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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 03/01/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

ALICE KAPLAN, as Trustee of the ) No. 1 CA-CV 11-0254  
George Kaplan Trust U/T/A dated )  
April 8, 1992; and ALICE and ) DEPARTMENT B  
GEORGE KAPLAN, wife and husband, )  
 ) **MEMORANDUM DECISION**  
Plaintiffs/Appellees, )  
 ) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
 ) Civil Appellate Procedure)  
CITY OF CHANDLER, an Arizona )  
municipal corporation, )  
 )  
Defendant/Appellant. )  
 )

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Appeal from the Superior Court in Maricopa County

Cause No. CV2010-016874

The Honorable Hugh E. Hegyi, Judge

**ORDER VACATED; REMANDED**

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

¶1 The City of Chandler appeals the superior court's reinstatement of Alice and George Kaplan's negligence claim against the City. We vacate the reinstatement order and remand for proceedings consistent with this decision.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 On June 4, 2009, the Kaplans learned a water pipe had burst, causing property damage to an unoccupied building they own in Chandler. Within the 180 days prescribed by Arizona Revised Statutes ("A.R.S.") section 12-821.01 (2012), the Kaplans filed a notice of claim that alleged the City was negligent by failing to turn off water service to the building.<sup>1</sup> After the City did not respond to the notice of claim, the Kaplans filed a complaint against the City and their insurance agent in superior court on June 4, 2010. Under Arizona Rule of Civil Procedure 4(i), the Kaplans had 120 days from that date to serve the defendants.

¶3 After filing the complaint, however, the Kaplans' lawyer completely abandoned them and their claim. On September 8, 2010, Court Administration filed a Notice of Intent to Dismiss for Lack of Service, warning that the Kaplans must complete service by October 4, 2010, or their case would be dismissed. The Kaplans' lawyer did not attempt to comply with

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<sup>1</sup> Absent material revisions after the relevant date, we cite a statute's current Westlaw version.

this deadline and did not inform the Kaplans of the status of their case.

¶4 On November 30, 2010, the Kaplans learned their attorney was the subject of attorney disciplinary proceedings and that he had stipulated to an interim suspension of one year, effective November 30, 2010. See *In re Tiffany*, Nos. 09-1275, et al. (Jan. 7, 2011) (Hearing Officer Report); *In re Tiffany*, Nos. 09-1275, et al. (Feb. 25, 2011) (Disciplinary Commission Report). In fact, the Kaplans' attorney had abandoned no fewer than seven other clients who filed bar complaints against him, resulting in his suspension. The Disciplinary Commission found that the Kaplans' attorney had, among other instances of misconduct, missed client deadlines, been unresponsive to communication from opposing counsel and clients, failed to file responsive motions, misrepresented progress on cases to clients, failed to inform clients of deadlines and lied to bar counsel when questioned about his conduct.

¶5 When the Kaplans learned that they, too, had been the victims of their attorney's misconduct, they immediately contacted another lawyer to represent them in their lawsuit against the City. On December 1, 2010, their new counsel filed a motion asking the court to extend to December 3 the time for service. Meanwhile, the new lawyer arranged for service to be made, and the City was served the same day the motion for an

extension of time was filed, December 1. But also on December 1, the court filed an administrative order dismissing the action for failure to timely serve the defendants.

¶16 After the administrative dismissal was entered, the Kaplans filed a motion to file a new action under A.R.S. § 12-504(A) (2012). Over the City's objection, the superior court construed the Kaplans' motion as a motion to set aside the judgment pursuant to Arizona Rule of Civil Procedure 60(c). Finding good cause, the court reinstated the original action. The City timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. § 12-2101(A)(2) (2012).

#### DISCUSSION

¶17 We review a superior court's ruling on a motion for relief pursuant to Rule 60(c) or A.R.S. § 12-504(A) for abuse of discretion. *Maher v. Urman*, 211 Ariz. 543, 550-51, ¶¶ 21, 25, 124 P.3d 770, 777-78 (App. 2005); *Johnson v. Elson*, 192 Ariz. 486, 488, ¶ 9, 967 P.2d 1022, 1024 (App. 1998). We review the court's order in this case to determine if it is supported by "any reasonable legal basis." *Johnson*, 192 Ariz. at 489, ¶ 10, 967 P.2d at 1025.

¶18 Arizona Rule of Civil Procedure 60(c) allows the superior court to grant a plaintiff relief from judgment because of "(1) mistake, inadvertence, surprise or excusable

neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

¶19 Addressing first the "mistake" ground of Rule 60(c)(1), we have held that "[n]eglect is excusable if it might be the act of a reasonably prudent person under the same circumstances." *Maher*, 211 Ariz. at 550, ¶ 22, 124 P.3d at 777 (quotation omitted). In this case, the actions of the Kaplans' attorney, who abandoned their case without taking any steps to effect service, did not constitute excusable neglect. Neither does such inexcusable neglect find relief under Rule 60(c)(6). In *Panzino v. City of Phoenix*, 196 Ariz. 442, 999 P.2d 198 (2000), our supreme court declined to adopt the "positive misconduct" rule, which would allow relief when an attorney has totally abandoned a client. *Id.* at 445-46, ¶¶ 8, 10, 999 P.2d at 201-02. Instead, the court held Rule 60(c)(6) does not allow relief from inexcusable neglect, even in the case of abandonment. *Id.* at 446, ¶ 11, 999 P.2d at 202.

¶10 The Kaplans argue their lawyer is to blame for their failure to timely serve the City. We accept the proposition that the failure to effect service is entirely the fault of the Kaplans' lawyer at the time. Indeed, the record of his disciplinary proceedings, of which we take judicial notice, tells a sorry story of a lawyer who, facing particular pressures in his personal life, failed his obligations to several clients.

But unfortunately for the Kaplans, the case authorities make plain that even gross negligence by a client's lawyer does not excuse a failure to prosecute a case diligently. Because the actions of the Kaplans' attorney in this case do not constitute excusable neglect, the Kaplans were not entitled to relief under Rule 60(c).

¶11 Under A.R.S. § 12-504(A),

[i]f an action timely commenced is terminated by abatement, voluntary dismissal by order of the court or 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.

The Kaplans' claim abated when they failed to serve the City within the 120-day time limit of Rule 4(i). Accordingly, A.R.S. § 12-504(A) allowed the superior court discretion to grant them leave to refile.

¶12 In determining whether to grant relief under § 12-504(A), a court must consider several factors: "whether the plaintiff acted reasonably and in good faith, whether he prosecuted his case diligently and vigorously, whether a procedural impediment exists which affects his ability to file a second action, and whether either party will be substantially prejudiced." *Jepson v. New*, 164 Ariz. 265, 272, 792 P.2d 728, 735 (1990) (quotation omitted). When a plaintiff's action has

terminated by abatement, in order to show that he "diligently and vigorously" prosecuted the case, the plaintiff "must show that despite diligent efforts, he was unable to effect service." *Id.* at 273, 792 P.2d at 736.

¶13 The Kaplans cannot make this showing because they cannot show that they attempted to serve the City before the 120 days had expired. The Kaplans argue they acted diligently to investigate their claim and timely filed a pre-suit notice of claim with the City. But under *Jepson*, the test when a case is dismissed for failure to serve is whether a plaintiff acted "diligently and vigorously" after filing the complaint, not before. And although the Kaplans argue that their lawyer was to blame for not diligently attempting to serve the defendants, they are responsible for and bound by their attorney's actions. *Panzino*, 196 Ariz. at 447, ¶¶ 16-17, 999 P.2d at 203 ("[U]nder agency principles, [Plaintiff's] right of action now lies against her former attorney, not against the original defendants.").

¶14 For these reasons, we conclude that A.R.S. § 12-504(A) did not allow the superior court to grant the Kaplans leave to refile their complaint against the City.

¶15 Although neither Rule 60(c) nor § 12-504(A) allowed the superior court to grant the Kaplans' motion for leave to refile their complaint, we note that the court did not address

the separate motion the Kaplans filed for an extension of time to effect service of their original complaint. On December 1, 2010, the Kaplans filed a motion requesting additional time to effect service. After the action was administratively dismissed that same day, the court did not rule on the motion.

¶16 Pursuant to Arizona Rule of Civil Procedure 4(i), the superior court may allow a plaintiff additional time to effect service of a complaint. Moreover, the court may grant such relief even without a showing of good cause. *Maher*, 211 Ariz. at 547, ¶ 10, 124 P.3d at 774. The Kaplans' motion to extend time asked the court to extend the deadline for service to December 3. According to the record, they served the City on December 1, well within the extended time their motion sought.

¶17 Accordingly, we remand for the superior court to consider and rule pursuant to Rule 4(i) on the Kaplans' motion for an extension of time to effect service.



**CONCLUSION**

¶18 For the reasons set forth above, we vacate the court's order of reinstatement and remand the matter for proceedings consistent with this decision.

/s/  
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/  
DONN KESSLER, Judge

/s/  
PETER B. SWANN, Judge