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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KAREN MOORE, *Plaintiff/Appellant*,

v.

DIANE CARUSO, *Defendant/Appellee*.

No. 1 CA-CV 15-0750
FILED 2-14-2017

Appeal from the Superior Court in Maricopa County
No. CV2013-002697
The Honorable James T. Blomo, Judge

AFFIRMED

COUNSEL

Phillips Law Group, P.C., Phoenix
By Kurt D. Maahs, Timothy G. Tonkin
Counsel for Plaintiff/Appellant

Riviere Law Group PLLC, Phoenix
By Roger W. Riviere
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Patricia A. Orozco joined.¹

P O R T L E Y, Judge:

¶1 Karen Moore appeals the dismissal of her personal injury lawsuit for failing to timely substitute the personal representative of Diane Caruso’s estate and denial of her motions for substitution, extension of time, relief from judgment, and new trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Moore filed a complaint against Caruso in 2013. Caruso filed an answer, but subsequently passed away. Her attorney filed a notice of suggestion of death in 2015.

¶3 Pursuant to Arizona Rule of Civil Procedure (“Rule”) 25(a)(1), Moore had 90 days after the filing of the notice of suggestion of death to move to substitute the proper party or face dismissal of the action.² Because Moore did not timely move for substitution, Caruso’s attorney moved to dismiss the lawsuit. The next day, Moore moved to substitute Caruso’s estate and/or personal representative. The superior court granted the motion to dismiss and denied the motion to substitute.

¶4 Moore unsuccessfully moved for a new trial, relief from judgment, and a time-extension to file a motion for substitution. Moore filed an appeal and we have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) section 12-2101(A)(1).

¹ The Honorable Maurice Portley and the Honorable Patricia A. Orozco, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² We cite the applicable version of the rules and statutes in effect during the pendency of the proceedings unless otherwise noted.

DISCUSSION

I. The Superior Court Did Not Abuse Its Discretion in Denying Moore's Motion for New Trial.

¶5 Moore argues the superior court erred by denying her motion for new trial because the court erroneously concluded her motion to substitute was untimely and dismissed the action. We review the denial of a motion for new trial for abuse of discretion. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998).

A. The Notice of Suggestion of Death Triggered the 90-Day Time Limit to Move for Substitution.

¶6 Moore argues that the 90-day time limit in Rule 25(a)(1) to move to substitute the personal representative of Caruso's estate was never triggered because Caruso's successors were not served with the notice of suggestion of death and the notice did not identify a successor or representative of the deceased.³

¶7 We review the issue de novo because it involves the interpretation of Rule 25(a)(1). *Haroutunian v. ValueOptions Inc.*, 218 Ariz. 541, 549, ¶ 22, 189 P.3d 1114, 1122 (App. 2008). We will follow the plain language of a rule if its language is unambiguous, *State v. Salazar-Mercado*, 234 Ariz. 590, 592, ¶ 4, 325 P.3d 996, 998 (2014), because our primary goal is to give effect to the drafters' intent. *See Fragoso v. Fell*, 210 Ariz. 427, 430, ¶ 7, 111 P.3d 1027, 1030 (App. 2005).

¶8 Rule 25(a)(1) provides, in relevant part, that:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rules 4, 4.1 or 4.2, as applicable, of

³ We do not address the argument that Caruso's attorney could not file the notice of suggestion of death. Because Moore failed to raise the argument to the superior court, the argument is waived on appeal. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, 204, ¶ 7, 119 P.3d 467, 471 (App. 2005) (noting the failure to raise issue in superior court waives the issue on appeal).

MOORE v. CARUSO
Decision of the Court

these rules for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

Ariz. R. Civ. P. 25(a)(1).⁴

¶9 Rule 25 plainly requires that service of the suggestion of death be made “as provided herein for the service of the motion;” meaning the notice “shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rules 4, 4.1 or 4.2, as applicable.” Ariz. R. Civ. P. 25(a)(1). And Rule 25(a)(1) requires only that service of the statement of death on non-parties be made as provided in Rules 4, 4.1 or 4.2. Thus, contrary to Moore’s argument, the plain language of Rule 25(a)(1) does not require service of the suggestion of death on any particular non-parties.

¶10 Moore also relies on *Varela v. Roman*, 156 Ariz. 476, 753 P.2d 166 (App. 1987) for her argument that the 90-day time limit is not triggered unless the notice of suggestion of death identifies a decedent’s successor or representative so that a plaintiff knows who should be substituted. In *Varela*, the plaintiff, more than 90 days after receiving actual notice of the defendant’s death, moved to substitute the personal representative of the estate, which the superior court denied and granted summary judgment to the defendant. *Id.* at 477–78, 753 P.2d at 167–68. This court reversed because no formal suggestion of death was made on the record and, as a result, the 90-day substitution period in Rule 25 was never triggered. *Id.*

¶11 Moreover, in *Varela* we noted the personal representatives of the decedent’s estate had been appointed, but the motion to withdraw filed by defendant’s attorney did not identify them. *Id.* at 478, 753 P.2d at 168. And, based on those facts, we noted that a suggestion of death that fails to identify the decedent’s successor or personal representative “opened the door to ‘a tactical maneuver to place upon the plaintiff the burden of

⁴ Rule 25 was amended effective January 1, 2017 and currently states: “[a] party or the decedent’s successor or representative may file a statement noting the death of a party. If filed by a party, the statement must identify the decedent’s successor or representative if one exists and is known by the filing party.” Ariz. R. Civ. P. 25(a)(2) (2017). The superior court did not and could not apply the amended rule. As a result, we limit our analysis to the language that existed while the superior court resolved this action.

MOORE v. CARUSO
Decision of the Court

locating the representative of the estate within 90 days.” *Id.* (quoting *Rende v. Kay*, 415 F.2d 983, 986 (D.C. 1969)). Despite such language, however, we did not add an additional requirement to Rule 25, especially when it was not required under the facts of the case. Instead, we resolved the issue on the failure to file a formal suggestion of death as required by Rule 25(a)(1) because “the requirements of Rule 25(a)[1] are specific.” *Id.* at 477, 753 P.2d at 167. Thus, *Varela* did not modify the plain language of Rule 25(a)(1) to require the suggestion of death identify a successor or personal representative. Consequently, to the extent language in *Varela* may imply that a notice of suggestion of death must identify a successor or personal representative to be sufficient, that language is dictum. See *Ariz. Corp. Comm’n v. Mtn. States Tel. & Tel. Co.*, 71 Ariz. 404, 412, 228 P.2d 749, 754 (1951) (language “unnecessary to sustain the judgment of the court” is dictum).

¶12 Here, unlike *Varela*, a formal notice of suggestion of death was filed into the record as contemplated by Rule 25(a)(1). Because a personal injury action does not abate when the defendant dies, “there can be no further proceedings until there is brought into court by substitution a defendant in a representative capacity, a defendant representing the estate of the deceased defendant.” *Jasper v. Batt*, 76 Ariz. 328, 332, 264 P.2d 409, 412 (1953); A.R.S. § 14-3110; Ariz. R. Civ. P. 25(b). And it is the plaintiff’s “obligation to bring the proper defendant before the court” if she chooses to continue with a pending case after a defendant dies. *Jasper*, 76 Ariz. at 333, 264 P.2d at 412 (analyzing former Section 21-534, A.C.A. 1939, later transferred to Rule 25(b)).

¶13 It is undisputed that an estate for Caruso was never created or probated, and no personal representative was ever appointed. Caruso’s relatives were not required to create an estate or seek appointment of a personal representative. A creditor, however, may seek appointment as personal representative. *Ader v. Estate of Felger*, 240 Ariz. 32, 42, ¶ 35, 375 P.3d 97, 107 (App. 2016); A.R.S. §§ 14-3203(A)(7), -3301(7). As a result, Moore could have sought the appointment of a personal representative. A.R.S. §§ 14-3203(A)(7), -3301(A)(7). Accordingly, there is no basis for Moore’s argument that any alleged lack of information as to the identity of the personal representative or successors had any bearing on the triggering of the 90-day time limit to move for substitution. Consequently, on this record, once the notice of suggestion of death was filed, the 90-day time limit to move for substitution began, and Moore failed to timely move to substitute a personal representative for Caruso.

B. The Superior Court Appropriately Denied the Motion for Substitution.

¶14 Moore also argues the superior court erred in denying her motion to substitute Caruso's estate and/or personal representative. We disagree.

¶15 Rule 25(a)(1) does not require substitution. Rule 25(a)(1) provides that, "[i]f a party dies and the claim is not thereby extinguished, the court *may* order substitution of the proper parties." Ariz. R. Civ. P. 25(a)(1) (emphasis added). The language is permissive and substitution "may be denied by the court in the exercise of a sound discretion." Ariz. R. Civ. P. 25(a), State Bar Committee Note, 1963 Amendment.

¶16 Rule 25(a)(1) only permits substitution of the "proper parties." An estate, absent the appointment of a personal representative, cannot be a party. *See Ader*, 240 Ariz. at 39, ¶ 22, 375 P.3d at 104. And the appropriate party to be substituted is the personal representative of the estate. *Id.*; *Jasper*, 76 Ariz. at 332, 264 P.2d at 412; A.R.S. § 14-3110; Ariz. R. Civ. P. 25(b). Although Moore asked alternatively to substitute the personal representative, she did not identify the personal representative, and it is undisputed that no personal representative was ever appointed. Particularly when there is no personal representative, an unidentified personal representative is not a "party." *See McHazlett v. Otis Eng'g Corp.*, 133 Ariz. 530, 532, 652 P.2d 1377, 1379 (1982). Thus, the superior court did not abuse its discretion in denying the motion for substitution.

¶17 Because the superior court properly denied the motion for substitution and dismissed the action, the court did not abuse its discretion by denying Moore's motion for new trial.

II. The Superior Court Did Not Abuse Its Discretion in Denying Moore's Motion for Extension of Time.

¶18 Moore next argues the superior court erred in denying her request for an extension of time pursuant to Rule 6(b). We review the court's denial of the extension request for an abuse of discretion. *Haroutunian*, 218 Ariz. at 549, ¶ 22, 189 P.3d at 1122.

¶19 Moore correctly notes the superior court could have extended the time to move to substitute the personal representative of Caruso's estate pursuant to Rule 6(b). Ariz. R. Civ. P. 25(a), State Bar Committee Note, 1963 Amendment (stating, "the motion [for substitution] may not be made later than 90 days after the service of the statement unless the period is extended

MOORE v. CARUSO
Decision of the Court

pursuant to Rule 6(b)"); *Ray v. Rambaud*, 103 Ariz. 186, 189, 438 P.2d 752, 755 (1968). However, Rule 6(b) expressly conditions an extension on a finding of excusable neglect when, as here, a party does not request an extension until after the time to act has expired. Ariz. R. Civ. P. 6(b)(2).⁵

¶20 Moore did not argue to the superior court, and does not argue on appeal, that her failure to act was the result of excusable neglect. Instead, she argues that it was “unjust and unfair” to dismiss her claims because defense counsel had not yet provided the name and contact information of Caruso’s successor and there had been “discussion as to whom would serve as the personal representative.” She further argues it was difficult to substitute parties in the absence of the identification of a successor or personal representative.

¶21 Moore’s failure to show any excusable neglect undermines her argument. She did not seek to get a personal representative appointed or timely seek an extension to start or complete the process. As a result, the court did not abuse its discretion by denying the late filed extension of time without any showing of excusable neglect.

III. The Superior Court Appropriately Denied the Motion for Relief from Judgment.

¶22 Finally, Moore argues the superior court erred by denying her motion for relief from judgment. We review the denial of a motion for relief from judgment for abuse of discretion. *Ezell v. Quon*, 224 Ariz. 532, 536, ¶ 15, 233 P.3d 645, 649 (App. 2010).

⁵ Rule 6(b) was amended effective January 1, 2017 and currently states:

- (1) *Generally*. When an act may or must be done within a specified time, the court may, for good cause, extend the time:
 - (A) with or without motion or notice if the court acts, or the request is made, before that original time or its extension expires; or
 - (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Ariz. R. Civ. P. 6(b)(1) (2017).

MOORE v. CARUSO
Decision of the Court

¶23 Rule 60(c) cannot be used to set aside an interlocutory order. *See Sw. Barricades, L.L.C. v. Traffic Mgmt., Inc.*, 240 Ariz. 139, 141, ¶ 11, 377 P.3d 336, 338 (App. 2016). A party must seek Rule 60(c) relief from a *final* judgment, order, or proceeding. *Altman v. Anderson*, 151 Ariz. 209, 211-12, 726 P.2d 625, 627-28 (App. 1986). A judgment, order, or proceeding, as referred to in Rule 60(c), is not final until all claims are resolved, unless the court includes Rule 54(b) finality language. *Id.* at 212, 726 P.2d at 628.

¶24 At the time Moore filed her Rule 60(c) motion for relief from judgment, the court had not signed its order granting dismissal and denying substitution. Moore’s request for an extension of time created a pending issue, and no final judgment had been entered. Thus, because the judgment was not yet final, the court did not abuse its discretion in denying Moore’s Rule 60(c) motion for relief from judgment.

¶25 Finally, the answering brief requests attorney fees and costs on appeal. The brief suggests counsel is entitled to fees under A.R.S. § 12-341.01 because the appeal is frivolous. The appeal was not, however, frivolous. Additionally, because the dispute did not arise from contract, it cannot be the basis for an award of attorney’s fees. *See ML Servicing Co., Inc. v. Coles*, 235 Ariz. 562, 570, 334 P.3d 745 (App. 2014). Consequently, we deny the fee request. We will award costs on appeal upon compliance with ARCAP 21. *See Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 223, 273 P.3d 668, 675 (App. 2012) (“A cost award ‘is mandatory in favor of the successful party.’”).

CONCLUSION

¶26 Based on the foregoing, we affirm the judgment of dismissal.



AMY M. WOOD • Clerk of the Court
FILED: AA