

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



DIVISION ONE
FILED: 10/30/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

L. S. TEMPLAR,) 1 CA-CV 12-0001
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
) - Rule 28, Arizona
LAURI ANN MOODY, SHANNON S.) Rules of Civil
BRADLEY, JANE DOE INSURANCE CO.,) Appellate Procedure)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-098688

The Honorable John R. Ditsworth, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

L.S. Templar
In Propria Persona

Mesa

N O R R I S, Judge

¶1 This appeal arises out of superior court orders dismissing L.S. Templar's common law tort and 42 U.S.C. § 1983 (2012) claims against Lauri Moody and Shannon Bradley, Moody's former attorney.

¶12 Templar sued Bradley and Moody, alleging claims for abuse of process, malicious prosecution,¹ unlawful imprisonment, negligent and intentional infliction of emotional distress, fraud, and mail fraud. He also alleged claims against Bradley and Moody under 42 U.S.C. § 1983. The record reflects these claims were grounded on first, allegedly wrongful accusations Bradley and Moody made against him, which resulted in various family court orders regarding a child he had with Moody ("family court allegations"); second, allegedly wrongful accusations Bradley and Moody made against him, which resulted in his criminal convictions and incarceration for assault, criminal trespass, and custodial interference ("criminal court allegations"); and third, allegedly wrongful accusations Moody made to police -- after Templar had been released from prison in March 2010, allegedly at Bradley's suggestion -- accusing him of criminal misconduct ("post-incarceration allegations").

¶13 The superior court granted Bradley's motion to dismiss. Subsequently, after Templar served Moody and moved for summary judgment against her, Moody filed an "Answer and Motion

¹We recognize that if the underlying action is civil, the correct legal term is "wrongful institution of civil proceedings," rather than "malicious prosecution," a term that applies when the underlying action is criminal. *Lane v. Terry H. Pillinger, P.C.*, 189 Ariz. 152, 153 n.1, 939 P.2d 430, 431 n.1 (App. 1997).

to Dismiss," which the court deemed to be a cross-motion for summary judgment, which it also granted.

¶14 On appeal, Templar argues the court should not have dismissed his claims against Bradley and Moody. Before addressing this argument, as an initial matter, we note this appeal is unique because neither Bradley nor Moody filed an answering brief. Thus, we could regard their failure to do so as a confession of error and reverse the superior court's orders dismissing Templar's claims against them. See ARCAP 15(c). In our discretion, we decline to do so, *Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994) (confession of reversible error doctrine is discretionary), and have reviewed the record and elected to address the merits of Templar's claims against Bradley and Moody. As we explain, the superior court properly dismissed Templar's claims grounded on his family court and criminal court allegations, but, with one exception, it should not have dismissed his claims grounded on his post-incarceration allegations.

I. Family Court and Criminal Court Allegations

¶15 As a matter of law, the superior court properly dismissed Templar's claims insofar as they were grounded on his family court allegations. Through these claims, Templar was attempting to collaterally attack the family court orders and

destroy their effect. As our supreme court has recognized, a party may not collaterally attack a prior judgment because such an attack is an impermissible effort to obtain another independent judgment to destroy the effect of the former judgment. *Cox v. Mackenzie*, 70 Ariz. 308, 312, 219 P.2d 1048, 1051 (1950).

¶16 For a similar reason, as a matter of law, the superior court also properly dismissed all of Templar's claims insofar as they were grounded on the criminal court allegations. Through these claims, Templar was attempting to collaterally attack his convictions and destroy their effect. See *Heck v. Humphrey*, 512 U.S. 477, 484-86, 114 S. Ct. 2364, 2371-72, 129 L. Ed. 2d 383 (1994) (criminal defendant cannot use 42 U.S.C. § 1983 civil suit to collaterally attack criminal convictions); cf. *Cox*, 70 Ariz. at 312, 219 P.2d at 1051 (plaintiff may not collaterally attack probate court order by filing civil action).

II. Post-Incarceration Allegations

¶17 Although the superior court properly dismissed Templar's claims against Bradley and Moody insofar as they were grounded on his family court and criminal court allegations, with one exception, it should not have dismissed his claims insofar as they were grounded on his post-incarceration allegations.

¶18 First, the record reflects, as Templar argues on appeal, that the superior court dismissed all of his claims against Bradley simply because he failed to appear at the oral argument on Bradley's motion to dismiss. Because Templar had filed a written response to Bradley's motion, the dismissal of his claims against Bradley for this reason alone was unwarranted. *Cf. Estate of Lewis v. Lewis*, 229 Ariz. 316, 324, ¶ 19, 275 P.3d 615, 623 (App. 2012) (court improperly dismissed complaint for plaintiff's failure to appear at pretrial conference; "[t]he imposition of the most severe sanctions contemplated by the rules should be reserved for those occasions where the violation is flagrant, persistent or willful or otherwise aggravated." (citing *Insua v. World Wide Air, Inc.*, 582 So. 2d 102, 103 (Fla. Dist. Ct. App. 1991))). The superior court thus should have considered the merits of Templar's claims against Bradley before dismissing them. *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998) (dismissal is appropriate under Arizona Rule of Civil Procedure 12(b)(6) only if "as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof").

¶19 Second, as discussed, the superior court dismissed Templar's claims against Moody after deciding to treat her

"Answer and Motion to Dismiss" as a summary judgment motion. In so doing, however, the record does not reflect the court notified the parties it intended to treat Moody's motion as a summary judgment motion. This was improper. *Young v. Rose*, 1 CA-CV 10-0786, 2012 WL 4357427 (Ariz. App. Sept. 25, 2012) (judgment vacated because superior court did not notify parties it would treat motion to dismiss as a motion for summary judgment and thus did not give them opportunity to present material relevant to such a motion). Further, insofar as Templar failed to plead factual allegations supporting his claims as necessary to withstand dismissal under Rule 12(b)(6), if requested to do so, a superior court should give "the non-moving party . . . an opportunity to amend the complaint if such an amendment cures its defects." *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, ¶ 26, 990 P.2d 26, 33 (App. 1999).²

¶10 Despite these procedural errors, the superior court properly dismissed Templar's 42 U.S.C. § 1983 claims against Bradley and Moody. Neither Bradley nor Moody were government actors. Only a "government actor" can be liable under 42 U.S.C.

²For example, Templar failed to plead all the required factual elements in support of his common law fraud and statutory mail fraud claims. See *Peery v. Hansen*, 120 Ariz. 266, 269, 585 P.2d 574, 577 (App. 1978) (nine elements of fraud); *Pereira v. United States*, 347 U.S. 1, 8, 74 S. Ct. 358, 362, 98 L. Ed. 435 (1954) (to prevail on mail fraud claim, plaintiff must prove scheme to defraud and mailing of "letter, etc." for purpose of executing scheme).

