

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 3/26/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

PAUL T. DEMOS,) 1 CA-CV 12-0328
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BARRY and DIANNE OLSON, husband) ARCAP 28)
and wife,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-050383

The Honorable Alfred M. Fenzel, Judge

APPEAL DISMISSED

Paul T. Demos
Plaintiff/Appellant, *In Propria Persona*

Phoenix

Clarkson Legal, P.L.C.
By Nat Clarkson
Attorney for Defendants/Appellees

Mesa

C R U Z, Judge

¶1 Paul T. Demos appeals the superior court's judgment and related orders resulting in an award of costs and attorneys' fees to Barry and Dianne Olson (collectively, "the Olsons") as a result of the dismissal of Demos' lawsuit. Concluding we lack

jurisdiction to decide the merits of this appeal, we dismiss the appeal and award costs and attorneys' fees to the Olsons.

BACKGROUND¹

¶2 In May 2006, Demos entered a "lease-to-own" contract to purchase a home from the Olsons. In February 2009, after Demos allegedly failed to make a required payment, the Olsons filed a forcible detainer complaint, seeking to evict him from the home. Demos contested the eviction action, but he lost in justice court and on appeal in superior court. In March 2010, Demos filed a *pro per* complaint in superior court against the Olsons and others, including the attorneys who had represented the Olsons in the eviction action, alleging numerous causes of action.²

¶3 In September 2010, court administration issued a 150-day order advising the parties that unless certain actions were taken, including filing a motion to set and certificate of readiness, the matter would be dismissed without further notice on or after February 22, 2011. Demos failed to file a motion to set and certificate of readiness.

¶4 In an order signed by a special commissioner and filed March 2, 2011, the superior court administratively dismissed

¹ In general, we view the evidence in the light most favorable to sustaining the superior court's decision. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82, ¶ 13, 107 P.3d 923, 928 (App. 2005).

² The superior court granted a motion to dismiss with prejudice in favor of the Olsons' prior counsel.

Demos' complaint without prejudice for lack of prosecution. Demos moved to reinstate the case, to extend time, and to compel discovery, and sought monetary sanctions against the Olsons in the form of an "hourly business consultant fee of \$358.00 per hour." In a minute entry filed April 27, 2011, the superior court denied Demos' motions, including his motion to reinstate his case "for failure to plead sufficient grounds in support thereof." The court also granted the Olsons' request for costs and attorneys' fees in the amount of \$2,973.00, and their request pursuant to Arizona Rule of Civil Procedure ("Rule") 41(d) that Demos pay the costs and attorneys' fees as a precondition to refiling his claims against the Olsons and obtain leave of court before naming the Olsons' current counsel in an action based on representation of the Olsons in the dismissed action.

¶15 On May 2, 2011, Demos moved for reconsideration. The superior court denied his motion in a minute entry filed May 23. On May 26, 2011, Demos filed a notice of appeal.

¶16 On June 22, 2011, the superior court entered a signed judgment against Demos and in favor of the Olsons in the amount of \$2,973.00 plus interest. Demos filed a "Motion to Set Aside Judgment; Motion for Reconsideration; and for Oral Argument" on July 13.

¶17 In August 2011, Department M of this court issued an order that: (1) dismissed the appeal for lack of jurisdiction as

to the superior court's March 2 order dismissing Demos' complaint without prejudice and as to the May 23 denial of the motion for reconsideration; (2) confirmed jurisdiction as to the June 22 judgment pertaining to attorneys' fees; (3) suspended the appeal; and (4) re-vested jurisdiction in the superior court for the purpose of considering Demos' pending motion to set aside the judgment. In part, this court reasoned as follows:

A dismissal without prejudice is generally not appealable. *L.B. Nelson Corp. of Tucson v. W. Am. Fin. Corp.*, 150 Ariz. 211, 217, 722 P.2d 379, 385 (App. 1986). Under certain circumstances, a dismissal without prejudice is appealable; however, it does not appear from the record that such circumstances are present in this case. See *Garza v. Swift Transp. Co.*, 222 Ariz. 281, 284, ¶ 15, 213 P.3d 1008, 1011 (2009). Additionally, to perfect jurisdiction in this court, a notice of appeal must be filed no later than 30 days after entry of an appealable order unless a party filed a timely post-judgment motion that extended the time for filing an appeal. Rules 9(a), (b), Arizona Rules of Civil Appellate Procedure. Even if the dismissal order was appealable, no time extending motion was filed, and therefore, the notice of appeal is untimely as to the dismissal order.

This court further recognized that the denial of a motion for reconsideration is generally not appealable, see *Spradling v. Rural Fire Prot. Co.*, 23 Ariz. App. 549, 551, 534 P.2d 763, 765 (App. 1975), and the appeal presented no circumstances making that denial appealable. See *Arvizu v. Fernandez*, 183 Ariz. 224, 226-27, 902 P.2d 830, 832-33 (App. 1995).

¶18 On remand, the superior court vacated the June 22 judgment awarding attorneys' fees and ordered the Olsons "to file

a motion for attorneys' fees so that [Demos] will have a chance to respond."³ The Olsons then filed an application for attorneys' fees and motion for entry of judgment. Demos objected and filed his own *pro per* application for attorneys' fees and costs. The Olsons objected to Demos' application for fees and costs, and moved for Rule 11 sanctions and other relief pursuant to Rule 41.

¶9 In an order dated February 10, 2012, the superior court (1) denied Demos' July 13, 2011 motion to set aside the judgment; (2) denied Demos' July 13, 2011 motion for reconsideration by affirming the court's May 23 denial of that motion; (3) granted the Olsons' application for attorneys' fees and motion for entry of judgment; (4) denied Demos' application for attorneys' fees and costs; and (5) denied the Olsons' motion for sanctions and motion for relief pursuant to Rule 41. The court also approved and signed a formal written judgment filed that day in favor of the Olsons and against Demos in the amount of \$2,973.00 plus interest.

¶10 On February 22, 2012, Demos filed a "Request for Reconsideration and/or Motion to Vacate Judgment and Request for Oral Argument." In a minute entry order filed April 2, 2012, the superior court denied Demos' "Request for Reconsideration and/or

³ Because the superior court vacated the June 22 judgment, this court dismissed Demos' appeal on November 30, 2011.

Motion to Vacate Judgment" and his request for oral argument, as well as the Olsons' request for reconsideration of their request for Rule 41 relief. On April 10, 2012, Demos filed a notice of appeal.

¶11 Because the April 2 order Demos sought to appeal was not signed, Department M of this court concluded the order was not final under Arizona Rule of Civil Procedure 58(a). Consequently, this court suspended the appeal and revested jurisdiction in the superior court to permit that court to consider an application by Demos for a signed order corresponding to its minute entry order filed April 2.⁴ Demos applied for a signed order, and the superior court granted his application. Pursuant to this court's prior order, Demos' appeal revested in this court.

ANALYSIS

I. Failure to Comply with ARCAP 13

¶12 In his opening brief, Demos fails to provide any citation to the record. An appellant's brief must contain a statement of facts relevant to the issues, with appropriate references to the record. ARCAP 13(a)(4). Otherwise, this court may disregard it. See *Flood Control Dist. of Maricopa Cnty. v.*

⁴ See *Eaton Fruit Co. v. Cal. Spray-Chem. Corp.*, 102 Ariz. 129, 130, 426 P.2d 397, 398 (1967).

Conlin, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985).⁵ An appellant must also include citations to the relevant authorities, statutes, and parts of the record relied on in his arguments. ARCAP 13(a)(6). Bald assertions, without elaboration or proper citation to legal authority, are generally insufficient to preserve an issue for review. See *Joel Erik Thompson, Ltd. v. Holder*, 192 Ariz. 348, 351, ¶ 20, 965 P.2d 82, 85 (App. 1998); *AMERCO v. Shoen*, 184 Ariz. 150, 154 n.4, 907 P.2d 536, 540 n.4 (App. 1995).

¶13 In this case, Demos' opening brief is wholly deficient. The statement of facts in the opening brief and the arguments fail to reference the record, and Demos' arguments are largely undeveloped. Nevertheless, we exercise our discretion and decline to dismiss his appeal on this basis. See *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966); *Lederman v. Phelps Dodge Corp.*, 19 Ariz. App. 107, 108, 505 P.2d 275, 276 (1973).

II. Jurisdiction

¶14 Demos argues that the superior court abused its discretion in dismissing his case and awarding costs and attorneys' fees to the Olsons. Before we address the merits of his argument, however, we must first address the Olsons'

⁵ Although marginally better, the Olsons' answering brief is also deficient in this respect, providing only a few citations to their appendix. See ARCAP 13(b)(1).

contention that this court lacks jurisdiction to consider this appeal because Demos failed to file a timely notice of appeal.

¶15 "It is settled in Arizona that the perfecting of an appeal within the time prescribed is jurisdictional; and, hence, where the appeal is not timely filed, the appellate court acquires no jurisdiction other than to dismiss the attempted appeal." *Edwards v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971). If jurisdiction is lacking, we have a duty to dismiss the appeal. See *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997); *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991).

¶16 "The general rule is that an appeal lies only from a final judgment." *Davis*, 168 Ariz. at 304, 812 P.2d at 1122. To the extent that Demos is appealing the superior court's February 10, 2012 judgment, his appeal is untimely.

¶17 In civil cases, a notice of appeal must be filed within thirty days of the entry of the judgment from which the appeal is taken, unless a different time is provided by law. ARCAP 9(a). When certain enumerated motions are timely filed, however, the time to appeal for all parties is extended, and the time to appeal is computed from the entry of the order granting or denying the motion. ARCAP 9(b). Those motions that extend the time for appeal include a motion for judgment as a matter of law,

a motion to amend or make additional findings of fact, a motion to alter or amend the judgment, and a motion for new trial. ARCAP 9(b)(1)-(4).

¶18 In this case, the superior court entered its judgment awarding attorneys' fees to the Olsons on February 10, 2012. Because February was a leap year, Demos' notice of appeal would normally have been due on Sunday, March 11, 2012. However, Arizona Rule of Civil Procedure 6(a), excepts Sundays from the computation of time. Consequently, under ARCAP 9(a) and (b), absent the filing of a time-extending motion, Demos was required to file his notice of appeal by Monday, March 12, 2012. Demos, however, filed neither a time-extending motion nor his notice of appeal by that date.

¶19 Instead, on February 22, 2012, Demos filed his "Request for Reconsideration and/or Motion to Vacate Judgment." If Demos' February 22 motion could be properly construed as a time-extending motion under ARCAP 9(b), the time to appeal would have been extended until thirty days after the superior court denied the motion on April 2, 2012. The general rule, however, is that neither a motion for reconsideration nor a motion to vacate judgment acts as a time-extending motion. See *Ariz. State Liquor Bd. v. Slonsky*, 106 Ariz. 25, 25, 470 P.2d 106, 106 (1970) (interpreting former Rule 73(b), Ariz. R. Civ. P.), *clarified and overruled in part by Hegel v. O'Malley Ins. Co.*, 117 Ariz. 411,

412, 573 P.2d 485, 486 (1977); *Spradling*, 23 Ariz. App. at 550-51, 534 P.2d at 764-65 (citing *Slonsky*); see also *James v. State*, 215 Ariz. 182, 185-86, ¶¶ 12-16, 158 P.3d 905, 908-09 (App. 2007) (discussing *Slonsky* and its progeny, including *Hegel*). Furthermore, Demos' February 22 motion did not refer to Arizona Rule of Civil Procedure 59 or any of its grounds, or any other civil procedure rule, and nothing suggests the superior court treated or intended to treat the motion as a time-extending motion; accordingly, in no way does the motion qualify as an exception to the general rule. See *James*, 215 Ariz. at 186, ¶ 16, 158 P.3d at 909. Consequently, Demos' April 10 notice of appeal was not timely as to the February 10 judgment.

¶20 Furthermore, although Demos filed his notice of appeal within thirty days after the superior court issued its April 2 order denying his "Request for Reconsideration and/or Motion to Vacate Judgment," he cannot use his appeal of the court's April 2 order to gain review of that order or to bootstrap his untimely appeal of the February 10 judgment. An order after judgment is not appealable when, as in this case, the appeal would present the same questions as would have been presented on appeal from the judgment. *Reidy v. O'Malley Lumber Co.*, 92 Ariz. 130, 136, 374 P.2d 882, 886 (1962); accord *In re Marriage of Dorman*, 198 Ariz. 298, 300, ¶ 3, 9 P.3d 329, 331 (App. 2000) (stating that to be appealable, a special order after judgment must raise

different issues than those that would be raised by appealing the underlying judgment); see also *Spradling*, 23 Ariz. App. at 551, 534 P.2d at 765 (citing *Reidy* and recognizing that the denial of a motion to reconsider is generally not in itself an appealable order).

¶21 Finally, as to the superior court's March 2, 2011 dismissal without prejudice, Department M of this court previously found that, if that order was appealable at the time, Demos' May 26, 2011 notice of appeal was not timely as to that order. Further, even assuming *arguendo* that the March 2, 2011 dismissal order was not appealable at the time but subsequent circumstances made the order appealable, see, e.g., *Garza*, 222 Ariz. at 284, ¶ 15, 213 P.3d at 1011; *Edgar v. Garrett*, 10 Ariz. App. 98, 101 & n.5, 456 P.2d 944, 947 & n.5 (1969) (noting that a dismissal for lack of prosecution is appealable when the statute of limitations has run), Demos did not file a notice of appeal from that order after any applicable statute of limitations ran and, as we have recognized, did not timely appeal the court's February 10, 2012 signed judgment. Thus, even if the dismissal order became appealable, Demos' April 10, 2012 notice of appeal is untimely as to the dismissal order.

III. Costs, Attorneys' Fees, and Sanctions on Appeal

¶22 Citing both section 7(e) of the contract that formed the basis for Demos' lawsuit and Arizona Revised Statutes

("A.R.S.") section 12-341.01 (West 2013), the Olsons argue that we should award them their costs and attorneys' fees on appeal. For the purpose of attorneys' fees, the Olsons were the successful party in the superior court, see *Britt v. Steffen*, 220 Ariz. 265, 268, ¶ 11, 205 P.3d 357, 360 (App. 2008), and given our dismissal of Demos' appeal, they are the successful party on appeal. Consequently, we award them their costs and reasonable attorneys' fees on appeal, upon their compliance with Rule 21(a), ARCAP. We decline, however, their invitation to sanction Demos for a frivolous appeal.

CONCLUSION

¶23 Demos' appeal is dismissed, and the Olsons are awarded their costs and reasonable attorneys' fees on appeal, upon their compliance with ARCAP 21.

_____/S/_____
MARIA ELENA CRUZ, Judge Pro Tempore*

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
PETER B. SWANN, Judge

* The Honorable Maria Elena Cruz, Judge Pro Tempore of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147 (West 2013)