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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/17/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GARY COCHENNOUR, a married man) 1 CA-CV 11-0182
dealing with his sole and)
separate property,) DEPARTMENT B
)
Plaintiff/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) (Rule 28, Arizona Rules of
PAUL E. DELOUGHERY and JANE DOE) Civil Appellate Procedure)
DELOUGHERY, husband and wife;)
GOODSON, MANLEY, FORAKIS AND)
DELOUGHERY, PLC,)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-029287

The Honorable Eileen S. Willett

AFFIRMED

The Law Office of Randall M. Sammons P.L.L.C.
By Randall M. Sammons
Attorneys for Plaintiff/Appellant

Tucson

Hinshaw & Culbertson LLP
By Victoria L. Orze
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Phoenix

H A L L, Judge

¶1 Gary Cochennour appeals the trial court's order dismissing with prejudice his lawsuit for legal malpractice against Paul E. Deloughery and the law firm of Goodson, Manley, Forakis and Deloughery, PLC (collectively, "Deloughery"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2007, Cochennour hired Deloughery to prepare an amendment to his mother's trust and other estate-planning documents. After her death, a petition was filed to invalidate these documents. In April 2009, four months before the statute of limitations on his legal malpractice claim expired, Cochennour commenced this lawsuit alleging that Deloughery negligently prepared the trust and estate-planning documents.

¶3 Cochennour did the bare minimum to keep the case from being dismissed for failure to serve and for failure to prosecute. The case was continued on the inactive calendar twice despite the fact that Cochennour provided little or no explanation for his failure to prepare the case for trial. Cochennour waited five months after filing the complaint to serve Deloughery and then provided it an indefinite extension of time to answer, subject to ten days written notice, assuring that no progress would be made readying the case for trial. The

case languished on the court's docket for nearly eighteen months before Deloughery filed a motion to dismiss.

¶4 Deloughery's motion to dismiss provided five reasons for dismissal, including failure to prosecute under Arizona Rules of Civil Procedure ("Rule") 41(b).¹ The trial court granted the motion on the merits, finding that "[n]o Response was filed." Cochennour immediately moved to extend the time to file a response to the motion to dismiss and simultaneously filed the response. Two weeks later, Cochennour filed a motion for new trial. After considering the motion for new trial, Deloughery's response and Cochennour's reply, the trial court issued a written judgment granting Deloughery's motion to dismiss.

¶5 Cochennour timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (West 2012).²

¹ Deloughery filed a motion to dismiss under Rules 12, 38.1 and 41(b) arguing that (1) the lawsuit abated due to Cochennour's failure to timely serve Deloughery; (2) the case was placed on the inactive calendar twice; (3) Cochennour failed to demonstrate good cause why the case should remain on the inactive calendar; (4) Cochennour failed to comply with the requirements of Arizona Revised Statutes ("A.R.S.") section 12-2602(A), by filing a certification regarding the need for an expert opinion; and (5) Cochennour filed the lawsuit in the wrong county. Because the case was transferred to the proper venue by the time the motion was decided, the last issue is moot.

² The Arizona Legislature recently renumbered A.R.S. § 12-2101. See 2011 Ariz. Sess. Laws, ch. 304, § 1 (1st Reg. Sess.)

DISCUSSION

¶16 The determinative issue on appeal is whether the trial court abused its discretion by dismissing Cochennour's claim with prejudice for failure to prosecute. On this record, we find no error.

¶17 The trial court dismissed Cochennour's complaint based in part on Rule 41(b), which allows for involuntary dismissal if the plaintiff fails "to prosecute or to comply with these rules or any order of court." Involuntary dismissal of an action pursuant to Rule 41(b) "is a matter directed to the sound discretion of the trial court." *Troxler v. Holohan*, 9 Ariz. App. 304, 306, 451 P.2d 662, 664 (App. 1969). "Trial courts have the inherent power to dismiss a case on their own motion if the case has not been diligently prosecuted. In this respect the discretion exercised by the trial court will not be reviewed on appeal in the absence of an abuse of discretion." *Cooper v. Odom*, 6 Ariz. App. 466, 469, 433 P.2d 646, 649 (1967).

¶18 The record shows that Cochennour did not diligently prosecute his claim. After filing a complaint on April 8, 2009, Cochennour failed to serve Deloughery within 120 days, as required by Rule 4(i). On July 10, 2009, the clerk of court

(effective July 20, 2011). We cite to the current Westlaw version of applicable statutes unless a material revision has since occurred.

issued a notice that the case would be dismissed after thirty days unless Cochennour showed good cause why he failed to complete service and why additional time should have been granted.

¶9 Instead of complying with that directive, Cochennour filed a motion to continue the case on the inactive calendar without any explanation for the delay in service or why an extension should be granted. Nonetheless, the motion was summarily granted. Then on September 3, 2009, Cochennour filed an amended complaint dismissing one of the defendants and finally completed service against Deloughery a few days later.

¶10 When Cochennour made no further effort to prosecute the case, the clerk of court issued a notice on June 25, 2010, that Cochennour's case had been placed on the inactive calendar and would be dismissed after sixty days. Five days before the case was to be dismissed, Cochennour filed an application for default against Deloughery. On the last day to avoid dismissal, Cochennour filed another motion to continue on the inactive calendar, contending that he recently applied for default, and a response "was presently due." Cochennour, however, did not properly serve Deloughery with the application for default. After Deloughery moved to strike the application, Cochennour withdrew it, admitting to improper service.

¶11 Even after Deloughery moved to dismiss on September 28, 2010, Cochennour failed to act diligently. About a month after Deloughery filed its motion to dismiss, it moved for summary disposition because Cochennour had not filed a response. The superior court granted the motion to dismiss on October 29, 2010. About an hour *after* the ruling was entered, Cochennour filed an untimely motion to extend the time to respond and an untimely response to the motion to dismiss. A few days later, Cochennour filed a motion for new trial, incorporating by reference the reasons stated in his untimely response to Deloughery's motion to dismiss, but providing no factual basis for a new trial.

¶12 In sum, Cochennour made no effort to prosecute his claim and only minimal efforts to prevent it from being involuntarily dismissed for lack of prosecution. Besides not making any effort to serve Deloughery in a timely manner, he had done nothing to advance the case on the court's calendar before Deloughery moved to dismiss it nearly sixteen months after the complaint was filed. See *Paul v. Paul*, 28 Ariz. 598, 603, 238 P. 399, 401 (1925) (holding that no action taken for sixteen months sufficient to warrant dismissal). Even then, Cochennour failed to timely respond to Deloughery's motion to dismiss.

¶13 The record is silent as to Cochennour's reasons for not prosecuting the case, and he likewise provides no reasonable explanation on appeal for the delay. On this record, and because "[m]ere delay can be the basis of dismissal," the trial court did not abuse its discretion in dismissing his case pursuant to Rule 41(b). *Cooper*, 6 Ariz. App. at 469, 433 P.2d at 649 (noting that plaintiff, under penalty of dismissal, has the duty to see that his case is brought up for trial within a reasonable time).

¶14 Cochennour nonetheless contends that the case should have been dismissed without prejudice because there was no prejudice to Deloughery, and Cochennour should not be penalized for his attorney's misconduct. We are not persuaded.

¶15 Rule 41(b) states, in pertinent part, "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits." The judgment here did not "otherwise" specify; therefore, it operated as an adjudication on the merits. Even if the dismissal had been denominated as one "without prejudice," the applicable statute of limitations had expired, and any new complaint filed by Cochennour would have been subject to dismissal with prejudice. The only way to avoid this scenario would have been for Cochennour to seek

relief pursuant to A.R.S. § 12-504, the savings statute.³ He did not do so; and we are not inclined to grant him relief on appeal based on a statute that he did not invoke in the trial court.

¶16 Moreover, Cochennour is mistaken in his premise that a dismissal for lack of prosecution should be without prejudice unless the defendant can show that it was prejudiced by the delay. Even had Cochennour urged in the trial court that he be granted relief under the savings statute, the court would not have abused its discretion had it denied the request based on Cochennour's demonstrable lack of diligence. See *Jepson v. New*, 164 Ariz. 265, 274, 792 P.2d 728, 737 (1990) ("Where an action is terminated for lack of prosecution, relief under the savings statute should only be granted where the plaintiff demonstrates that despite diligent pursuit of the case, it was dismissed.").

¶17 Finally, Arizona has rejected the "positive misconduct rule," which permits a client to seek relief from judgment based on an attorney's abandonment of the claim. *Panzino v. City of Phoenix*, 196 Ariz. 442, 444, 446, ¶¶ 1, 10, 999 P.2d 198, 200, 202 (2000). Because a failure to prosecute is tantamount to abandonment of a claim, any delays caused by

³ "If an action timely commenced is terminated by . . . dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired." A.R.S. § 12-504(A).

Cochennour's attorney are attributable to Cochennour for the purpose of determining whether the dismissal should have been with or without prejudice.

CONCLUSION

¶18 Based on the totality of circumstances, we conclude that the trial court did not abuse its discretion by dismissing Cochennour's complaint with prejudice. Therefore, we affirm the trial court's judgment of dismissal.

/s/ _____
PHILIP HALL, Judge

CONCURRING:

/s/ _____
DIANE M. JOHNSEN, Presiding Judge

/s/ _____
DONN KESSLER, Judge