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



DIVISION ONE
FILED: 1/15/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LEORA M. UDULUTCH,)
)
) No. 1 CA-CV 12-0069
)
) DEPARTMENT C
)
 Plaintiff/Appellant,) **MEMORANDUM DECISION**
)
)
 v.)
) (Not for Publication -
) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
 JAMES A. DICKSON,)
)
)
 Defendant/Appellee.)
)
)
 _____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-006221

The Honorable Maria del Mar Verdin, Judge

AFFIRMED AS MODIFIED

The Brill Law Firm, P.L.L.C.
By Daniel S. Brill
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By Jeffrey J. Spamer
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J O H N S E N, Judge

¶1 Leora M. Udulutch ("Appellant") appeals the superior court's dismissal with prejudice of her complaint against James A. Dickson ("Appellee") for lack of prosecution. We hold the superior court did not abuse its discretion in dismissing Appellant's complaint, but modify the judgment to provide that the dismissal is without prejudice.

FACTS AND PROCEDURAL HISTORY

¶2 Appellant filed a complaint alleging a claim of negligence against Appellee in March 2009. On Appellant's motion, the superior court extended the deadline for service to September 20, 2009. The court also entered a 150-day order directing Appellant to file a Motion to Set and Certificate of Readiness by December 15, 2009, pursuant to Arizona Rule of Civil Procedure ("Rule") 38.1. The order stated, "If Rule 38.1 is not complied with, the case will be placed on Inactive Calendar . . . and it will be dismissed . . . without further notice, on or after 2/15/2010."

¶3 On September 20, 2009, Appellant moved for an

additional 30 days to effect service. The court granted the motion and extended the service deadline to January 15, 2010. Although Appellant served Appellee during the additional time allotted, she failed to file a Motion to Set and Certificate of Readiness, and, on September 15, 2010, court administration dismissed the case without prejudice for lack of prosecution.

¶14 Appellant filed a motion to "reinstate the case." The court granted the motion and issued an order placing the case on the inactive calendar until May 31, 2011, "to allow [Appellant] to pursue, and conclude, default proceedings against [Appellee]." On June 8, 2011, having failed to commence default proceedings and now represented by new counsel, Appellant filed a motion to continue the case on the inactive calendar for another 150 days. By then the case had been reassigned to Judge Burke, who denied the motion. In a minute entry filed July 8, 2011, the court stated,

This case is 27 months old and no significant action has been taken by [Appellant].

In September of 2010 [Appellant] requested that this case, which had previously been dismissed for lack of activity, be reinstated on the Inactive Calendar to allow [Appellant] to obtain a default judgment.

On March 31, 2011, Judge Garcia reinstated this case on the Active Calendar until May 31, 2011, and [Appellant] still did nothing, except change counsel,

notwithstanding the fact that service by publication was apparently completed in October of 2009.

[Appellant has] shown no good cause to justify a further continuance on the Inactive Calendar.

Although the court denied the motion to continue on the inactive calendar, it did not dismiss the case; nor did court administration issue an order of dismissal. Appellant filed a motion for reconsideration, which the court denied.

¶15 In the absence of an order dismissing the case, Appellant filed a Notice of Change of Judge, pursuant to Rule 42(f). Appellant then applied for entry of default against Appellee on July 20, 2011, and with that application pending, filed a Motion to Set and Certificate of Readiness on July 23, 2011. Three days later, Appellee answered, denying liability, and filed a Controverting Certificate of Readiness and Request for a Rule 16 Scheduling Conference. In the meantime, court administration acted on the Notice of Change of Judge by reassigning the case to Judge Verdin on July 28, 2011. Responding to an order from Judge Verdin, Appellant and Appellee filed a proposed scheduling order, which the court entered on September 29, 2011.

¶16 Appellee, who first appeared in the case after Judge Burke had denied Appellant's motion to continue the case on the inactive calendar, filed a motion to dismiss on September 29,

2011. He argued that Judge Burke found Appellant had not demonstrated good cause to continue the case and that the matter should have been dismissed administratively after Judge Burke ruled. Over Appellant's objection, Judge Verdin granted the motion and dismissed the case with prejudice. The court explained it was ordering dismissal "for the reason cited by [Appellee] and those contained in the record." Apparently referring to Judge Burke's order, the court added, "this matter should have been dismissed on May 31, 2011."

¶7 This timely appeal followed.¹ We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).²

DISCUSSION

A. Legal Principles.

¶8 We review a superior court's order dismissing an action pursuant to Rule 38.1 for failure to prosecute for an abuse of discretion. *Jepson v. New*, 164 Ariz. 265, 270, 792 P.2d 728, 733 (1990). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or

¹ Appellant moved for relief from judgment pursuant to either Rule 60(c) or Arizona Revised Statutes ("A.R.S.") section 12-504 (West 2013), but filed her notice of appeal before the superior court ruled on that motion. Whether relief might be appropriate pursuant to either Rule 60(c) or A.R.S. § 12-504 therefore is not before this court.

² Absent material revisions after the relevant date, we cite a statute's current version.

for untenable reasons." *Quigley v. City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982) (citation omitted).

B. The Superior Court Did Not Abuse Its Discretion in Dismissing for Failure to Prosecute.

¶9 The issue is whether the superior court abused its discretion in dismissing the case for lack of prosecution pursuant to Rule 38.1 based on its conclusion that the case should have been dismissed after Judge Burke denied Appellant's motion to continue the case on the inactive calendar on July 8, 2011. In relevant part, Rule 38.1 provides:

(d) Inactive Calendar. The clerk of the court or court administration shall place on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness has not been served within nine months after the commencement thereof[.] All cases remaining on the Inactive Calendar for two months shall be dismissed without prejudice for lack of prosecution, and the court shall make an appropriate order as to any bond or other security filed therein, unless prior to the expiration of such two month period;

(1) a proper Motion to Set and Certificate of Readiness is served;

(2) the court, on motion for good cause shown, orders the case to be continued on the Inactive Calendar for a specified period of time without dismissal; or

(3) a notice of decision has been filed with the clerk of court in a case assigned to arbitration.

¶10 Appellant argues the superior court erred by concluding the matter should have been dismissed after Judge

Burke's ruling. Appellant's argument is based on her contention that Judge Burke abused his discretion in denying the motion to continue because she showed good cause justifying the continuance. We disagree.

¶11 Appellant's motion to continue, filed on June 8, 2011, a week after the prior deadline expired, consisted of five sentences that, combined, took up less than a full page. In support of her request for an extension, Appellant noted only that she "recently" retained new counsel and "recently" had sent the summons and complaint to Appellee's insurer. She added that a further extension on the inactive calendar would allow Appellee "to file his responsive pleading" and "for the parties to conduct discovery."

¶12 Judge Burke plainly did not abuse his discretion in denying Appellant's motion to continue. See *Hyman v. Arden-Mayfair, Inc.*, 150 Ariz. 444, 448, 724 P.2d 63, 68 (App. 1986) (court did not abuse its discretion in rejecting motion to continue based on stipulation that more time was needed for discovery and because settlement talks had delayed prosecution of case). Appellant argues that after serving Appellee, she took "affirmative and active steps to advance" the case. But, as Judge Burke's order stated, the case had been pending for 27 months; although Appellant effected service in October 2009, she had done nothing more to prosecute the matter in the 21 months

since then. Given that Appellee had been served in October 2009 but had failed to respond, the prior order extending the case to May 31, 2011, anticipated that Appellant would file for a default. In asking for an additional extension, Appellant gave no explanation for her failure to do so.

¶13 The record does not show why the case was not dismissed off the inactive calendar following Judge Burke's ruling. Appellant argues Appellee should be estopped from seeking dismissal for failure to prosecute because he engaged in certain discovery and joined in filing a scheduling order during the three months following Judge Burke's order. But Appellee had not appeared in the action before Judge Burke entered his order, and Appellee was not endorsed on the order. Because we cannot know from the record when Appellee became aware of Judge Burke's order, we cannot conclude that he acted with unclean hands in proceeding to defend the action after Appellant threatened to default him.

¶14 This is particularly true given Appellant's own choice to file a Rule 42(f) Notice of Change of Judge immediately after Judge Burke denied her motion to continue and her motion to reconsider that ruling. The notice was not technically improper. Pursuant to Rule 42(f)(1)(D), Judge Burke had not ruled on a contested issue because Appellee had not yet appeared in the action; nor had Judge Burke held a scheduled conference

or contested hearing. But under the circumstances, the notice appears likely to have been an attempt to stave off the routine order of dismissal that normally follows expiration of time on the inactive calendar. Having apparently succeeded in postponing that dismissal, Appellant may not fault Appellee for defending the action in apparent ignorance of the denial of her motion to continue.³

¶15 Given that Judge Burke did not abuse his discretion in denying Appellant's motion to continue, we cannot conclude that the superior court's later decision to dismiss the complaint for failure to prosecute was "manifestly unreasonable."

¶16 As noted, administrative dismissal routinely follows a court's refusal to continue a case on the inactive calendar. After dismissal apparently fell through the cracks in this case after Judge Burke ruled, Appellant finally engaged in some discovery and otherwise pursued her case in the weeks following the order. We cannot conclude, however, that the superior court abused its discretion by implicitly finding these efforts were too little and too late.

³ Contrary to Appellee's contention, Judge Burke's order declining to continue the case on the inactive calendar did not dismiss the case. Because Rule 38 is not self-executing, a case that is retained on the inactive calendar beyond the date for dismissal is not dismissed unless and until the court issues an order of dismissal. *Campbell v. Deddens*, 93 Ariz. 247, 250, 379 P.2d 963, 965 (1963).

¶17 Appellant argues we should reverse the dismissal because she has demonstrated a right to relief under Arizona Rule of Civil Procedure 60(c), pursuant to *Campbell v. Deddens*, 93 Ariz. 247, 250, 379 P.2d 963, 965 (1963).⁴ But the order before us is an order dismissing for failure to prosecute pursuant to Rule 38.1(d), not an order denying a motion for relief from judgment pursuant to Rule 60(c). Moreover, even under *Campbell*, the court analyzes the Rule 60(c) factors only if “the good cause required by [Rule 38] is shown.” *Id.* at 251, 379 P.2d at 965.

¶18 We already have concluded that Judge Burke did not abuse his discretion in ruling that Appellant did not show good cause for continuing the case on the inactive calendar past May 31, 2011. In opposing Appellee’s motion to dismiss, Appellant argued she had prosecuted her claim diligently, but could only point to acts she took after July 20, 2011, roughly two weeks after Judge Burke ruled and seven weeks after expiration of the inactive calendar deadline. Appellant argues that Appellee is partly to blame for the delay because he failed to respond to

⁴ Rule 60(c) permits relief from dismissal of an action for lack of prosecution when (1) there has been vigorous pursuit of the case, (2) steps were taken to inform the court of the case’s status, (3) there would be prejudice to the moving party for dismissing the case, (4) the movant acted promptly in seeking the continuance and (5) a meritorious claim exists. *Jepson*, 164 Ariz. at 270, 792 P.2d at 733.

the complaint until after Appellant initiated default proceedings in July 2011. But Appellant offers no explanation for her own failure to move promptly for entry of default in the many months following service in October 2009. Based on the record, we cannot conclude the superior court exceeded the bounds of reason by dismissing the case.

¶19 Appellant argues in her reply brief that her filing of the Motion to Set and Certificate of Readiness on July 23, 2011, caused the case to be removed from the inactive calendar, and that Judge Verdin erred by dismissing it thereafter from the active calendar. Appellant has waived this argument, however, by failing to raise it in her opening brief. *United Bank v. Mesa N.O. Nelson Co.*, 121 Ariz. 438, 443, 590 P.2d 1384, 1389 (1979).

¶20 Finally, Appellant argues the superior court erred by dismissing her complaint with prejudice. We agree; pursuant to Rule 38.1(d), a dismissal for failure to prosecute shall be without prejudice. We modify the judgment accordingly.

CONCLUSION

¶21 For the reasons set forth above, we modify the judgment to provide that the dismissal is without prejudice, and affirm the judgment as modified. Contingent on compliance with

Arizona Rule of Civil Appellate Procedure 21, Appellee may recover his costs of appeal.⁵

/s/

DIANE M. JOHNSEN, Judge

CONCURRING:

/s/

SAMUEL A. THUMMA, Presiding Judge

/s/

MICHAEL J. BROWN, Judge

⁵ The caption has been modified to reflect only the parties involved in this appeal.