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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 06/05/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

JONATHAN McALLISTER, SR.,

Plaintiff/Appellant,

v.

SERGIO SANCHEZ,

Defendant/Appellee.

1 CA-CV 11-0087

DEPARTMENT E

MEMORANDUM DECISION
(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-030485

The Honorable John Christian Rea, Judge
The Honorable J. Richard Gama, Judge

AFFIRMED

Jonathan McAllister, Sr.,
Plaintiff/Appellant In *Propria Persona*

Tucson

Jennings, Haug & Cunningham, L.L.P.
by Laurence R. Sharlot
William F. Begley
Attorneys for Defendant/Appellee

Phoenix

G E M M I L L, Judge

¶1 Plaintiff/appellant Jonathan McAllister, Sr., appeals

from the trial court's decision granting summary judgment in favor of defendant/appellee Sergio Sanchez. McAllister had alleged that either Sanchez or his co-defendant Isidro C. Jimenez was the driver of a vehicle that collided with his, resulting in damages. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 On November 18, 2008, McAllister filed a complaint on behalf of himself and his minor child against defendant/appellee Sergio Sanchez and defendant Isidro C. Jimenez. The complaint alleged that on May 2, 2008, a blue 1999 Plymouth Voyager struck McAllister's car causing property damage and injuries. It alleged that Sanchez was the registered owner and that either Sanchez or Jimenez had been driving the vehicle at the time of the accident. The unknown driver had fled the scene on foot.

¶13 On February 13, 2009, McAllister filed an application for entry of default against Sanchez. On February 17, Sanchez, in *propria persona*, filed a statement stating that in February 2008 he had sold the vehicle involved in the accident to Isidro Cigarroa and was no longer responsible for the vehicle. Attached was a notarized letter from Isidro Cigarroa Jimenez in which Jimenez confirmed Sanchez's statement.

¶14 McAllister filed an amended complaint on March 2, 2009, and Sanchez, through counsel, filed an answer to the amended complaint. McAllister filed a motion for default

judgment against Sanchez. Sanchez responded that he answered the complaint within ten days after McAllister's motion for entry of default as permitted by Rule 55(a), Arizona Rules of Civil Procedure, and noted that Sanchez had filed an answer to McAllister's amended complaint. McAllister maintained that Sanchez had not answered the original complaint within the twenty days required, that he had not been served a copy of that answer, and that he had not received any notice of appearance that would permit an attorney to file documents on behalf of Sanchez.

¶15 On May 1, 2009, McAllister filed a motion for an extension of time to serve Jimenez. The trial court granted the motion and extended the service time to June 16, 2009.

¶16 In November 2009, Sanchez filed a motion for summary judgment. Sanchez argued that, although he was the registered owner of the vehicle, he had sold the vehicle to Jimenez and had relinquished control of the vehicle prior to the accident, that Jimenez agreed that he had purchased the vehicle and was responsible for it, that a wallet containing multiple identification papers belonging to Jimenez had been found under the steering wheel of the vehicle after the accident, and that a police investigation concluded that Jimenez had caused the accident. Sanchez argued that McAllister had no evidence that he was driving the vehicle at the time of the accident and so

could not meet his burden of proof. McAllister opposed the motion, and filed a cross motion for summary judgment.

¶17 On January 14, 2010, in an unsigned minute entry, the trial court granted Sanchez's motion, stating:

Mr. Sanchez has sworn that he was not the driver of the vehicle that collided with Plaintiff. The Plaintiff has shown that Mr. Sanchez remained the title holder of the vehicle, although the identification papers of Defendant Isidro Jimenez were found in the abandoned vehicle. Based on the evidence submitted in the Motion, Response, and Reply, no reasonable juror could conclude that Mr. Sanchez was driving at the time of the accident.

¶18 On February 8, 2010, McAllister filed an "Affidavit (in Support of Motion for Change of Judge for Cause)," in which he claimed that numerous motions he had filed remained outstanding and that the trial judge, the Honorable John Rea, was biased against him. The Honorable J. Richard Gama treated the affidavit as a motion for change of judge for cause. Judge Gama noted that many of the pleadings on which McAllister claimed the court had not ruled were pleadings that did not require a ruling by the court. Judge Gama further explained that whether to disqualify a judge for cause was based on an objective standard, that the bias necessary to disqualify a judge had to come from an extrajudicial source, and that rulings in a case were generally insufficient to establish bias or prejudice. The court found no basis for disqualification and,

on March 16, 2010, Judge Gama denied McAllister's motion for change of judge for cause.

¶9 The trial court entered a formal signed judgment granting Sanchez's motion for summary judgment and dismissing McAllister's case with prejudice on March 16, 2010. The judgment included language certifying its finality pursuant to Rule 54(b), Arizona Rules of Civil Procedure. McAllister simultaneously filed a motion for new trial and a notice of appeal from the judgment in favor of Sanchez. McAllister also filed a "Notice of Objections and Rebuttal of Court Findings," in which he contended that the trial court had failed to rule on various motions, and asked that the court set aside the judgment and grant a change of judge and a new trial by jury. The trial court, noting that McAllister had filed a notice of appeal, concluded that it lacked jurisdiction to act on the motion. McAllister's appeal of the judgment in favor of Sanchez was initially docketed in March 2010 in this court as cause number 1 CA-CV 10-0238.

¶10 In superior court on July 19, 2010, McAllister filed a motion for leave to provide service of process on Jimenez by publication. Jimenez, noting that he had not yet been properly served, filed a response through counsel. Jimenez argued that McAllister's cause of action against him had abated for failure to serve within the time limits under the Arizona Rules of Civil

Procedure. Jimenez argued that McAllister was required to serve him within 120 days after the filing of the original complaint, which would have been by March 18, 2009, that more than a month after that deadline the court had granted an extension to serve until June 16, 2009, and that the current motion came more than twenty months after the original deadline and more than a year after the expiration of the previous extension. Jimenez argued that no good cause was shown for the delay. Jimenez moved for dismissal with prejudice.

¶11 In a signed minute entry, the court denied McAllister's request to serve Jimenez by publication and granted Jimenez's motion to dismiss. McAllister filed a notice of appeal, resulting in the docketing of an appeal in this court in September 2010 with cause number 1 CA-CV 10-0627.

¶12 On September 20, 2010, this court dismissed McAllister's appeal (cause number 1 CA-CV 10-238) of the Sanchez judgment for lack of jurisdiction because the notice of appeal was filed while a motion for new trial was pending.

¶13 McAllister subsequently filed a motion to reinstate the case and all pleadings in the trial court. The court ruled on pending motions, denied McAllister's motion for new trial, and entered a signed order on December 22, 2010. McAllister appealed, resulting in the initiation of this appeal in February 2011 (1 CA-CV 11-0087). We have jurisdiction pursuant to

Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) and (5)(a) (Supp. 2011).¹

¶14 On February 28, 2011, this court dismissed McAllister's appeal of the Jimenez judgment (1 CA-CV 10-0627) for failure to file an opening brief.

DISCUSSION

¶15 McAllister first argues that Jimenez's affidavit attached to Sanchez's response to McAllister's motion for entry of default constituted an appearance by Jimenez tantamount to having received timely, valid service of process and therefore the court was precluded from dismissing McAllister's claim against Jimenez.

¶16 McAllister's claim against Jimenez was dismissed for lack of timely service in a signed minute entry from which McAllister appealed. Any claims of error in the trial court's dismissal of Jimenez should have been raised in the appeal from that order (1 CA-CV 10-0627). That appeal was dismissed because McAllister failed to file an opening brief. Consequently, the ruling as to Jimenez is final and, moreover, Jimenez is not a party to this appeal. Accordingly, McAllister may not now argue in this appeal that the trial court erred regarding Jimenez.

¶17 Regarding his claim against Sanchez, McAllister first

¹ We cite the current versions of statutes when no material revisions have been enacted since the events in question.

argues that the trial court erred in allowing Sanchez's counsel to represent Sanchez without having first filed a formal notice of appearance.

¶18 Rule 5.1, Arizona Rules of Civil Procedure, states in part:

No attorney shall appear in any action or file anything in any action without first appearing as counsel of record.

Ariz. R. Civ. P. 5.1(a)(1). The rule essentially requires counsel to notify the court and parties of counsel's appearance as attorney of record on behalf of a party. The rule does not require the filing of a formal notice of appearance separate from any other filing that performs that function. Here, Laurence R. Sharlot and Jennings, Haug & Cunningham, L.L.P., appeared in the action as counsel of record for Sanchez on March 25, 2009, by filing Defendant Sanchez's Answer to Plaintiff's Amended Complaint and Sanchez's Certificate of Agreement re: Compulsory Arbitration. In both documents, Sharlot and Jennings, Haug & Cunningham identified themselves as attorneys for Defendant Sanchez. No other notice of appearance was necessary.

¶19 McAllister also argues that the trial court failed to rule on any of his motions for approximately nine months from the filing of his complaint on November 18, 2008, in violation of Article 6, Section 21, of the Arizona Constitution and Rule

91(e), Arizona Rules of the Supreme Court. Article 6, Section 21 states:

Every matter submitted to a judge of the superior court for his decision shall be decided within sixty days from the date of submission thereof. The Supreme Court shall by rule provide for the speedy disposition of all matters not decided within such period.

Ariz. Const. art. 6, § 21. Rule 91(e) of the Rules of the Supreme Court restates the sixty-day requirement. The provisions are directory, not mandatory. *In re Estate of Appleton*, 15 Ariz. App. 490, 493, 489 P.2d 864, 867 (1971).

¶20 McAllister does not identify any particular matters on which he claims the court failed to timely rule. The record shows that in August 2009, approximately nine months after McAllister filed his complaint, he filed a Request for Orders and Rulings on Motions and Return of Conformed Copies/Subpeona(s) [sic]. In that document, he listed five matters on which he was awaiting a response from the court. On September 24, 2009, the court ruled. With respect to McAllister's application for entry of default and motion for judgment of default, the court explained that it had considered the motions withdrawn and moot given that Sanchez had responded to the motion for entry of default within the ten days provided in Rule 55(a)(3), Arizona Rules of Civil Procedure, and had answered McAllister's amended complaint. The court denied the

motions. With respect to motions by McAllister for a protective order and for an extension of time to answer interrogatories filed May 11, 2009, the court noted that neither motion had been provided to the assigned division. The court denied the motions, noting that McAllister was able to file multiple motions and was able to respond to discovery and comply with disclosure requirements. With respect to McAllister's Rule 38.1 motion to set,² the court noted that Sanchez had filed a controverting certificate on August 27, that McAllister had declared his claim subject to compulsory arbitration, and so transferred the matter to arbitration. The court did not address the fifth matter raised by McAllister: McAllister claimed that on July 3 he had submitted subpoenas for signature to the court clerk and that they had not been returned. The issuance of subpoenas is generally not a matter requiring a ruling from the court.

¶21 McAllister claims the court failed to timely rule on his motions in the first nine months of the case. The record shows the court addressed the matters that McAllister brought to the court's attention. McAllister does not specify any other matters that the court failed to address, nor does he explain how any delay in ruling caused injury or justifies reversal of

² McAllister claimed to have filed the motion approximately June 10, 2009; the record shows a filing date of July 2, 2009.

the court's summary judgment in favor of Sanchez. We conclude that any delay does not warrant reversal.

¶122 Additionally, McAllister argues that Judge Gama abused his discretion in denying McAllister's motion for change of judge for cause. McAllister contends that the record objectively showed the appearance of bias and prejudice by Judge Rea against McAllister based on the court's denial of "any and all" of McAllister's motions. We review a court's denial of a motion for a change of judge for cause for an abuse of discretion. *State v. Schackart*, 190 Ariz. 238, 257, 947 P.2d 315, 334 (1997) (considering a motion for change of judge under Rule 10.1, Arizona Rules of Criminal Procedure).

¶123 Judges are presumed to be impartial and a party challenging that impartiality has the burden of proving bias by a preponderance of the evidence setting forth the specific basis for the claim. *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 63, ¶ 29, 234 P.3d 623, 631 (App. 2010). Bias for purposes of disqualification of a judge is "'a hostile feeling or spirit of ill-will . . . towards one of the litigants.'" *Scheehle v. Justices of the Supreme Court of the State of Arizona*, 211 Ariz. 282, 299, 120 P.3d 1092, 1109 (2005) (quoting *State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984), overruled on other grounds by *State v. Noble*, 152 Ariz. 284, 288, 731 P.2d 1228, 1232 (1987)). The bias must arise from an extra-judicial

source and not from the judge's participation in the case. *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977).

¶24 McAllister's affidavit shows that he bases his claim of judicial bias entirely on Judge Rea's actions or alleged inaction in the case. He does not demonstrate that Judge Rea acted towards him with ill-will or hostility arising from outside the case. The affidavit, therefore, does not establish grounds for disqualification. Judge Gama did not abuse his discretion in denying McAllister's motion for change of judge for cause.

¶25 McAllister further argues that the trial court erred in granting summary judgment to Sanchez. Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). We determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). Summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*,

166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). A motion for summary judgment should also be granted if the party opposing the motion has the burden of proof on an element at trial and fails in responding to the motion to present evidence establishing a genuine issue of material fact as to that element. *Id.* at 310, 802 P.2d at 1009. "To defeat the motion, the non-moving party must call the court's attention to evidence overlooked or ignored by the moving party or must explain why the motion should otherwise be denied. Such an explanation could include a request for a continuance for discovery under Rule 56(f)." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 119, ¶ 26, 180 P.3d 977, 984 (App. 2008). The non-moving party is entitled to a sufficient opportunity for discovery. *Id.* at 118, ¶ 24, 180 P.3d at 983.

¶26 McAllister argues that Sanchez failed to provide any affirmative defense to his claim. Sanchez was not obligated to present an affirmative defense. McAllister, as the plaintiff, had the burden of proving that Sanchez was the driver of the 1999 Plymouth Voyager that caused the accident.

¶27 Sanchez submitted an affidavit in which he avowed that in February 2008 he entered into a verbal agreement with Jimenez by which he sold the vehicle to Jimenez and turned over to Jimenez full possession and control of the vehicle. Sanchez was to retain title to the vehicle until Jimenez made full payment,

which Jimenez had not done by the time of the accident. Sanchez avowed that, since February 2008, he had at no time driven the 1999 Plymouth Voyager and was neither the driver nor a passenger at the time of the accident. Sanchez also submitted a sworn declaration from Jimenez stating that he had purchased the vehicle in February 2008 from Sanchez and "had full responsibility for the vehicle." Sanchez also provided a copy of a police report in which the officer that investigated the accident reported that he had recovered a brown wallet containing multiple IDs belonging to Jimenez from under the steering wheel of the vehicle after the accident and in which the officer noted that witnesses saw the driver of the 1999 Plymouth Voyager flee the scene on foot but could not identify him.

¶128 Having been presented with evidence showing that Sanchez had relinquished control of the vehicle to Jimenez in February 2008 and that Jimenez's IDs were found in the vehicle at the time of the accident, the burden shifted to McAllister to challenge that evidence and show that evidence existed that Sanchez was driving the vehicle, thereby creating a genuine issue of material fact. *Orme Sch.*, 166 at 310, 802 P.2d at 1009. In response to the motion, McAllister contended that Sanchez did not sell the vehicle or relinquish possession. He noted the absence of any documents supporting a sale and the

fact that Sanchez remained the holder of the vehicle's title. McAllister contended that if Sanchez sold the vehicle, he did not do so properly in accordance with Arizona law.

¶29 The relevant issue, however, is not whether Sanchez properly executed a sale of the vehicle, but whether he was the driver of the vehicle at the time of the accident. Even if Sanchez was the legal owner at the time of the accident, being the owner would not in itself impose liability on Sanchez for the accident. See *Siverson v. Martori*, 119 Ariz. 440, 443, 581 P.2d 285, 288 (App. 1978) ("[I]n the absence of statutory liability or the owner's independent negligence, an owner of a motor vehicle is not liable for the negligence of a borrower to whom he has relinquished control over the vehicle and who is using it exclusively for his own purposes."). McAllister presented no evidence that Sanchez was driving the 1999 Plymouth Voyager at the time of the accident and no evidence controverting Sanchez's evidence that he had no control over the vehicle since February 2008.

¶30 McAllister contends that no depositions had been taken, that Sanchez had avoided answering any interrogatories, and that the trial court had failed to rule on his motion for order compelling disclosure of discovery and for appropriate sanctions. The record shows that the trial court did rule on McAllister's motion. The court accepted Sanchez's

representation that he had been unavailable for a time to respond to McAllister's discovery requests, but that discovery and disclosure were then proceeding. The court therefore found the motion to compel to be moot. Soon after the court entered its order, Sanchez filed his motion for summary judgment. As the nonmoving party with the ultimate burden of proof on his claim at trial, McAllister was entitled to receive a sufficient opportunity for discovery. See *Thruston*, 218 Ariz. at 118, ¶ 24, 180 P.3d at 983. However, when McAllister answered the motion, he did not seek additional time for discovery under Rule 56(f), Arizona Rules of Civil Procedure. To the extent that McAllister may be claiming that entry of summary judgment was improper because discovery was not complete, he has waived that argument. See *Edwards v. Bd. of Supervisors of Yavapai Cnty.*, 224 Ariz. 221, 223-24, ¶ 19, 229 P.3d 233, 235-36 (App. 2010) (failing to request relief under Rule 56(f) constitutes waiver of claim that summary judgment is improper because it is granted before completion of discovery).

¶31 We conclude that the trial court did not err in granting summary judgment to Sanchez.

CONCLUSION

¶132 The judgment of the trial court is affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PHILIP HALL, Judge