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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

CHAD M. LAKRIDIS, *Plaintiff/Appellant*,

v.

HOLLY UDY-MEEKIN, et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0473
FILED 9-29-2020

Appeal from the Superior Court in Maricopa County
No. CV2016-001399
The Honorable Rosa Mroz, Judge
The Honorable Jo Lynn Gentry, Judge

AFFIRMED

COUNSEL

Degnan Law, PLLC, Phoenix
By David Degnan and Mark W. Horne (argued)
Counsel for Plaintiff/Appellant

Jones, Skelton & Hochuli, P.L.C., Phoenix
By Donald L. Myles, Jr., Patrick C. Gorman, and Justin M. Ackerman
(argued)
Counsel for Defendant/Appellee Massachusetts Mutual Life Insurance Company

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge James B. Morse Jr. and Judge Maria Elena Cruz joined.

M c M U R D I E, Judge:

¶1 Chad Lakridis appeals from the superior court’s orders (1) dismissing his complaint; and (2) denying his motion to either vacate the judgment of dismissal under Arizona Rule of Civil Procedure 60(b) or refile the complaint according to Arizona Revised Statutes (“A.R.S.”) section 12-504. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In February 2016, Lakridis filed a complaint alleging liability against Massachusetts Mutual Life Insurance Company (“Massachusetts Mutual”), Holly Udy-Meekin, and P.A.M., Inc. (collectively, the “Defendants”), among others, for an injury resulting from a slip-and-fall incident occurring in February 2014. The court dismissed the complaint as barred by the statute of limitations. Lakridis appealed, and this court reversed, *Lakridis v. Udy-Meekin*, 1 CA-CV 16-0699, 2017 WL 5589477, at *2, ¶ 7-8 (Ariz. App. Nov. 21, 2017) (mem. decision), and remanded the case on July 23, 2018.

¶3 On August 15, 2018, Lakridis moved to amend the complaint, which the court granted two days later. On December 14, 2018, Lakridis filed a motion to substitute counsel, which the court granted shortly thereafter. Approximately two months later, on February 26, 2019, the court issued an order informing the parties it had placed the action on the dismissal calendar and that the case would be dismissed on April 22, 2019, unless the parties filed a joint report and proposed scheduling order or a motion to continue showing good cause. *See* Ariz. R. Civ. P. 38.1(d)(2).

¶4 On May 1, 2019, after the deadline set by the court, Lakridis’s counsel moved to (1) withdraw as counsel “due to irreconcilable differences and disagreements with [Lakridis]”; and (2) continue the action on the dismissal calendar “to allow [Lakridis] sufficient time to retain new counsel.” Massachusetts Mutual objected to the motion, providing a history of the parties’ conduct related to the case, and noting that since Lakridis

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retained new counsel in December 2018, “[n]o scheduling order ha[d] been entered, no disclosure statements ha[d] been exchanged, and no depositions ha[d] taken place.” In Lakridis’s reply, his counsel noted:

the Court should take into consideration the practical difficulties resulting from Mr. Lakridis’ injuries. Mr. Lakridis has suffered a traumatic brain injury, which has given rise to challenges beyond what ordinarily appear in civil cases. Frankly, there are days in which Mr. Lakridis is simply not capable [of] processing issues related to this case, which has led to additional delays. . . . For the sake of preserving attorney client privilege, Plaintiff will not detail the reasons for undersigned’s request to withdraw beyond the irreconcilable differences noted in the Motion to Withdraw.

Lakridis’s counsel did not explain why he had not moved to continue or withdraw before the court’s dismissal deadline expired.

¶5 On May 8, 2019, the court granted counsel’s motion to withdraw, finding good cause. The next day, the court issued an order denying Lakridis’s untimely motion to continue and dismissing the case without prejudice, holding: “Plaintiff did nothing to prosecute the case before the April 22, 2019 deadline, despite the warning. It is too late to ask for the case to be continued.”

¶6 In June 2019, Lakridis filed a motion requesting the court vacate the judgment of dismissal under Rule 60(b) or permit him to refile the complaint according to A.R.S. § 12-504. The Defendants objected to the motion. The court summarily denied Lakridis’s motion.

¶7 Lakridis appealed, and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1) and -2101(A)(3).

DISCUSSION

¶8 Lakridis argues the superior court erred by refusing to continue the case or vacate the judgment under Rule 60(b) or permit him to refile the complaint under A.R.S. § 12-504.

A. The Superior Court Did Not Err by Denying Lakridis’s Motion to Continue and Dismissing His Case.

1. The Superior Court Did Not Abuse Its Discretion by Denying Lakridis’s Motion to Continue.

¶9 We review for an abuse of discretion the superior court’s denial of a motion to continue, *Nordale v. Fisher*, 93 Ariz. 342, 345 (1963), and “affirm where any reasonable view of the facts and law might support the judgment.” *City of Phoenix v. Geyley*, 144 Ariz. 323, 330 (1985). The court may grant a motion to continue if the moving party establishes good cause, considering the conditions that permit relief under Rule 60(b). *Cf. Jepson v. New*, 164 Ariz. 265, 269–70 (1990) (referring to the “conditions” outlined in Rule 60(c), at the time, and “good cause” as outlined in Uniform Rule of Practice of the Superior Court of Arizona V(e)(2)).

¶10 Here, from the time this court remanded the case to the superior court on July 23, 2018, until the court’s denial of Lakridis’s motion to continue on May 9, 2019, Lakridis failed to file a joint report, a proposed scheduling order or disclosure statement, or conduct any depositions. On February 26, 2019, the court notified Lakridis it would dismiss his case if he did not act before April 22, 2019, and Lakridis failed to do so. Under these facts, the court could reasonably find Lakridis could not establish good cause to continue the case on the dismissal calendar. Therefore, the court did not abuse its discretion by denying Lakridis’s motion.

2. The Superior Court Did Not Err by Dismissing Lakridis’s Case.

¶11 “We review de novo whether the trial court correctly applied the substantive law to the facts.” *Trust v. County of Yuma*, 205 Ariz. 272, 274, ¶ 7 (App. 2003). Rule 38.1(d)(2) requires the superior court to dismiss an action if the parties do not timely take steps to prosecute the case:

If an action remains on the Dismissal Calendar for 60 days, the court *must* dismiss it without prejudice and enter an appropriate order regarding any bond or other posted security, unless, *before* the 60-day period expires:

(A) the parties file a Joint Report and a Proposed Scheduling Order under Rule 16(c);

(B) in an action assigned to arbitration, the arbitrator files a notice of decision under Rule 76; or

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(C) the court, on motion showing good cause, orders the action to be continued on the Dismissal Calendar for a specified period of time without being dismissed.

(Emphasis added.) Rule 38.1 required the court to dismiss Lakridis's complaint because the case had been on the dismissal calendar for more than 60 days. Lakridis made no showing that any of the conditions negating the mandatory dismissal were met. Therefore, the court did not err by dismissing his complaint.

3. The Superior Court Did Not Err by Failing to conduct an Evidentiary Hearing *Sua Sponte* Before Dismissing the Case.

¶12 Relying on *Estate of Lewis v. Lewis*, 229 Ariz. 316, 323–26, ¶¶ 20–26 (App. 2012), and *Weaver v. Synthes, Ltd.*, 162 Ariz. 442, 445 (App. 1989), Lakridis argues the superior court erred by failing to hold an evidentiary hearing *sua sponte* before dismissing his complaint. In *Lewis*, the superior court sanctioned the plaintiff for failing to comply with the court's discovery order by dismissing the case. 229 Ariz. at 322, ¶¶ 13–14. In *Weaver*, the superior court sanctioned the defendant for failing to comply with the court's discovery order by entering a default. 162 Ariz. at 444. In both cases, this court held the superior court erred by failing to hold an evidentiary hearing to determine whether the non-abiding parties acted in bad faith by failing to comply with the orders. *See id.* at 444–45; *Lewis*, 229 Ariz. at 324–25, ¶¶ 21–22. The holdings in *Lewis* and *Weaver* relied on *Robinson v. Higuera*, which held that because public policy prefers the superior court enter sanctions less drastic than dismissal or default when exercising its discretion under Rule 37(b)(2), and due process may require a hearing before imposing such sanctions to determine whether the non-abiding party acted in bad faith. 157 Ariz. 622, 624–25 (App. 1988).

¶13 Lakridis's case is distinguishable. Here, the superior court did not use its discretion under Rule 37(b)(2) to dismiss the case as a sanction for a discovery violation. Instead, the court dismissed the case, as required, under Rule 38.1(d)(2). Lakridis did not request an evidentiary hearing but relied instead on arguments submitted in the untimely motion to continue. As discussed above, the court had a sufficient basis for denying the untimely motion. Therefore, the court did not err by failing to conduct an evidentiary hearing before dismissing the action.

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B. The Superior Court Did Not Err by Denying Lakridis’s Motion to Vacate the Dismissal Under Rules 60(b)(4) or (b)(6).

¶14 Lakridis argues the court abused its discretion by denying his motion to vacate under Rule 60(b). Massachusetts Mutual argues Lakridis waived this argument by failing to comply with Arizona Rule of Civil Appellate Procedure (“ARCAP”) 13(a)(7). We review the superior court’s denial of Rule 60 relief for an abuse of discretion. *Copeland v. Ariz. Veterans Mem’l Coliseum & Exposition Ctr.*, 176 Ariz. 86, 89 (App. 1993).

1. Lakridis’s Opening Brief Sufficiently Raised the Issue of Whether the Superior Court Abused Its Discretion by Denying Relief Under Rules 60(b)(4) and (b)(6), But Not Under Any Additional Subsections.

¶15 ARCAP 13.7(a)(7) provides that an appellant’s opening brief must include an argument that contains:

(A) Appellant’s contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies[;] . . .

[and]

(B) For each contention, references to the record on appeal where the particular issue was raised and ruled on, and the applicable standard of appellate review with citation to supporting legal authority.

Failure to abide by this rule can constitute a waiver of the claim. *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62 (App. 2009).

¶16 Lakridis’s opening brief included an argument that the superior court erred by denying his motion to vacate the dismissal. The essence of Lakridis’s argument was that the court “had no basis for concluding that the case was not being prosecuted,” and the court’s failure to hold an evidentiary hearing before dismissing his case violated due process. As a result, Lakridis argued the order of dismissal was void. As authority, the brief cited Rules 60(b)(4) and (b)(6), and multiple other legal authorities, but no additional subsections of Rule 60.

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¶17 Thus, Lakridis complied with ARCAP 13.7(a)(7) and did not waive his claim for relief under Rule 60(b)(4) and (b)(6). Any other request for relief under the other clauses is waived. The grounds for relief in each of the clauses are separate and distinct. “Clause 6 and the first five clauses are mutually exclusive.” *Webb v. Erickson*, 134 Ariz. 182, 186 (1982); *Gonzalez v. Nguyen*, 243 Ariz. 531, 535, ¶ 15 (2018). Although Lakridis argued in his reply brief that he “is not required to give legal dissertations on each of the specific subsections” and subsection (b)(1) is “innately self-explanatory,” he made no mention of subsection (b)(1) in his opening brief. Therefore, he waived the issue. *See Ritchie*, 221 Ariz. at 305, ¶¶ 61–62 (plaintiff waived the issue on appeal because opening brief contained no arguments regarding the subject).

2. The Superior Court Did Not Abuse Its Discretion by Denying Lakridis Relief Under Rule 60(b)(4).

¶18 Lakridis argues the superior court abused its discretion by denying his motion to vacate under Rule 60(b)(4) because the court’s failure to hold an evidentiary hearing before dismissing the case deprived him of due process, making the judgment void.

¶19 Only errors that undermine jurisdiction render a judgment void for purposes of clause 4 of Rule 60(b). *Ezell v. Quon*, 224 Ariz. 532, 537, ¶ 19 (App. 2010) (citing *Cockerham v. Zikratch*, 127 Ariz. 230, 235 (1980)); *see also Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 74, ¶ 19 (App. 2004) (“A judgment or order is void if the court lacked jurisdiction over the subject matter, over the person, or over the particular judgment or order entered.”). The lack of an evidentiary hearing does not concern the court’s jurisdiction over the subject matter, person, or judgment. The court did not abuse its discretion by denying relief under Rule 60(b)(4).

3. The Superior Court Did Not Abuse Its Discretion by Denying Lakridis Relief Under Rule 60(b)(6).

¶20 The superior court may relieve a party from a final judgment under Rule 60(b)(6) “when justice so requires.” *Skousen v. W.C. Olsen Inv. Co.*, 149 Ariz. 251, 254 (App. 1986). Relief under Rule 60(b)(6) “is reserved for extraordinary cases” where “the facts are compelling enough the courts are ready to find that ‘something more’ than one of the grounds stated in the first five clauses is present.” *Roll v. Janca*, 22 Ariz. App. 335, 337 (1974) (quoting 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2864, at 219–20 (1973)).

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¶21 Here, the superior court dismissed the case over 60 days after placing it on the dismissal calendar and notifying Lakridis it would dismiss the case if he did not take timely action. Lakridis provided no evidence regarding how his condition prevented his counsel from conducting proper measures such as moving for the continuance before the Rule 38 deadline. Without such evidence or argument, the court could correctly find that Lakridis’s counsel failed to file a joint report, proposed scheduling order, or motion showing good cause to continue the case according to Rule 38.1(d)(2)(A) and (C), despite Lakridis’s condition. These facts provide a sufficient basis for the superior court to conclude that justice did not require relief from the judgment of dismissal. Without evidence or argument that counsel was personally impeded from filing the required requests before the expiration of the order, there were no facts for the court to consider or resolve. Therefore, the court did not abuse its discretion by denying Lakridis’s motion to vacate under Rule 60(b)(6).

C. The Court Did Not Abuse its Discretion by Denying Lakridis’s Motion to Permit Refiling Under A.R.S. § 12-504.

¶22 Under A.R.S. § 12-504(A), “[i]f an action timely commenced is terminated by . . . dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired.” When exercising this discretion, “[t]he court should ascertain whether the plaintiff acted reasonably and in good faith, whether he prosecuted his case diligently and vigorously, whether a procedural impediment exists which affects his ability to file a second action, and whether either party will be substantially prejudiced.” *Jepson*, 164 Ariz. at 272 (emphasis omitted) (quoting *Flynn v. Cornoyer-Hedrick Architects & Planners, Inc.*, 160 Ariz. 187, 192 (App. 1988)).

¶23 Here, Lakridis filed nothing from the time this court remanded the case in July 2018 until the action’s time on the dismissal calendar had run in April 2019 except for submitting a request to amend the complaint and a request for change of counsel. This lack of action provided a basis for the court to conclude Lakridis failed to prosecute the case diligently. Further, as the alleged injury occurred in February 2014, the court could conclude that Defendants would suffer substantial prejudice by granting Lakridis’s motion because of the dissipation of evidence due to the length of time since the incident. Therefore, the court did not abuse its discretion by denying Lakridis’s request for relief under A.R.S. § 12-504.

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CONCLUSION

¶24

We affirm the superior court's orders.



AMY M. WOOD • Clerk of the Court
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