

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

BARBARA E. SHERRILL,
Plaintiff/Appellant,

v.

PIMA COUNTY JUSTICE COURT, JUDGE MARIA FELIX,
AND JUDGE CARMEN DOLNY,
Defendants/Appellees.

No. 2 CA-CV 2015-0129
Filed February 25, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20150113
The Honorable D. Douglas Metcalf, Judge
The Honorable Sarah R. Simmons, Judge

AFFIRMED

COUNSEL

Barbara E. Sherrill, Tucson
In Propria Persona

Barbara LaWall, Pima County Attorney
By Daniel Jurkowitz, Deputy County Attorney, Tucson
Counsel for Defendants/Appellees

SHERRILL v. PIMA CTY. JUSTICE COURT
Decision of the Court

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Barbara Sherrill filed a special-action petition in the Superior Court for Pima County alleging she had been denied due process in an eviction hearing in Pima County Justice Court. Sherrill subsequently filed a motion for change of judge. The superior court treated the motion as one for cause, denied it, and dismissed her petition. She appeals both decisions. We find no error and affirm the superior court's rulings.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the trial court’s judgment.” *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). On August 19, 2014, Sherrill was scheduled to appear in justice court in an eviction action. After she failed to appear, the court awarded judgment to the plaintiff. Sherrill apparently filed a notice of appeal, which the justice court dismissed as untimely on September 5, 2014.

¶3 In January 2015, Sherrill filed a special-action petition in the superior court against the Pima County Justice Court, Judge Maria Felix, and Judge Carmen Dolny (hereinafter “respondents”). Sherrill alleged she “was denied due process of law when she attended the [eviction] hearing but was precluded to participate and the Court failed to even consider her filed documents.”

¶4 Respondents filed a motion to dismiss the special action, arguing that (1) special-action relief was not available because Sherrill had an equally plain, speedy, and adequate remedy by appeal; (2) the complaint failed to name the real party in interest as required by Rule 2(a)(1), Ariz. R. P. Spec. Actions; and (3) the respondents had been improperly served. Sherrill filed a response, but she did not address respondents’ argument that special-action

SHERRILL v. PIMA CTY. JUSTICE COURT
Decision of the Court

relief was not available. Sherrill barely addressed the argument that her complaint had failed to name the real party in interest, saying, “in reading the rules about Special Actions for the Superior Court from a lower Court, there is no information requiring the naming a Real Party In Interest for the procedure.”

¶5 While a decision on the motion to dismiss was pending, Sherrill filed a motion for change of judge from Judge D. Douglas Metcalf. In that motion, Sherrill alleged, “Judge Metcalf is already currently involved with her civil traffic case and . . . the Defendants in this case are the Plaintiffs in that case, which therefore creates a conflict of interest.” The superior court construed her motion as a change of judge for cause, specifically “bias and prejudice.” Presiding Judge Sarah Simmons of the superior court denied Sherrill’s motion, concluding she had failed to file an affidavit in compliance with the requirements of Rule 42(f)(2), Ariz. R. Civ. P., and had not established that Judge Metcalf was biased or prejudiced against her. Sherrill filed a motion for reconsideration, which Judge Simmons also denied.

¶6 Subsequently, the superior court granted respondents’ motion to dismiss. The court concluded Sherrill “had the opportunity to appeal the trial court’s decision to the Superior Court . . . , but failed to file a timely notice of appeal.” Thus, “[b]ecause [Sherrill] had an equally plain, speedy, and adequate remedy by appeal,” the court declined special-action jurisdiction and dismissed the petition. Sherrill timely appealed, Ariz. R. Civ. App. P. 9(a), and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) and Ariz. R. P. Spec. Actions 8(a).

Discussion

¶7 Sherrill argues the superior court improperly denied her petition for special action and erred in concluding she had not timely appealed. She further argues the superior court erred in denying her motion for change of judge. Special-action jurisdiction is appropriate where there is no “equally plain, speedy, and adequate remedy by appeal.” Ariz. R. P. Spec. Actions 1(a). When a superior court declines jurisdiction of a special action from justice court, “the sole issue on appeal is whether the [superior] court

SHERRILL v. PIMA CTY. JUSTICE COURT
Decision of the Court

abused its discretion when it declined to accept jurisdiction.”¹ *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (App. 1979). Generally, a court abuses its discretion when it commits an error of law in reaching its discretionary decision, such decision “was reached without consideration of the evidence,” or the record does not contain a substantial basis for its decision. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982). We will uphold the denial of special-action relief “for any valid reason disclosed by the record.” *State ex rel. Ariz. Dep’t of Econ. Sec. v. Kennedy*, 143 Ariz. 341, 345, 693 P.2d 996, 1000 (App. 1985).

¶8 The superior court did not abuse its discretion in declining special-action jurisdiction here. The court determined Sherrill could have appealed the trial court’s ruling but had failed to do so in a timely manner. And, because Arizona has a strong policy against using special actions as substitutes for appeals, *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76, 796 P.2d 876, 878 (1990), the court properly declined to accept special-action jurisdiction and dismissed the petition.

¶9 Sherrill also contests the superior court’s denial of her motion for change of judge. She argues Rule 42(f), Ariz. R. Civ. P., entitled her to a “peremptory change of judge . . . even if she provided an explanation as to why she was requesting a change of judge.” According to Sherrill, the court erred in treating her motion as one for cause and not as one of right. We will not upset the court’s ruling on a motion for change of judge absent an abuse of discretion. See *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 232 Ariz. 562, ¶ 21, 307 P.3d 989, 995 (App. 2013) (reviewing denial of motion for change of judge based on claim of judicial bias for an abuse of discretion); *Smith v. Mitchell*, 214 Ariz. 78, ¶ 5, 148 P.3d 1151, 1153 (App. 2006) (reviewing denial of motion for change of judge as a matter of right for an abuse of discretion).

¶10 Rule 42(f)(1)(A), however, requires the certification of various facts and provides that a party is not to “specify grounds”

¹Sherrill raises several other issues on appeal that relate to her special-action petition, but because the court did not accept jurisdiction over the matter we do not consider them.

SHERRILL v. PIMA CTY. JUSTICE COURT
Decision of the Court

for a change of judge as a matter of right. Sherrill's motion not only included the grounds for removal of Judge Metcalf, but failed to include the requisite certification. We therefore cannot say the superior court erred in construing the motion as one for a change of judge for cause pursuant to Rule 42(f)(2).

¶11 To the extent Sherrill addresses the superior court's ruling on the question of cause, we find no abuse of discretion. Sherrill argues that Rule 42(f) does not require the filing of an affidavit. While a change of judge as a matter of right neither requires nor permits an affidavit, Ariz. R. Civ. P. 42(f)(1)(A), a change of judge for cause does require the filing of an affidavit, Ariz. R. Civ. P. 42(2)(B). The superior court treated Sherrill's motion as a motion for change of judge for cause, and under the applicable rule Sherrill was required to provide an affidavit attesting why she was entitled to relief. Thus, the court found Sherrill's failure to file a proper affidavit "constitute[d] an independent and sufficient basis" to deny her request. We find no flaw in the court's reasoning and no abuse of its discretion.

¶12 Further, even had the superior court erred in denying Sherrill's motion for change of judge, treating it as for-cause rather than as-of-right, her argument would fail because seeking relief on appeal is not the proper remedy for a court's denial of a preemptory notice of change of judge. See *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996). Instead, a party challenging such a ruling must seek review by way of special action. *Id.* Having never sought special-action relief on the issue of a change of judge, Sherrill cannot now raise error on appeal.

Disposition

¶13 For the foregoing reasons, we affirm the rulings of the superior court.