

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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GARY YODER,)	
)	
Plaintiff/Appellant,)	2 CA-CV 2009-0049
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JAMES LACHEMANN,)	Rule 28, Rules of Civil
)	Appellate Procedure
Defendant/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. C 200701119

Honorable Gilberto V. Figueroa, Judge

REVERSED AND REMANDED

Gary Yoder

Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Gary Yoder appeals from the trial court’s dismissal of his complaint against appellee James Lachemann, his former criminal defense lawyer. Because the trial court erroneously dismissed the complaint on its own motion, we reverse the judgment of dismissal and remand the case to the trial court for further proceedings.

¶2 Yoder, a prison inmate, filed a civil lawsuit against Lachemann alleging claims for fraud, negligence, ineffective assistance of counsel, breach of contract, and constitutional violations—all based on Lachemann’s representation of Yoder in connection with criminal charges that had been brought against Yoder. After Lachemann answered the complaint and the trial court ruled on several pretrial motions, the court dismissed Yoder’s action sua sponte for failure to state a claim upon which relief could be granted. Lachemann had neither asserted that defense in his answer to the complaint nor filed a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., for failure to state a claim for relief.

¶3 We conclude the trial court erred when it dismissed Yoder’s complaint on its own motion. *See Acker v. CSO Chevira*, 188 Ariz. 252, 256, 934 P.2d 816, 820 (App. 1997). In *Acker*, the trial court dismissed an inmate’s civil rights complaint before any defendants had been served. *Id.* at 253, 934 P.2d at 817. Reversing that ruling, Division One of this court concluded “the trial court lacked express authority to dismiss the complaint on the stated grounds” and had “neither invoked [its inherent] authority [to dismiss an action] nor made any record to support its use of that authority.” *Id.* The court expressly stated it was “not hold[ing] that an Arizona trial court can never order a sua sponte Rule 12(b)(6)

dismissal.” *Id.* at 256, 934 P.2d at 820. Rather, it held that, “before the trial court orders such a dismissal of an *in forma pauperis* complaint,” it should follow the procedural safeguards discussed in *Franklin v. Oregon State Welfare Division*, 662 F.2d 1337 (9th Cir. 1981).¹ *Acker*, 188 Ariz. at 256, 934 P.2d at 820.

¶4 *Franklin* held a trial court “may dismiss an action on its own motion for failure to state a claim, but only after the court takes the proper procedural steps.” 662 F.2d at 1340-41. Those steps include notifying the plaintiff of the proposed dismissal and giving him an opportunity to file a written opposition. *See id.* at 1341. This court’s reasons in *Acker* for disapproving sua sponte Rule 12(b)(6) dismissals included avoiding “the appearance that the judiciary is a proponent rather than an independent entity,” a concern in this case because Yoder has alleged judicial bias in his opening brief on appeal. *Acker*, 188 Ariz. at 256, 934 P.2d at 820, *quoting Franklin*, 662 F.2d at 1342.

¶5 Here, the trial court did not invoke its inherent authority to dismiss a frivolous lawsuit.² Nor did it make findings that would support the use of that authority. *See Acker*,

¹The court in *Acker* was only addressing the sua sponte dismissal of complaints filed *in forma pauperis*. 188 Ariz. at 253, 256, 934 P.2d at 817, 820. Yoder’s lawsuit clearly qualifies as such.

²The trial court’s “inherent screening power” in the inmate lawsuit context “has generally been used to get control of inmates who have proven themselves to be abusers of the *in forma pauperis* privilege by filing frivolous actions.” *Acker*, 188 Ariz. at 254, 934 P.2d at 818. Although the record suggests Yoder may be one of the inmates appropriately subject to the court’s “inherent screening power,” *id.*, the court here made no findings reflecting such a characterization in order to invoke properly its inherent authority to dismiss the case. *See id.* at 255, 934 P.2d at 819.

188 Ariz. at 256, 934 P.2d at 820 (when trial court dismisses complaint “by invoking its inherent authority to dismiss frivolous actions, it should make findings which explain its action”). Rather, it dismissed Yoder’s complaint because it “failed to assert a claim upon which relief can be granted.” *See* Ariz. R. Civ. P. 12(b)(6) (setting forth “[f]ailure to state a claim upon which relief can be granted” ground for motion to dismiss). Because the court did so upon its own motion, without following the procedural steps required in *Acker*, we reverse the judgment and remand this matter to the trial court for further proceedings consistent with this decision.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge