IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

MEL MARIN,
Plaintiff/Appellant,

v.

WILMOT SELF-STORAGE, LLC,
Defendant/Appellee.

No. 2 CA-CV 2017-0067
Filed October 4, 2017

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NOT FOR PUBLICATION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. C20155817
The Honorable Sarah R. Simmons, Judge

APPEAL DISMISSED IN PART;
AFFIRMED IN PART

COUNSEL

Mel Marin, San Diego, California
In Propria Persona

Burris & MacOmber, P.L.L.C., Tucson
By Karl MacOmber
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Mel Marin appeals from the trial court's dismissal with prejudice of his complaint against Wilmot Self-Storage ("Wilmot"), Mario Teran, and Edward Lacambra,[1] as well as its order designating him a vexatious litigant. For the reasons stated below, we dismiss in part and affirm in part.

Factual and Procedural Background

¶2 Marin filed this lawsuit in December 2015, alleging claims of conversion, interference with economic advantage, wrongful death, and violations of the Bankruptcy Code and Civil Rights Act. All of the claims stem from a 2009 sale of the property in a storage unit belonging to Marin's now-deceased father, following a rent dispute. Wilmot filed a motion to dismiss the complaint pursuant to Rule 12(b), Ariz. R. Civ. P., arguing that Marin "fail[ed] . . . to state a claim upon which relief can be granted" and that "the statute of limitations bar[red] all of the claims." Wilmot also requested that the trial court designate Marin a vexatious litigant pursuant to A.R.S. § 12-3201, based on the "many times [he] has sued the present Defendants for the same 'claims.'" Teran and Lacambra joined Wilmot's motion and request. Wilmot additionally sought its attorney fees and costs under A.R.S. § 12-349.

¶3 After Marin's response and Wilmot's reply, the trial court entered a written ruling, dismissing the complaint in its entirety with prejudice. As part of that ruling, the court also designated Marin a vexatious litigant and enjoined him from filing any future lawsuit

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[1]Neither Teran nor Lacambra have appeared on appeal or filed an answering brief.

against Wilmot, its employees, Teran, or Lacambra, without prior court approval. This appeal followed.

Jurisdiction

¶4 "Although neither party has raised the issue, we have an independent obligation in every appeal to ensure we have jurisdiction." *Robinson v. Kay*, 225 Ariz. 191, ¶ 4, 236 P.3d 418, 419 (App. 2010). Because our jurisdiction is defined by statute, *see* A.R.S. § 12-2101(A), "we must dismiss an appeal over which we lack jurisdiction," *Baker v. Bradley*, 231 Ariz. 475, ¶ 8, 296 P.3d 1011, 1015 (App. 2013).

¶5 Generally, our jurisdiction is limited to appeals from final judgments that dispose of all claims against all parties. *Id.* ¶ 9; *see* § 12-2101(A)(1); *see also* Ariz. R. Civ. P. 54(a) (defining "judgment" as "decree [or] any order from which an appeal lies"). Such a judgment must include language pursuant to Rule 54(c), indicating that "no further matters remain pending." *See In re Guardianship of Sommer*, 241 Ariz. 308, ¶¶ 25-26, 386 P.3d 1281, 1286 (App. 2016). Alternatively, a decision that resolves fewer than all claims against all parties may be appealed as a final judgment if the trial court exercises its discretion and certifies the decision as appealable pursuant to Rule 54(b), indicating that "there is no just reason for delay." *See Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, ¶ 12, 380 P.3d 659, 667 (App. 2016); *see also* Ariz. R. Civ. P. 54(a) (defining "[d]ecision" as "written order, ruling, or minute entry that adjudicates at least one claim or defense"). Absent language pursuant to Rule 54(b) or (c), a ruling is not appealable as a final judgment. *Brumett*, 240 Ariz. 420, ¶ 12, 380 P.3d at 667.

¶6 Here, although the trial court's ruling from which Marin is attempting to appeal resolved all of his claims against Wilmot, Teran, and Lacambra, it did not contain the necessary language pursuant to Rule 54(b) or (c). And notably, Wilmot's request for attorney fees and costs under § 12-349 is still pending.[2] *See* Ariz. R.

[2] Additionally, another defendant had been previously dismissed without prejudice for Marin's failure to timely serve that defendant. A dismissal without prejudice is not a final judgment,

Civ. P. 54(h)(1)(A) (except as otherwise provided, claim for attorney fees and costs must be resolved before final judgment may be entered under Rule 54(b) or (c)). Thus, consistent with Rule 54, it appears the court intended its ruling to be a "decision" entered before the "final judgment." *See* Ariz. R. Civ. P. 54(a) (defining judgment and decision), (h) (proposed form of judgment), (i) (scope and jurisdiction). Consequently, the court has not yet entered a final judgment from which Marin could challenge the dismissal of his complaint, and we must dismiss this part of the appeal. *See* Ariz. R. Civ. App. P. 8(a); *Baker*, 231 Ariz. 475, ¶¶ 10, 18-19, 296 P.3d at 1015-17.[3]

¶7 However, part of the trial court's ruling—the order designating Marin a vexatious litigant—is in effect an order granting an injunction, which is an appealable ruling pursuant to § 12-2101(A)(5)(b). *See Madison v. Groseth*, 230 Ariz. 8, n.8, 279 P.3d 633, 638 n.8 (App. 2012). And an order granting an injunction does not require Rule 54(b) or (c) language to be appealable. *Brumett*, 240 Ariz. 420, ¶ 19, 380 P.3d at 669. We thus have jurisdiction over this part of Marin's appeal pursuant to § 12-2101(A)(5)(b).

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and, therefore, any final judgment as to the remaining defendants would presumably require language pursuant to Rule 54(b). *See McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 4, 202 P.3d 536, 539 (App. 2009); *Brumett*, 240 Ariz. 420, ¶ 32, 380 P.3d at 671-72; *see also Grand v. Nacchio*, 214 Ariz. 9, ¶ 16, 147 P.3d 763, 770 (App. 2006) (when claims dismissed without prejudice, summary judgment as to remaining claims not final).

[3]Although a premature notice of appeal "is treated as filed on the date of, and after the entry of, the judgment," Ariz. R. Civ. App. P. 9(c), no final judgment has been entered in this case, *see McCleary v. Tripodi*, 772 Ariz. Adv. Rep. 13, ¶ 11 (Ct. App. Aug. 29, 2017) ("By its plain language, Rule 9(c) applies to notices of appeal taken from orders upon which the trial court later enters an appealable, final judgment.").

Vexatious Litigant

¶8 Marin challenges the trial court's designation of him as a vexatious litigant under § 12-3201.[4] Because we are treating the order as a grant of injunctive relief, we review it for an abuse of discretion. *See Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000); *see also De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir. 1990) (reviewing vexatious-litigant order for abuse of discretion).

¶9 Marin argues the trial court erred in designating him a vexatious litigant because it improperly found his claims in the underlying lawsuit "barred by res judicata [when he] filed them in two Arizona courts before coming here."[5] He further contends that his "prior two filings in Arizona courts were not dismissed with prejudice[, so claim preclusion] should not have been applied."[6]

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[4]Marin asserts that § 12-3201 is "overbroad and vague" and is thus unconstitutional. However, he did not raise this argument below. Accordingly, the issue is waived, and we do not address it further. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768-69 (App. 2000) (issues raised for first time on appeal, even constitutional ones, generally not considered); *see also Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, ¶¶ 23-25, 254 P.3d 418, 423-24 (App. 2011) (declining to exercise discretion to address constitutional argument raised for first time on appeal).

[5]"Res judicata . . . [is a] traditional legal term[] describing the effect of a prior decided case upon a later pending case." *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 425, 880 P.2d 642, 645 (App. 1993). But the modern term "claim preclusion" is used "instead of the archaic phrase[] 'res judicata'" to make the doctrine "more understandable." *Id*. We therefore use the term "claim preclusion" hereinafter.

[6]It is unclear which two other Arizona cases Marin is referring to. The record shows 2007 and 2013 Arizona District Court cases, as well as a 2010 Pima County Superior Court case, all involving the same defendants. In the 2007 case, the district court noted that it was the twenty-second case Marin had filed there related to this dispute and that all of the prior cases "ha[d] been decided against [Marin]."

Thus, as we understand it, Marin seems to suggest the court was required to first find his underlying claims barred by claim preclusion before designating him a vexatious litigant. We disagree with the premise of Marin's argument.

¶10 "Arizona courts possess inherent authority to curtail a vexatious litigant's ability to initiate additional lawsuits." *Madison*, 230 Ariz. 8, ¶ 17, 279 P.3d at 639. In 2014, our legislature enacted § 12-3201 to allow a trial court, upon its own motion or the request of a party, to "designate a pro se litigant a vexatious litigant," if it "finds the pro se litigant engaged in vexatious conduct."[7] § 12-3201(A), (C); *see* 2014 Ariz. Sess. Laws, ch. 41, § 1. This designation prohibits the litigant from filing "a new pleading, motion or other document without prior leave of the court." § 12-3201(B). Vexatious conduct includes: "[r]epeated filing of court actions solely or primarily for the purpose of harassment," "[c]ourt actions brought or defended without substantial justification," and "[r]epeated filing of documents or requests for relief that have been the subject of previous rulings by the court in the same litigation." § 12-3201(E).

¶11 Thus, based on the plain language of the statute, the trial court was not required to find Marin's underlying claims barred by the doctrine of claim preclusion before designating him a vexatious litigant. *See Stein v. Sonus USA, Inc.*, 214 Ariz. 200, ¶ 3, 150 P.3d 773, 774 (App. 2007) (if statute is clear and unambiguous, we apply plain language). Even before § 12-3201 was enacted, our own case law establishing guidelines for a vexatious-litigant designation did not require such a determination. *See Madison*, 230 Ariz. 8, ¶ 18, 279 P.3d at 639 (litigant must be afforded notice and opportunity to be heard;

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[7] The statute grants the authority to designate a vexatious litigant to "the presiding judge of the superior court or a judge designated by the presiding judge of the superior court." § 12-3201(A). The presiding judge of the Pima County Superior Court ordered that "each judge assigned to a particular case is hereby designated as the judicial officer to make the determination as to whether a self-represented or pro se litigant is a vexatious litigant in that case." Pima Cty. Superior Ct. Admin. Order No. 2015-06 (Feb. 6, 2015).

court must create record that includes list of cases leading to order; court must make findings of litigant's frivolous or harassing conduct; and order must be narrowly tailored).

¶12 Here, the record shows Marin has filed dozens of lawsuits against these and other defendants throughout Arizona and other states. The claims presented here were dismissed by the same court in 2010, and Marin also sued these defendants in the Arizona District Court more than once. In addition, at least one other court has found Marin to be a vexatious litigant.[8]

¶13 Marin nevertheless contends that the trial court erred by taking judicial notice of "prior cases in which [he] was supposedly a party" when Wilmot made no such request. But the only published case Marin cites in support of his argument does not, contrary to his assertion, require a party to file a motion requesting that the court take judicial notice before the court may do so. *See Hawkins v. State*, 183 Ariz. 100, 104, 900 P.2d 1236, 1240 (App. 1995) (discussing doctrine of claim preclusion as applied to administrative order never challenged by judicial review). In fact, "a court could, and should, take judicial notice of proceedings in certain other cases in the same court . . . without the necessity of the record of such previous suits being offered in evidence." *Hershey v. Banta*, 55 Ariz. 93, 99, 99 P.2d 81, 84 (1940); *see also State v. Rushing*, 156 Ariz. 1, 4, 749 P.2d 910, 913 (1988) (proper for court to take judicial notice of its own files). Even disregarding cases from other courts for which there was no record provided, the record in this case is sufficient for a finding of vexatious conduct. *See* § 12-3201(E).

¶14 In addition, the trial court ensured that Marin had an opportunity to respond to Wilmot's vexatious-litigant request, and Marin in fact did so. *See Madison*, 230 Ariz. 8, ¶ 18, 279 P.3d at 639. In its ruling, the court made detailed, specific findings about the other cases and Marin's "abusive" and "harassing" conduct. *See id.* The order is also narrowly tailored to prohibit claims against these defendants. *See id.* Accordingly, we cannot say the court abused its

[8]A California District Court declared Marin a vexatious litigant in 2012. The Arizona District Court also threatened to do so in 2007.

discretion in designating Marin a vexatious litigant. *See Ahwatukee Custom Estates Mgmt. Ass'n*, 196 Ariz. 631, ¶ 5, 2 P.3d at 1279; *see also De Long*, 912 F.2d at 1146.

Disposition

¶15 For the reasons stated above, we dismiss Marin's appeal from the trial court's dismissal of his complaint; however, we affirm the court's designation of Marin as a vexatious litigant. Wilmot has requested its attorney fees and costs on appeal pursuant to § 12-349, reasoning that Marin's appeal was "frivolous." Because we agree that Marin's challenge to the vexatious-litigant designation was without substantial justification, we grant Wilmot's request for that part of the appeal. *See Rogone v. Correia*, 236 Ariz. 43, ¶ 22, 335 P.3d 1122, 1129 (App. 2014). However, because we otherwise dismiss Marin's appeal on jurisdictional grounds not raised or briefed by Wilmot, we decline to award its fees related to that portion of the appeal. Wilmot is also entitled to its costs upon compliance with Rule 21(b), Ariz. R. Civ. App. P. *See Robinson*, 225 Ariz. 191, ¶ 8, 236 P.3d at 420 (prevailing party entitled to costs when appeal dismissed).