

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: 06/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

AMIN RAHMAN SHAKUR,) No. 1 CA-CV 10-0530
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DORA B. SCHRIRO; CHARLES RYAN,) Rule 28, Arizona Rules
) of Civil Appellate
Defendants/Appellees.) Procedure)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-035887

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

Amin Rahman Shakur Florence
Plaintiff/Appellant, *In propria persona*

Thomas C. Horne, Arizona Attorney General Phoenix
By Kelley J. Morrissey, Assistant Attorney General
Attorneys for Defendants/Appellees

W I N T H R O P, Judge

¶1 Plaintiff/Appellant, Amin Rahman Shakur, appeals the trial court's order dismissing his complaint for breach of contract against Charles Ryan, the director of the Arizona Department of Corrections ("ADOC"). The court found that Shakur

had not filed a notice of claim with the proper person under Arizona Revised Statutes ("A.R.S.") section 12-821.01 (2003). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 Shakur is an inmate in the custody of ADOC. Between August 5 and 9, 2008, Shakur entered a settlement agreement with the director of ADOC and others, whom he had sued in federal district court for alleged violations of his rights under the First and Fourteenth Amendments to the United States Constitution. Shakur sought, among other things, to have the defendants provide a specialized diet in accordance with his religious beliefs. The settlement agreement provided that the defendants would provide Shakur with the requested religious diet, which absent certain limitations could not be withheld as a disciplinary measure, and ADOC could not take any retaliatory or punitive action against Shakur in connection with the litigation and settlement agreement. The settlement agreement further provided that, if ADOC violated the agreement, Shakur had to first seek recourse through the inmate grievance process "prior to filing an action in this Court to enforce this agreement," and he was "not prevented from filing an action in the district court to enforce the terms of this agreement." The litigation was dismissed with prejudice in federal district court on August 11, 2008.

¶13 On November 2, 2009, Shakur filed a complaint for breach of contract in Maricopa County Superior Court against "Dora B. Schriro or Current ADOC Director Charles Ryan, et al." The complaint alleged that the defendants had breached the terms of the settlement agreement on numerous occasions between September 1 and November 18, 2008. The complaint also noted that on January 12, 2009, Shakur had filed a motion in the federal district court to enforce the settlement agreement, and the district court had issued an order on August 4, 2009, stating it lacked jurisdiction because its dismissal order in the earlier action had not incorporated the settlement agreement. On August 14, 2009, the district court denied Shakur's motion for reconsideration. Shakur's complaint filed in superior court generally alleged that "the defendants willingly and deliberately violated the terms of the settlement agreement and further violated plaintiff's constitutionally protected rights," which "caused him to abandon his religious diet."

¶14 Defendant Ryan filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure. Ryan argued, among other things, that given Shakur asserted the violations began September 1, 2008, Shakur had failed to file a notice of claim within 180 days of accrual of the cause of

action as required by A.R.S. § 12-821.01(A), and he had failed to file the complaint within one year after the cause of action had accrued as required by A.R.S. § 12-821 (2003), time barring the complaint.

¶15 In response, Shakur explained that, upon experiencing violations of the settlement agreement, he filed inmate letters, grievances, and grievance appeals as required by the agreement. He then filed a motion in federal district court to enforce the settlement agreement, which was dismissed by the district court for lack of federal jurisdiction. Shakur further explained that, after the district court issued its order denying his motion for reconsideration on August 14, 2009, he sent a letter to Kelley J. Morrissey, an assistant attorney general, who had been involved in the prior litigation and signed the settlement agreement for the defendants. The letter, dated August 27, 2009, was headed "Notice of Claim (Litigation)," referred to the dismissal of the federal action, and advised that Shakur intended to file a civil suit to enforce the settlement agreement and seek monetary damages.

¶16 Shakur asserted that the notice to Morrissey constituted a timely notice of claim. He contended that he filed the notice when he did because he first pursued the inmate grievance procedures and an action in federal court as required by the settlement agreement. He further argued his claim should

not be time-barred because, as with the notice of claim, he complied with the settlement agreement's requirements that he pursue relief through the prison grievance proceedings and then the federal court.

¶17 In reply, Ryan did not dispute that Morrissey had received notice, but he maintained that because he and not the state was the defendant, service on the attorney general was not sufficient. Ryan argued that service of the notice of claim had to be made on him or someone authorized to accept service on his behalf and that no such service had occurred. He also argued that both the notice to Morrissey and Shakur's complaint were untimely.

¶18 The court granted the motion to dismiss, stating as follows:

Mailing a letter to an assistant attorney general does not constitute proper filing of a notice of claim under A.R.S. § 12-82[1].01(A). Consequently, Plaintiff has not complied with a necessary prerequisite to bringing this action.

¶19 Shakur filed a premature appeal, which was made timely upon the court's entry of a signed order. See *Barassi v. Matison*, 130 Ariz. 418, 421-22, 636 P.2d 1200, 1203-04 (1981). We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

ANALYSIS

¶10 We review a trial court's decision granting a motion to dismiss for an abuse of discretion, but we review issues of

law *de novo*. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). Shakur argues that he complied with the notice of claim requirement by sending a notice of claim letter to Morrissey, who had represented the defendant director of ADOC in the earlier federal action that resulted in the settlement agreement and in Shakur's attempt to enforce that agreement in federal court.

¶11 A person having a claim against a public entity or a public employee must file a notice of claim "with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues." A.R.S. § 12-821.01(A). A person asserting a claim for damages against a public employee for conduct committed in the course and scope of employment must serve a notice of claim on both the employee individually and the employer. *Crum v. Superior Court*, 186 Ariz. 351, 352, 922 P.2d 316, 317 (App. 1996). If the notice of claim is not properly filed within 180 days, the claim is barred. *Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527, ¶ 10, 144 P.3d 1254, 1256 (2006). Neither actual notice nor substantial compliance is sufficient under the statute, *id.*, although the 180-day time period may be subject to equitable tolling. See *Pritchard v. State*, 163 Ariz. 427, 430, 788 P.2d 1178, 1181

(1990) (holding that filing a timely notice of claim is not a jurisdictional prerequisite to bringing suit); *Kosman v. State*, 199 Ariz. 184, 186-87, ¶¶ 10-11, 16 P.3d 211, 213-14 (App. 2000) (finding the 180-day period could be subject to equitable tolling or excusable neglect).

¶12 Shakur's complaint named as defendant "Dora B. Schriro or Current ADOC Director Charles Ryan, et al."¹ Shakur has not named as defendants ADOC or the State of Arizona. Although vague, the complaint alleged that the defendant had violated the settlement agreement, which required ADOC to provide Shakur with a religious diet. The allegations against the defendant are based on Ryan's conduct in the course and scope of his position as director of ADOC. Shakur was therefore required to file a notice of claim with Ryan, personally, as well as with his employer, ADOC. See *Crum*, 186 Ariz. at 352, 922 P.2d at 317.

¶13 Shakur sent a notice of claim to Morrissey, and he argues that she was an authorized agent of Ryan's based on her representation of the defendants in the federal court proceedings. The proper persons to be served the notice of claim are determined by Rule 4.1, Arizona Rules of Civil Procedure. See A.R.S. § 12-821.01(A). A person asserting a claim against the State of Arizona must file a notice of claim

¹ The record shows that Ryan was served with the summons and complaint, but contains no indication that Schriro was served.

by delivering a copy to the attorney general. Ariz. R. Civ. P. 4.1(h). Rule 4.1 also provides in part as follows:

(d) Service . . . Upon Individuals. Service upon an individual . . . shall be effected by delivering a copy [of the notice of claim] to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy . . . to an agent authorized by appointment or by law to receive service of process.

. . . .

(j) Service . . . Upon Other Governmental Entities. Service upon any governmental entity [other than the state, a county, a municipal corporation, or any other governmental subdivision] shall be effected by serving the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity.

Ariz. R. Civ. P. 4.1(d), (j).

¶14 For service of the notice on Morrissey to constitute proper service on Ryan as an individual defendant, Morrissey needed to be "an agent authorized by appointment or by law to receive service of process." Ariz. R. Civ. P. 4.1(d). To qualify as an agent for the purpose of accepting service, "an attorney must 'appear . . . authorized, either expressly or impliedly, to receive service of process for his client, and if such agency is to be implied, it must be implied from all circumstances accompanying the attorney's appointment which indicate the extent of authority the client intended to

confer.'" *Kline v. Kline*, 221 Ariz. 564, 570, ¶ 20, 212 P.3d 902, 908 (App. 2009) (quoting *Rotary Club of Tucson v. Chaprales Ramos de Pena*, 160 Ariz. 362, 365, 773 P.2d 467, 470 (App. 1989)). An attorney retained by an individual is not necessarily authorized to accept service of process on that individual's behalf. *Id.* at ¶ 19. Even when the attorney is counsel of record, that attorney is not presumed to be authorized to accept service before entering an appearance. *Id.* at ¶ 20.

¶15 In *Kline*, the court dismissed Wife's petition for dissolution against Husband, who was represented by an attorney, Ziman. *Id.* at 567, ¶ 2, 212 P.3d at 905. Seven months later, Wife filed a second petition for dissolution and effected personal service on Husband. *Id.* Wife later filed an amended petition, allegedly providing a copy to Ziman. *Id.* at ¶ 3. This court found that Ziman was not an agent for purposes of accepting service, despite having previously represented Husband in the earlier action:

There is no evidence in the record on appeal indicating that at the time of the alleged service of the amended petition Ziman appeared to represent Husband in the new action, much less that he was an agent authorized by appointment to receive service on Husband's behalf.

Id. at 570, ¶ 20, 212 P.3d at 908.

¶16 Under the facts present here, Morrissey represented Ryan in the federal proceedings. That representation, however, did not make her Ryan's agent such that she was authorized to accept service of the notice of claim on his behalf as an individual in the subsequent, albeit related, state action. As in *Kline*, the record here contains nothing to support a conclusion that, at the time the notice of claim was sent to Morrissey, she had been appointed as an agent to accept service of the notice on Ryan's behalf.²

¶17 Shakur also argues that, in the event Morrissey was not the proper person on whom notice should have been served, Morrissey had a "judicial responsibility" to forward the notice to the proper authority. By statute, the person asserting the claim is required to file a notice of claim with the appropriate person; the burden is on the claimant. See A.R.S. § 12-821.01(A). We are aware of no obligation on the part of the recipient of a notice of claim to forward the notice to another.

¶18 Because we have concluded that Shakur failed to serve the notice of claim on Ryan, we do not address whether sending

² Shakur also contends that he sent a copy of the notice of claim to ADOC Legal Services. The copy of the notice of claim in the record indicates that a copy was sent; the record does not indicate whether the notice was received. Shakur asserts that Legal Services is "also an authorized agent of defendants who accept[s] service for them." Even assuming that Legal Services received the notice, nothing in the record indicates that Legal Services was an agent of Ryan's authorized to accept service of a notice of claim on his behalf.

the notice of claim to Morrissey constituted proper service of the notice on ADOC. We also do not address Ryan's arguments that the notice of claim and the complaint were untimely.

CONCLUSION

¶19 The trial court's judgment is affirmed.

LAWRENCE F. WINTHROP, Judge

CONCURRING:

MAURICE PORTLEY, Presiding Judge

ANN A. SCOTT TIMMER, Chief Judge