

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: 05-06-2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT EARL KRONCKE,) 1 CA-CV 09-0097
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules of
RAYMOND VACA, JR; MARICOPA) Civil Appellate Procedure)
COUNTY BOARD OF SUPERVISORS;)
DEPUTY COUNTY ATTORNEY MICHAEL)
G. SULLIVAN; DEPUTY COUNTY)
ATTORNEY RANDALL R. GARCZYNSKI;)
and MARICOPA COUNTY ATTORNEY)
ANDREW P. THOMAS, all in their)
individual and official)
capacities,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-003352

The Honorable Bethany G. Hicks, Judge

AFFIRMED

Robert Earl Kroncke
Plaintiff-Appellant *In Propria Persona*

Florence

Calderon Law Offices PLC
By Ernest Calderon
And April M. Norton
Attorneys for Defendants-Appellees

Phoenix

O R O Z C O, Judge

¶1 Robert Earl Kroncke (Kroncke) appeals the trial court's order dismissing his amended complaint against Raymond Vaca, Jr. (Vaca), et al. (collectively, Defendants). Kroncke also appeals the trial court's order denying his motion for a new trial; to alter or amend judgment; and for relief from judgment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Kroncke filed a complaint on February 11, 2008 (Complaint) and an amended complaint on June 16, 2008 (Amended Complaint). Both the Complaint and the Amended Complaint raised various state law claims and a 42 U.S.C. § 1983 claim against Defendants. Kroncke alleged that the deputy county attorneys who represented Vaca¹ in a 2005 civil suit brought by Kroncke (2005 Case) made intentional misrepresentations to the trial court regarding the applicability of *res judicata*. Defendants moved to dismiss the Complaint, and Kroncke responded admitting that the trial court in the 2005 Case did not dismiss that case on *res judicata* grounds. The trial court implicitly denied Defendants' motion when it granted Kroncke leave to file the Amended Complaint.

¹ Vaca was Kroncke's public defender in Maricopa County Superior Court No. CR1994-090617.

¶13 Defendants moved to dismiss the Amended Complaint pursuant to Arizona Rule of Civil Procedure 12(b)(6)² for failure to state a claim (Motion to Dismiss). Kroncke did not receive a copy of the Motion to Dismiss. On November 21, 2008, the trial court granted Defendants' Motion to Dismiss and ordered the case dismissed with prejudice.

¶14 On December 2, 2008, Kroncke attempted to file a "Motion for New Trial or to Amend the Judgment" and an "Amended Motion for New Trial; to Alter or Amend Judgment; and for Relief from Judgment" (New Trial Motion).³ Kroncke argued he was entitled to relief from the order dismissing his case because he "was never served with the underlying dispositive motion and was therefore deprived of his due process right to file a response to it." The trial court denied the motion and Kroncke timely appealed.

¶15 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-2101.B and -120.21.A.1 (2003).

² Unless otherwise specified, hereafter, an Arizona Rule of Civil Procedure is referred to as "Rule ____."

³ The superior court clerk did not accept these motions in compliance with Administrative Order No. 2008-134 (Administrative Order). See *infra* ¶ 10. The motions were not originally part of the record on appeal; however, this Court ordered the record supplemented to include them. Because the "Amended Motion for New Trial" raises the same argument as the "Motion for New Trial" in addition to raising new arguments regarding Rule 60(c) relief, we refer to the former as the "New Trial Motion."

DISCUSSION

¶16 As an initial matter, Kroncke filed a Motion to Disqualify and Recuse Judge Jon W. Thompson. We deny this motion.

¶17 Kroncke argues the trial court should have allowed him to respond to the Motion to Dismiss before dismissing the Amended Complaint. Implicit in this argument is the contention that Kroncke should have been allowed the opportunity to again amend the Amended Complaint to cure any deficiencies therein.

¶18 We review a trial court's grant of a motion to dismiss for failure to state a claim *de novo*. *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 402, ¶ 8, 142 P.3d 708, 710 (App. 2006). We assume the allegations in the complaint are true, and will "uphold dismissal only if the plaintiff[] would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *T.P. Racing, L.L.L.P. v. Ariz. Dep't of Racing*, 223 Ariz. 257, ___, ¶ 8, 222 P.3d 280, 282 (App. 2009) (citation and internal quotation marks omitted). Generally, "[b]efore the trial court grants a Rule 12(b)(6) motion to dismiss, *the non-moving party* should be given an opportunity to amend the complaint *if such an amendment cures its defects*." *Dube v. Likins*, 216 Ariz. 406, 415, ¶ 24, 167 P.3d 93, 102 (App. 2007) (quoting *Wigglesworth v. Mauldin*, 195

Ariz. 432, 439, ¶ 26, 990 P.2d 26, 33 (App. 1999)) (emphasis added).

¶9 In this case, even if we assume Kroncke's allegations are true, Kroncke would not be entitled to relief. The Amended Complaint, like the original Complaint, rests on the allegation that the deputy county attorneys who represented Vaca in the 2005 Case made intentional misrepresentations to the trial court concerning *res judicata*. In his response to Defendants' Motion to Dismiss the original Complaint, Kroncke admitted that the trial court in the 2005 Case did not rely on Defendants' *res judicata* arguments in dismissing the case against Vaca. Kroncke therefore has no cognizable claim against Defendants based on any purported misrepresentation in the 2005 Case, and no amendment would cure this defect in the Amended Complaint. Consequently, the trial court did not err in failing to give Kroncke another opportunity to further amend the Amended Complaint or in denying Kroncke's New Trial Motion. See *Wigglesworth*, 195 Ariz. at 439, ¶ 27, 990 P.2d at 33.

¶10 We summarily address two additional issues Kroncke raises. First, he requests that we publish an opinion in this appeal. We refuse this request because we determine that this matter is not appropriately disposed of by an opinion. See ARCAP 28(b). Finally, Kroncke challenges the propriety of the Administrative Order wherein the presiding judge of the Maricopa

County Superior Court found Kroncke to be a vexatious litigant. This Administrative Order prohibits Kroncke from instituting new causes of action without leave of the presiding judge and from filing any post-judgment document in his pending civil cases without leave of the court. Because the Administrative Order was not the basis of the dismissal in this case, it is not properly before us and we do not address this issue. See A.R.S. § 12-120.21 (stating that this Court has appellate jurisdiction only in those matters permitted by law to be appealed from superior court); A.R.S. § 12-2101 (outlining judgments and orders that can be appealed).

CONCLUSION

¶11 The trial court's order dismissing this case is affirmed.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Judge

/S/

JON W. THOMPSON, Judge