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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALICE NOVOA-BENSON, Plaintiff/Appellant, v. ALMA VILDOSOLA, Defendant/Appellee.	2 CA-CV 2011-0036 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV201000977

Honorable James L. Conlogue, Judge

AFFIRMED

Alice Novoa-Benson — McNeal
In Propria Persona

James L. Riley — Bisbee
Attorney for Defendant/Appellee

B R A M M E R, Judge.

¶1 Alice Novoa-Benson appeals from the trial court's ruling dismissing with prejudice her election contest filed against Alma Vildosola. She argues the court erred in dismissing her complaint as to the issue of Vildosola's employment, denying her motion for a continuance, and failing to rule on her motion for sanctions. We affirm.

Factual and Procedural Background

¶2 In November 2010, Novoa-Benson filed an election challenge contesting Vildosola's election to the office of Cochise County Justice of the Peace. In June 2010, the Cochise County superior court in cause number CV201000455 (the "first case") had resolved a previous challenge by Novoa-Benson regarding Vildosola's qualifications to run for the office of Cochise County Justice of the Peace in the primary election. In the instant case, the trial court held a hearing and found that all the issues the complaint raised, except Vildosola's employment between 1993 and 1996, had been resolved in the first case and were barred by the doctrine of res judicata, or claim preclusion.[1] The court dismissed all Novoa-Benson's claims with prejudice. This appeal followed.

Discussion

¶3 Novoa-Benson argues the trial court erred in dismissing her complaint as to the issue of "Vildosola's employment between 1993 and 1996." "We review a trial court's grant of a motion to dismiss for an abuse of discretion, but review issues of law de novo." *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 11, 158 P.3d 232, 236 (App. 2007).

¶4 Although her argument is unclear, Novoa-Benson appears to base her challenge to Vildosola's election on A.R.S. §§ 16-672(A)(2) and 16-674(A), suggesting she was not eligible to serve because she had been "improperly natur[a]lized" in 1996,

[1]"We use the more modern terms 'claim preclusion' instead of 'res judicata' and 'issue preclusion' instead of 'collateral estoppel.'" *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, n.3, 158 P.3d 232, 236 n.3 (App. 2007).

and her allegedly illegal employment for the three years preceding that naturalization is some evidence the naturalization must have been improper. The trial court found there was "no criminal liability for the acts that have been alleged and . . . [Novoa-Benson] ha[d] not submitted any authority, nor could the Court find any authority that would have an effect on this election contest." Novoa-Benson has failed to provide this court a certified transcript of the hearing on the motion to dismiss, *see* Ariz. R. Civ. App. P. 11(b), and so we assume it would support the court's determination. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."); *see also Copper State Bank v. Saggio*, 139 Ariz. 438, 441, 679 P.2d 84, 87 (App. 1983) (we hold pro se litigant to "same familiarity with required procedures" as qualified member of bar).

¶5 Moreover, to the extent Novoa-Benson contends the employment issue is probative of whether Vildosola's naturalization documents are valid, the court in the first case determined after a hearing that Vildosola had presented prima facie evidence that she meets the citizenship requirement to seek re-election to the position of Justice of the Peace. Accordingly, we will not address that issue, especially where the trial court has determined no new evidence affected Vildosola's eligibility. *See Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 16, 146 P.3d 1027, 1033 (App. 2006) ("'Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits.'"), *quoting Montana v.*

United States, 440 U.S. 147, 153 (1979). Therefore, the court did not err in dismissing Novoa-Benson's claim as to the issue of Vildosola's employment prior to 1996.[2]

¶6 Novoa-Benson also argues the trial court erred in denying her motion for a continuance. She filed a motion for a continuance the afternoon before the hearing alleging she "ha[d] not been afforded sufficient time to execute subpoenas for associated and necessary documentary evidence." The court denied the motion. We review the court's denial of a motion to continue for an abuse of discretion. *Ornelas v. Fry*, 151 Ariz. 324, 329, 727 P.2d 819, 824 (App. 1986). And "[i]nherent in the concept of abuse of discretion is a showing of prejudice resulting from the exercise of that discretion." *E. Camelback Homeowners Ass'n v. Ariz. Found. for Neurology & Psychiatry*, 18 Ariz. App. 121, 128, 500 P.2d 906, 913 (1972).

¶7 Novoa-Benson does not argue she was prejudiced by the trial court's denial of her motion. Although she states she needed time "for execution of subpoena [sic] for critical evidence as to how the incontrovertible unlawful employment occurred," she has not explained how this evidence would have altered the outcome below. And additional evidence relating to Vildosola's alleged unlawful employment as it relates to her

[2]Novoa-Benson also argues that, pursuant to Rule 8(d), Ariz. R. Civ. P., Vildosola conceded and admitted the amended complaint's allegation that her employment between 1993 and 1996 "would constitute grounds for disapproval . . . by the United States Citizenship and Naturalization Services" because she did not specifically deny it in her responsive pleading. However, even if the issue of citizenship was not precluded by the adjudication of that issue in the first case, nothing in the record suggests this argument was raised below, so it has been waived. *See Airfreight Express Ltd.*, 215 Ariz. 103, ¶ 17, 158 P.3d at 238-39 (argument not raised in trial court waived on appeal).

citizenship status would have had no effect because, as discussed above, that issue has been precluded as previously resolved. Therefore, we find no abuse of discretion in the court's denial of her motion for a continuance. *See E. Camelback Homeowners Ass'n*, 18 Ariz. App. at 128, 500 P.2d at 913.

¶8 Novoa-Benson also alleges the trial court erred in failing to rule on her motion for sanctions. She contends "[t]here was no action or acknowledgement of the sanction motion by [the court]." We disagree. The court's minute entry states: "Ms. Novoa-Benson requested that the Court order sanctions against Mr. Riley." The court acknowledged but did not grant the request, thus implicitly denying it. And we will not find error merely because of a defect in the court's ruling. *See* Ariz. R. Civ. P. 61. Moreover, Novoa-Benson could have obtained an explicit ruling on that motion by filing a motion to alter or amend the judgment pursuant to Rule 59(l), Ariz. R. Civ. P., and we will not address issues if the trial court has not been provided the opportunity first to do so. *See Airfreight Express Ltd.*, 215 Ariz. 103, ¶ 17, 158 P.3d at 238-39. Therefore, we find no error in the court's ruling implicitly denying Novoa-Benson's motion for sanctions.[3]

¶9 Vildosola has suggested this court impose sanctions against Novoa-Benson for pursuing this appeal. Rule 25, Ariz. R. Civ. App. P., allows us to impose sanctions "[w]here the appeal is frivolous or taken solely for the purpose of delay" to discourage

[3]We note Novoa-Benson has not argued the denial would have been erroneous, but only that the court erred by not ruling on the motion for sanctions. Therefore, we do not address whether the court erred in denying the motion.

"like conduct in the future." An appeal is frivolous when either (1) it is prosecuted for an improper purpose, or (2) any reasonable attorney would agree that the appeal is without merit. *Price v. Price*, 134 Ariz. 112, 114, 654 P.2d 46, 48 (App. 1982). As we have noted already, Novoa-Benson's arguments on appeal either are precluded or without merit. Each of Novoa-Benson's arguments is founded on her assertion that Vildosola is not a lawful United States citizen despite the admission of evidence in prior proceedings establishing Vildosola's citizenship. And, a trial court previously had ruled against Novoa-Benson in an election contest on the same issue. We determine that any reasonable attorney would agree that Novoa-Benson's arguments on appeal are without merit. Therefore, we impose a $1,000 sanction against her, payable to the clerk of this court.

Disposition

¶10 For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge