

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: 03/06/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

DARLENE BURLEY, ) No. 1 CA-CV 10-0854  
 )  
Plaintiff/Appellant, ) DEPARTMENT B  
 )  
v. ) **MEMORANDUM DECISION**  
 )  
ERIC ALI, ) (Not for Publication -  
 ) Rule 28, Arizona Rules of  
Defendant/Appellee. ) Civil Appellate Procedure  
 )

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Appeal from the Superior Court in Maricopa County

Cause No. CV2009-002491

The Honorable J. Richard Gama, Judge

**REVERSED AND REMANDED**

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Darlene Burley  
Plaintiff/Appellant *in propria persona*

Phoenix

Eric Ali  
Defendant/Appellee *in propria persona*

Tempe

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**J O H N S E N**, Judge

¶1 Darlene Burley appeals the dismissal of her complaint pursuant to Arizona Rule of Civil Procedure 38.1 for failure to prosecute. For the reasons that follow, we reverse and remand.

## FACTS AND PROCEDURAL BACKGROUND

¶12 On July 1, 2009, Burley's lawsuit against Eric Ali was placed on the inactive calendar and set for automatic dismissal on December 22, 2009, unless Burley filed a motion to set and certificate of readiness or an appeal from arbitration. On September 18, 2009, Burley filed a motion to set. The court subsequently appointed an arbitrator and established a March 22, 2010 deadline for the arbitration. On March 24, 2010, after the arbitrator failed to timely set the arbitration hearing, and apparently mistakenly believing the case remained on the inactive calendar, Burley filed a motion to continue the case on the inactive calendar. On May 19, the court granted Burley's motion and continued the case on the inactive calendar until August 19, 2010.

¶13 On June 16, the arbitrator filed his notice of decision, finding in favor of Burley for \$1,651 and against Ali on his counterclaim. On June 23, Burley appealed the arbitrator's award by filing a "Motion to Appeal Notice of Decision of Arbitrator." Burley's appeal was timely and she posted a bond, as required by Arizona Rule of Civil Procedure 77(b). On October 7, 2010, the superior court dismissed the case off the inactive calendar for failure to prosecute.

¶14 Burley timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1)

(2012); see *Johnson v. Elson*, 192 Ariz. 486, 488, ¶ 6, 967 P.2d 1022, 1024 (App. 1998).

#### DISCUSSION

¶5 Rule 38.1(d) provides that a case on the inactive calendar shall be dismissed unless (1) a motion to set and certificate of readiness is served; (2) the case is continued on the inactive calendar; or (3) a notice of decision has been filed by a court-appointed arbitrator. The arbitrator in this case filed his notice of decision on June 19, well before the August 19 deadline set by the court's May 19 order. Because the notice of arbitrator's decision was filed within the required period, the court erred by dismissing the case for failure to prosecute pursuant to Rule 38.1.

#### CONCLUSION

¶6 We reverse the judgment of dismissal for lack of prosecution under Rule 38.1 and remand to the superior court for further proceedings consistent with this decision.

/s/  
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/  
DONN KESSLER, Judge

/s/  
PETER B. SWANN, Judge