
BRAD L. HAYMAN,) - Rule 28, Arizona
) Rules of Civil
Defendant/Appellee.) Appellate Procedure)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-070096

The Honorable Eileen S. Willett, Judge

VACATED AND REMANDED

Edward G. Goldwater
In Propria Persona

Buckeye

N O R R I S, Judge

¶1 On appeal, Plaintiff/Appellant Edward George Goldwater argues the superior court should not have dismissed his complaint against Defendant/Appellee Brad L. Hayman with prejudice. For the reasons discussed below, we agree, and therefore vacate the superior court's order dismissing

Goldwater's complaint and remand for further proceedings consistent with this decision.

¶12 In Maricopa County cause number CV2008-014481, Goldwater sued Hayman and alleged Hayman held "several thousand dollars of [his] money" and refused to transmit these funds to a law firm to prepare and file a brief to the United States Supreme Court on Goldwater's behalf ("first case").¹ After arbitration, Goldwater obtained a judgment against Hayman for \$3,208.30.

¶13 Subsequently, in Maricopa County cause number CV2011-070096, Goldwater sued Hayman again ("second case"). In his complaint, he alleged, in part, Hayman had not paid the judgment obtained in the first case. Goldwater also accused Hayman of "throw[ing] away all of [his] mail" and alleged he had acted unprofessionally as a licensed podiatrist in violation of various Arizona statutes. Although served with a summons and

¹We take judicial notice of the superior court's record in CV2008-014481. *In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000) (appellate court may judicially notice anything superior court may judicially notice) (citation omitted).

copy of Goldwater's complaint, Hayman "failed to plead or otherwise defend." Ariz. R. Civ. P. 55(a).²

¶14 Through multiple filings, Goldwater then requested the superior court to enter a judgment against Hayman. Instead, the superior court sua sponte dismissed Goldwater's second case with prejudice. Applying the doctrine of res judicata, it found there was a final judgment on the merits in the first case, and the first and second case reflected "a common identity of the parties, the capacity in which they appeared, the subject matter, and cause of action." Accordingly, the court held "the doctrine of res judicata bar[red] a second suit based on the same cause of action." Although the court did not reference Rule 12(b)(6) of the Arizona Rules of Civil Procedure, it implicitly relied on that rule in dismissing Goldwater's complaint in the second case. The court further noted Goldwater's "cause of action, if any, lies in execution upon the judgment filed [in the first case]."

¶15 The superior court should not have dismissed Goldwater's complaint, however, without following the procedural

²Hayman did not file an answering brief. Although we could regard his failure to do so as a confession of error and reverse the superior court's order, see Rule 15(c) of the Arizona Rules of Civil Appellate Procedure, in our discretion, we decline to do so. *Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994) (confession of reversible error doctrine is discretionary).

steps outlined in *Acker v. CSO Chevira*, 188 Ariz. 252, 934 P.2d 816 (App. 1997). In *Acker*, we discussed whether a superior court could sua sponte dismiss a complaint under Rule 12(b)(6). After noting dismissal of a complaint for failure to state a claim upon which relief can be granted is discouraged, and an opportunity should be given to amend a complaint if an amendment will cure its defects, we held, nevertheless, that a court could dismiss a complaint on its own motion for failure to state a claim. *Id.* at 255-56, 934 P.2d at 819-20. But, we also held that before doing so it should, as relevant here, notify the plaintiff of its proposed dismissal, afford the plaintiff an opportunity to submit written argument in opposition, provide the plaintiff with the reasons for the dismissal, and give the plaintiff an opportunity to amend, unless the complaint is clearly deficient. *Id.* at 256, 934 P.3d at 820 (citation omitted).

¶16 Here, the superior court did not implement any of these procedures before it dismissed Goldwater's complaint in the second case.³ Additionally, in so far as Goldwater was seeking to enforce the judgment he obtained against Hayman in

³We note, consistent with *Acker's* procedural requirements, Rule 56 of the Arizona Rules of Civil Procedure has been amended effective January 1, 2013 and now authorizes the superior court to grant summary judgment for a nonmovant after giving notice and a reasonable time to respond. Ariz. R. Civ. P. 56(h).

