

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GEORGE IKNADOSIAN, et al., *Plaintiffs/Appellants*,

v.

AIMEE SMITH, et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0679

FILED 11-17-2020

Appeal from the Superior Court in Maricopa County

No. CV2019-005593

The Honorable Sherry K. Stephens, Judge

AFFIRMED

Baker & Baker, Phoenix
By Thomas M. Baker
Counsel for Plaintiffs/Appellants

Phoenix City Attorney's Office, Phoenix
By Robert A. Hyde
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Cynthia J. Bailey joined.

H O W E, Judge:

¶1 Appellants George Iknadosian, X-Caliber Guns, LLC, and X-Caliber Properties, LLC (“Iknadosian”) appeal the trial court’s granting Defendants’, City of Phoenix, Aimee Smith, and Arthur Widowski (“Defendants”), Arizona Rule of Civil Procedure (“Rule”) 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. The trial court ruled that Iknadosian filed his complaint beyond the statute of limitations and that he was not entitled to discretionary relief under A.R.S. § 12-504(A), the state’s saving statute. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In March 2009, Iknadosian, a federally licensed firearms dealer, was prosecuted for multiple criminal offenses but was acquitted. The State also filed two related forfeiture cases, and Iknadosian prevailed in them as well in 2009 and 2011.

¶3 In March 2010, Iknadosian sued the State of Arizona, an attorney with Attorney General’s Office, the City of Phoenix, and two Phoenix police officers for malicious prosecution, conversion of real and personal property, intentional infliction of emotional distress, loss of income, tortious interference with a business expectancy, and defamation. In December of 2012, the trial court dismissed the attorney from the Attorney General’s Office from the case, and Iknadosian appealed the ruling. During the appeal, Iknadosian took no further action in his litigation with the remaining defendants.

¶4 In early 2015 and before Iknadosian had lost his appeal in this Court, Defendants asked the trial court to order Iknadosian to comply with outstanding discovery and interrogatory requests. The trial court ordered him to comply. In early 2016, he failed to disclose the basis for his damages before the date set for a court-ordered settlement conference. As a result, the trial court continued and then vacated the settlement conference. In July 2016, the State, followed by the City, moved to dismiss for failure to

IKNADOSIAN, et al. v. SMITH, et al.
Decision of the Court

prosecute. Iknadosian moved to extend time to file a response, requesting a deadline of August 12, 2016. On August 12, he moved again to extend the response time, requesting a new deadline of August 19, 2016, which the court granted. Iknadosian never filed a response, however, and the court dismissed the case without prejudice for failure to prosecute.

¶5 Iknadosian moved for a new trial under Rule 59. He argued that he had consistently pursued prosecution, whether before the trial court or in the Court of Appeals. He also argued that Defendants had failed to provide timely mandatory discovery until nine months after his request. He argued in his reply pleading that the dismissal was an improper discovery sanction without a hearing. The court denied the motion for new trial, finding that Iknadosian had waived his sanction argument and specifying that the dismissal was granted for failure to prosecute, not as a discovery sanction. Iknadosian timely appealed. This Court affirmed, finding that the record supported the trial court's finding of failure to prosecute. In particular, it found Iknadosian had been dilatory in his prosecution by failing to comply with court orders to answer interrogatories, failing to provide damage calculations, and allowing his case to remain dormant for approximately two years while he pursued an unsuccessful appeal.

¶6 Iknadosian re-filed the complaint in March 2019 and requested relief under A.R.S. § 12-504(A), the state's savings statute, which allows an action dismissed for failure to prosecute to be revived if, in the trial court's discretion, appropriate grounds warrant it. Defendants moved to dismiss the action, and the trial court granted the motion, finding that Iknadosian failed to establish appropriate grounds to allow the action to continue. Iknadosian timely appealed.

DISCUSSION

¶7 Iknadosian concedes that the new cause of action is beyond the statute of limitations. He argues, however, that the trial court erred in denying discretionary relief under A.R.S. § 12-504, the savings statute. We review the claim for an abuse of discretion. *Jepson v. New*, 164 Ariz. 265, 274 (1990); *Passmore v. McCarver*, 242 Ariz. 288, 291 ¶ 7 (App. 2017).

¶8 The savings statute creates a remedial procedure by which plaintiffs may, in some circumstances, refile terminated actions without regard to the statute of limitations. *Passmore*, 242 Ariz. at 291 ¶ 7; *Janson v. Christensen*, 167 Ariz. 470, 472 (1991). The statute includes a mandatory provision and a discretionary provision. *Passmore*, 242 Ariz. at 291 ¶ 7. Pertinent here is the discretionary provision, which states that "if an action

IKNADOSIAN, et al. v. SMITH, et al.
Decision of the Court

timely commenced is terminated by . . . dismissal for lack of prosecution, the court in its discretion may” provide a time period for a new action so long as the period does not exceed six months. A.R.S. § 12-504(A).

¶9 The “discretionary portion of the provision requires a case-by-case application and evaluation.” *Jepson*, 164 Ariz. at 271. In exercising its discretion under the statute, the court must consider whether (1) the plaintiff acted reasonably and in good faith, (2) he prosecuted his case diligently and vigorously, (3) a procedural impediment exists that affects his ability to file a second action, and (4) either party will be substantially prejudiced. *Id.* at 272; *Passmore*, 242 Ariz. at 291 ¶ 9. When applying the standard, courts “must ensure that the statute is not misused as a safe haven for the dilatory and a loophole through which parties may avoid the applicable rules of practice and procedure.” *Jepson*, 164 Ariz. at 271. Where an action is terminated for lack of prosecution, relief under the savings statute should be granted only when the plaintiff demonstrates that the case was dismissed despite diligent pursuit of the case. *Id.* at 274. To hold otherwise “would undermine the policies the savings statute was intended to serve . . . by providing an out for litigants who, for no good reason, fail to comply with [court rules].” *Id.* The plaintiff has the burden to present the particular circumstances that justify relief under A.R.S. § 12-504(A). *Id.* at 272.

¶10 The record supports the court’s denial of A.R.S. § 12-504(A) discretionary relief. Iknadosian argues that despite dismissal for lack of prosecution, he vigorously and diligently pursued his case. He argues that the nature of the case produced multiple accrual dates that resulted in multiple notices of claim and amendments to Plaintiffs’ complaint to add new causes of action. This procedural landscape resulted in the filing of several motions to dismiss, which Iknadosian argues took time to fully brief. He further argues that Defendants were also dilatory in providing mandatory discovery. He asserts that given these circumstances, he diligently pursued the case both at the trial court and appellate court level and that discretionary relief should have been awarded.

¶11 Nevertheless, the trial court had ample evidence to reach a contrary conclusion. Iknadosian did not respond to discovery requests, motions to compel, and a motion to dismiss for lack of prosecution despite two extensions, including a stipulated date he asked for himself. He also allowed the initial action to lay dormant for years. The court did not abuse its discretion by finding that Iknadosian failed to present a reasonable, good faith basis for his failure to diligently prosecute his case.

IKNADOSIAN, et al. v. SMITH, et al.
Decision of the Court

¶12 Iknadosian also argues that the trial court erred in finding that Defendants' prejudice was greater than his own. But the trial court never compared his prejudice with Defendants' prejudice, and instead merely found that Defendants would be harmed if Iknadosian were allowed to continue his lawsuit. A comparative finding is not required under A.R.S. § 12-504. *Jepson* makes clear that when analyzing A.R.S. § 12-504(A)'s discretionary provision, the court must examine a party's diligence, vigorousness, reasonableness, and good faith when considering a dismissal for lack of prosecution rather than just simply conducting a comparison of prejudices. 164 Ariz. at 272. In any event, Defendants note the limited extent of discovery completed in the prior proceedings, including Iknadosian's failure to comply with discovery requests, and the superior court cited to the inherent prejudice Defendants would suffer in defending and garnering evidence in a decade-old action..

¶13 Therefore, the trial court did not abuse its discretion in finding Iknadosian did not meet his burden under A.R.S. § 12-504(A).

CONCLUSION

¶14 For the foregoing reasons, we affirm. Iknadosian requests his attorneys' fees and costs on appeal pursuant to A.R.S. § 12-348. We deny his request because he was not successful on appeal. Defendants request attorneys' fees and costs pursuant to A.R.S. § 12-349. An award of attorney fees is mandatory if the other party brings or defends a claim without substantial justification. A.R.S. § 12-349. Although we have affirmed the trial court's ruling, we do not find Iknadosian's arguments were so meritless that awarding fees is justified. As the prevailing party, however, Defendants are entitled to their costs incurred in this appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court
FILED: AA