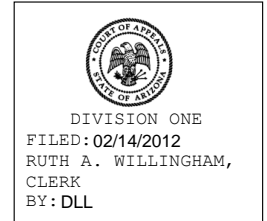


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



CHARLES E. MATTHEWS,) 1 CA-CV 11-0101
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
CITY OF PHOENIX, an Arizona) (Not for Publication -
municipality, RICHARD LANG;) (Rule 28, Arizona Rules of
MICHAEL MYERS; TOBY SPEAS; ROBERT) Civil Appellate Procedure)
KIMERY; DONALD SLAUGHTER;)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-038012

The Honorable John A. Buttrick

REVERSED AND REMANDED

Neuheisel Law Firm, P.C. Tempe
by Richard G. Neuheisel
and
Law Office of Glynn W. Gilcrease, Jr., P.C. Tempe
by Glynn W. Gilcrease, Jr.

and

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by David L. Abney
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by Michele M. Iafrate
Courtney R. Cloman
Attorneys for Defendants/Appellees

P O R T L E Y, Judge

¶1 Appellant Charles E. Matthews ("Matthews") challenges the denial of his Arizona Rule of Civil Procedure ("Rule") 60(c)(1) motion. We agree, reverse the denial and remand this matter to the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Matthews filed a tort action against the City of Phoenix and five police officers (collectively, "the City"). The City subsequently filed a motion for judgment on the pleadings pursuant to Rule 12(b) and argued that the claims were barred by the statute of limitations; were barred for his failure to comply with the notice of claim statute; and failed to state a claim upon which relief may be granted.

¶3 The response was due on August 10, 2010. The next day, Matthews moved for a ten-day extension. His motion alternatively requested that the trial court treat the City's motion as one for summary judgment and permit him thirty days to respond.

¶14 Matthews's request for a ten-day extension to respond was granted. The court's order, however, was not filed until August 20, 2010, and Matthews did not receive it for another three days. He filed his response three days later.

¶15 In the meantime, the City's motion was granted and the matter was dismissed. The signed order contains the court's writing that no opposition had been filed. Matthews then filed a successful motion to vacate the order of dismissal pursuant to Rule 60(c)(1) and the complaint was reinstated, in part because the City had not opposed the motion.

¶16 The City, however, immediately filed a motion for reconsideration and claimed that it had considered Matthews's motion to be a motion for reconsideration and therefore did not need to respond unless ordered to by the court. Despite the fact that the motion to vacate did not mention a motion for reconsideration or Rule 7.1(e), the trial court granted the City's motion for reconsideration and correctly allowed the City to respond to the motion to vacate. However, before Matthews could file his timely reply, the court found that the neglect was not excusable pursuant to Rule 60(c). As a result, the court reinstated its previous order dismissing the case.

DISCUSSION

¶7 On appeal Matthews challenges the order denying him Rule 60(c) relief.¹

¶8 We first review our jurisdiction. We can only review the denial of the Rule 60 motion, not the underlying judgment. *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311, 666 P.2d 49, 56 (1983) (citations omitted) ("The scope of an appeal from a denial of a Rule 60 motion is restricted to the questions raised by the motion to set aside and does not extend to a review of whether the trial court was substantively correct in entering the judgment from which relief was sought."). As a result, we will not address the issues raised that relate directly to the judgment of dismissal.²

¶9 This case would give a law student awaiting the bar exam a nightmare. A Rule 12(b) motion is filed based only on the complaint and the exhibits attached to it. No response is filed, but a motion for extension is filed the day after the response was due. The court grants the request for extension,

¹ The trial court denied the motion to vacate in an unsigned minute entry. We suspended the appeal to allow Matthews to secure a signed order.

² We also do not review whether the Rule 12(b) motion should have been handled like a summary judgment motion. Our decision in *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 226 P.3d 1046 (App. 2010), resolves the issue contrary to the argument posed by Matthews.

but the order is filed on the new response date and not received until three days later. A response is then filed three days later. The court then grants the Rule 12(b) motion five days later, but notes that there was no opposition – a notation not supported by the record.

¶10 The plaintiff then files a motion to vacate the dismissal because of excusable neglect. The motion is granted because the defendant did not respond. The defense then files a motion for reconsideration and convinces the trial court that it thought the motion to vacate under Rule 60(c) was a motion for reconsideration to which the court did not order a response. The court allows the defendant to respond, but before the reply is due denies the motion to vacate and again dismisses the action. What to do on appeal?

¶11 First, it is clear that Matthews gained additional time to respond to the Rule 12(b) motion – the response was filed sixteen days after it was originally due, and before the court granted the motion. The court, however, mistakenly believed that there had been no response in spite of the fact that the response had been electronically filed five days earlier.

¶12 Second, it is also clear that the City did not timely respond to the motion to vacate. Instead, the City convinced

the court that the motion to vacate was merely a motion for reconsideration, and was allowed the opportunity to respond. Matthews, however, was not allowed the opportunity to reply.

¶13 We do not know how this case may be resolved on the merits. We know, however, that there was an abuse of discretion because the trial court denied the motion before reviewing the reply Matthews had filed timely. *BCAZ Corp. v. Helgoe*, 194 Ariz. 11, 15, ¶¶ 15-16, 976 P.2d 260, 264 (App. 1998). Consequently, we reverse the denial of the motion to vacate and remand this matter to the trial court to consider all of the pleadings filed in conjunction with the motion to vacate pursuant to Rule 60(c).

CONCLUSION

¶14 Based on the foregoing, we reverse the denial of the motion to vacate and remand this matter to the trial court.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Judge

/s/

ANDREW W. GOULD, Judge