IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

DAVID EASTEP, *Plaintiff/Appellant*,

v.

GOODWILL CENTRAL OF AZ, INC., et al., *Defendants/Appellees*.

No. 1 CA-CV 15-0146
FILED 6-21-2016

Appeal from the Superior Court in Maricopa County
No. CV2014-010505
The Honorable Christopher T. Whitten, Judge

AFFIRMED

COUNSEL

Law Offices of Earle & Associates, Sedona
By Robert L. Earle
Counsel for Plaintiff/Appellant

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Phoenix
By Nonnie L. Shivers, Meaghan K. Kramer
*Counsel for Defendants/Appellee*s

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Maurice Portley and Judge John C. Gemmill joined.

T H U M M A, Judge:

¶1 In this appeal, plaintiff David Eastep challenges an order granting, as unopposed, a motion to dismiss his claims against defendants Goodwill Central of Arizona, Eric Eaker and Jessica Kalmick (Defendants). Eastep also challenges an order denying his subsequent motion to vacate, to reconsider or for new trial and a motion to amend. Because Eastep has shown no error, the orders are affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Eastep, who worked for Goodwill as an employee for nearly six years, was terminated in January 2014. In August 2014, Eastep filed this case alleging six counts against Defendants: a violation of Arizona Revised Statutes (A.R.S.) section 23-1501 (2016)[2] (claiming retaliatory discharge); defamation; intentional infliction of emotional distress; breach of contract; common law fraud and inducement of breach of contract.

¶3 On September 17, 2014, Defendants filed a motion to dismiss all counts for failure to state a claim upon which relief could be granted and, for the statutory claim, that Eastep failed to exhaust his administrative remedies. Eastep filed no response to the motion to dismiss. Nor did Eastep seek leave for additional time to file a response, although the parties did discuss a proposed amended complaint.

¶4 On November 10, 2014, nearly 60 days after Defendants moved to dismiss, the superior court granted the motion, stating "The Court has Defendant[s'] Motion to Dismiss filed September 17, 2014. No

---

[1] In reviewing a motion to dismiss, this court assumes as true the facts in the complaint and views them in the light most favorable to the plaintiff. *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 552 (App. 1995).

[2] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

response has been filed. Good cause appearing, IT IS ORDERED granting Defendant[s'] Motion to Dismiss filed September 17, 2014."

¶5 On November 18, 2014, Eastep filed a "motion to vacate dismissal, or alternatively motion to reconsider or for new trial," citing Ariz. R. Civ. P. 59 and 60, that attached a "motion for leave to file first amended complaint," citing Ariz. R. Civ. P. 15(a), and a redlined first amended complaint. After full briefing, the court denied the motions. In doing so, the court noted Eastep did not make a showing "of surprise or excusable neglect, pursuant to [Ariz. R. Civ. P.] 60(c), or accident or surprise, pursuant to [Ariz. R. Civ. P.] 59(a)." The court also found Eastep's claim "based upon the lack of notice from the Court of its intent to rule on a motion which had been pending for nearly two months is unpersuasive," adding there was no evidence that the parties had agreed to give Eastep additional time to respond and there was no evidence that Eastep "acted diligently, or at all, in response to the" motion to dismiss.

¶6 The court later entered a final judgment,[3] and this court has jurisdiction over Eastep's timely appeal pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. § 12-2101(A)(1) and -120.21(A)(1).

DISCUSSION

I. The Superior Court Did Not Err By Granting The Motion To Dismiss.

¶7 An opposing party has ten days to file a response to a motion to dismiss. *See* Ariz. R. Civ. P. 7.1(a). Absent an extension, if the opposing party does not file a timely response, "such non-compliance may be deemed a consent to the . . . granting of the motion, and the court may dispose of the motion summarily." Ariz. R. Civ. P. 7.1(b). Although the dismissal of a complaint for failure to state a claim is reviewed de novo, *Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶ 7 (2012), this court reviews the summary disposition of a motion as unopposed for an abuse of discretion, *see Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64-65 ¶¶ 16-17 (App. 2010).

---

[3] Because the judgment appealed from originally lacked a certificate of finality, Ariz. R. Civ. P. 54(c), this court stayed the appeal and revested jurisdiction in the superior court to include the required certification. After the superior court did so, this court reinstated the appeal.

¶8 Eastep argues that the superior court erred by granting the motion to dismiss as unopposed pursuant to Rule 7.1(b) because the rule "does not mean a court can or should dismiss under circumstances such as those here." *Strategic Development* squarely rejected Eastep's argument. In a case with an identical procedural history, *Strategic Development* concluded:

> Pursuant to Rule 7.1(a), the non-moving party must respond to a Rule 12(b)(6) motion within ten days. If the nonmoving party does not timely respond, the superior court has discretion to grant the motion summarily. Ariz. R. Civ. P. 7.1(b); *Choisser v. State ex rel. Herman,* 12 Ariz. App. 259, 260 [] (1970). Because Strategic failed to file a timely response to the motion to dismiss, the court had the power to grant the motion for that reason alone. Ariz. R. Civ. Proc. 7.1(b). We cannot conclude the court abused its discretion in summarily granting Partners' motion in the absence of a response. *See Arnold v. Van Ornum,* 4 Ariz. App. 89, 90-91 [] (1966).

224 Ariz. 60, 65 ¶ 17. Eastep has not shown this analysis is inapplicable here.

¶9 Relying primarily on *Zimmerman v. Shakman*, 204 Ariz. 231, 237 ¶ 21 (App. 2003),[4] Eastep claims Rule 7.1(b) "is not mandatory," adding "the failure to respond to a motion does not in and of itself authorize a judgment against the nonmoving party." *Zimmerman*, however, does not alter the result here. First, Eastep did not cite *Zimmerman* or raise a *Zimmerman*-based argument in filings with the superior court, including in the motion to vacate, to reconsider or for new trial. Even after Defendants cited *Strategic Development* in the response, Eastep distinguished *Strategic Development*, but did not cite *Zimmerman*. Thus, Eastep is attempting to raise

[4] Eastep also cites the two cases cited in *Zimmerman* addressing summary judgment motions: *Aranki v. RKP Investments, Inc.*, 194 Ariz. 206, 211 (App. 1999) ("[G]iven that the . . . defendants' summary judgment motion rested on legal and factual assertions wholly irrelevant to the claims against the sellers, such a ruling would be a manifest abuse of discretion."); *Choisser v. State ex rel. Herman,* 12 Ariz. App. 259, 261 (1970) ("A failure to respond to the motion with a written memorandum or opposing affidavits cannot, by itself, entitle the movant to summary judgment.").

an issue on appeal that could have been raised with the superior court, but was not. *See Trantor v. Fredrikson,* 179 Ariz. 299, 300 (1994) ("[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

¶10 Second, even absent waiver, *Zimmerman* does not control. In *Zimmerman*, after four years of discovery, the defendant filed a partial motion for summary judgment and a motion in limine and for sanctions. 204 Ariz. at 234 ¶¶ 3, 5. The plaintiff did not respond to the motion in limine and was changing lawyers during the time to respond. *Id*. at 234 ¶ 6. The superior court summarily granted the motion in limine based on the failure to respond, which resulted in the case being dismissed. *Id*. On appeal, this court held that the superior court should not have granted the motion in limine summarily without a so-called "culprit hearing," to determine whether the party or the lawyer was responsible for the sanctionable conduct, to determine the impact a failure to disclose had on the case and to determine the appropriate sanction. *Id*. at 237 ¶ 23. Such factually-intensive issues are akin to a motion for summary judgment, which even if unopposed, can only be granted "if it is supported by the record pursuant to Rule 56(c)(1)." *Strategic Dev. & Constr., Inc.*, 224 Ariz. at 65 n.7 ¶ 17 (citing *Schwab v. Ames Const.*, 207 Ariz. 56, 59 ¶ 14 (App. 2004)). Given this important difference, *Strategic Development* and *Arnold* (not *Zimmerman*) control here.

¶11 Third, and relatedly, Arizona cases decided both before and after *Zimmerman* authorized the superior court to summarily grant a motion to dismiss if a party failed to timely respond. Promulgated in 2000, Rule 7.1(b) contains "the provisions formerly set forth in" Rule IV(b) of the Uniform Rules of Practice. *See* Ariz. R. Civ. P. 7.1(b) State Bar Committee Note 2000 Amendments. Construing Rule IV(b), nearly fifty years ago, this court affirmed the summary grant of a motion to dismiss for lack of prosecution, noting "the trial court had the discretion to dismiss said complaint and to deny plaintiffs' motion" to set aside the dismissal. *Arnold v. Van Ornum*, 4 Ariz. App. 89, 90-91 (1966). Similarly, construing Rule 7.1(b), *Strategic Development* affirmed the summary grant of a motion to dismiss for failure to state a claim. 224 Ariz. at 61, 65 ¶¶ 2, 17. Accordingly, even if it was not distinguishable procedurally, applying *Zimmerman* here would run counter to published decisions issued before and after it was decided.

¶12 For these reasons, Eastep has not shown the superior court abused its discretion in summarily granting the motion to dismiss given his

failure to file any opposition before the superior court issued its ruling nearly two months after Defendants moved to dismiss.

II. The Superior Court Did Not Err By Denying The Motion To Vacate, To Reconsider Or For New Trial.

¶13 Eastep argues the superior court erred by denying his "motion to vacate dismissal, or alternatively motion to reconsider or for new trial." This court reviews the denial of such a motion for an abuse of discretion. *See, e.g., Woodbridge Structured Funding, LLC v. Arizona Lottery*, 235 Ariz. 25, 29-30 (App. 2014); *Arnold v. Van Ornum*, 4 Ariz. App. at 91.

¶14 Largely repeating the arguments made under Rule 7.1(b), Eastep argues that he was working to reach an agreement with Defendants on an amended complaint and, because the court did not give notice "that a dismissal might be forthcoming," vacating the dismissal is required. The superior court, however, found no evidence of an agreement to extend time to file a response and no evidence Eastep acted diligently. Indeed, Eastep did not file anything for more than two months after Defendants filed their motion to dismiss. Nor has Eastep shown the superior court was required to give him notice that "a dismissal might be forthcoming" or that the court erred in finding he did not act diligently. On this record, Eastep has not shown the superior court abused its discretion by denying his motion to vacate, to reconsider or for a new trial.

III. The Superior Court Did Not Err By Denying The Motion For Leave To Amend.

¶15 Eastep claims the superior court abused its discretion by denying his motion for leave to file an amended complaint, stating such an amendment should be allowed if it would cure the defects suggested in the motion to dismiss. This court reviews the denial of a motion to amend a pleading for an abuse of discretion. *Alosi v. Hewitt*, 229 Ariz. 449, 452 ¶ 13 (App. 2012). Although amendments should be liberally allowed, *MacCollum v. Perkinson*, 185 Ariz. 179, 185 (App. 1996), futility is a proper ground to deny a motion to amend, *Alosi*, 229 Ariz. at 452 ¶ 13.

¶16 Although the superior court did not provide its rationale for denying Eastep's motion to amend, the court granted the motion to dismiss because Eastep failed to timely respond under Rule 7.1(b). That failure could not be cured by an amended complaint. Accordingly, Eastep has not shown how any amendment to his pleadings would not be equally futile. Thus, Eastep has not shown the superior court abused its discretion in denying the motion for leave to amend his complaint.

IV. Attorneys' Fees And Costs On Appeal.

¶17 Both parties request attorneys' fees and costs on appeal pursuant to A.R.S. § 12-341.01. Because Eastep is not the successful party, his claim for fees is denied. A.R.S. § 12-341.01(A). In its discretion, this court will award Defendants a portion of their fees, as well as their taxable costs, upon compliance with Ariz. R. Civ. App. P. 21.[5]

CONCLUSION

¶18 The judgment is affirmed.

Ruth A. Willingham · Clerk of the Court
FILED: AA

[5] Defendants also seek attorneys' fees as a sanction, but have provided no authority supporting that request, which is denied.