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YODER, Plaintiff/Appellant, v. JAMES LACHEMANN, Defendant/Appellee.	2 CA-CV 2010-0077 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. C200701119

Honorable William J. O'Neil, Judge

AFFIRMED IN PART
REVERSED IN PART AND REMANDED

Gary Yoder — Buckeye
In Propria Persona

K E L L Y, Judge.

¶1 Appellant Gary Yoder appeals from the trial court's dismissal of his complaint against appellee James Lachemann, his former criminal defense lawyer. For the reasons that follow, we affirm in part, reverse in part, and remand for proceedings consistent with this decision.

Facts and Procedural Background

¶2 Yoder, a prison inmate, filed a civil lawsuit against Lachemann in May 2007, in which he alleged claims for fraud, negligence, ineffective assistance of counsel, breach of contract, and constitutional violations based on Lachemann's representation of Yoder on criminal charges. 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. Yoder appealed and in our memorandum decision issued in November 2009, we remanded the matter because the court dismissed the action upon its own motion, without following the procedural steps required in *Acker v. CSO Chevira*, 188 Ariz. 252, 256, 934 P.2d 816, 820 (App. 1997). *Yoder v. Lachemann*, No. 2 CA-CV 2009-0049 (memorandum decision filed Nov. 20, 2009).

¶3 On December 18, 2009, a month before our mandate issued, the trial court issued an unsigned "notice" reassigning the matter to the Honorable William O'Neil and denying Yoder's "Motion for Entry of Default Judg[]ment by Res Judicata," which had been filed on December 10, 2009. The court further ordered that the matter be placed on the Inactive Calendar for dismissal on March 15, 2010, pursuant to Rule 38.1(d), Ariz. R.

Civ. P. On February 24, 2010, the trial court issued a second "Notice Ruling on Motions/Issues" in which it acknowledged that "[t]he original trial judge prematurely recused himself prior to the Mandate" and that as a result, the court had "prematurely ruled upon a motion of Plaintiff." The court then reinstated its premature ruling, including the dismissal date of March 15, 2010.[1] On March 17, 2010, the court ordered the action dismissed with prejudice "pursuant to Rule 38.1(d), [Ariz. R. Civ. P.]" This appeal followed.[2]

Discussion

¶4 As a threshold matter, Yoder failed to set forth specific arguments in his opening brief as required by the rules of civil appellate procedure. *See* Ariz. R. Civ. App. P. 13(a)(6) ("The brief of the appellant shall concisely and clearly set forth . . . [a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *Lake Havasu City v. Ariz. Dep't of Health Servs.*, 202 Ariz. 549, n.4, 48 P.3d 499, 503 n.4 (App. 2002). Yoder also failed to include a statement of facts

[1]The trial court did not have jurisdiction to enter its ruling on December 18, 2009, because Yoder's appeal was still pending until we issued our mandate. *See Sonitrol of Maricopa County v. City of Phoenix*, 181 Ariz. 413, 417, 891 P.2d 880, 884 (App. 1994) (trial court generally loses jurisdiction once an appeal is pending except when it acts "in furtherance of the appeal").

[2]Yoder filed a notice of appeal, followed by a "Notice to Appeal and Request Judg[]ment from Court of Appeals Div. II Tucson AZ" and a "Motion for Judg[]ment on the Pleadings by Appe[]llant," which this court denied on June 30, 2010.

or citations to the record on appeal to support most of the facts asserted in his brief, and thus has not complied with Rule 13(a)(4), Ariz. R. Civ. App. P.

¶5 Despite Yoder's pro se status, he is held to the same standards as a qualified attorney. *See Old Pueblo Plastic Surgery, P.C. v. Fields*, 146 Ariz. 178, 179, 704 P.2d 819, 820 (App. 1985). Nonetheless, because we prefer to resolve cases on their merits, *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984), we will attempt to discern and address the substance of Yoder's arguments.

¶6 It appears that Yoder's appeal centers on the trial court's dismissal of the case with prejudice, based on Rule 38.1(d), Ariz. R. Civ. P. In February 2009, after our mandate issued, the trial court reinstated its premature minute entry of December 2009 notifying Yoder that his case had been "placed on the Inactive Calendar for Dismissal on March 15, 2010." Rule 38.1(d) states:

> The clerk of the court or court administration shall place on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness has not been served within nine months after the commencement thereof[.] All cases remaining on the Inactive Calendar for two months shall be dismissed without prejudice for lack of prosecution . . . .

¶7 Although Yoder does not state in his brief whether he ever filed a Motion to Set and Certificate of Readiness, our review of the record indicates he did not. Thus, the trial court properly placed his case on the inactive calendar for lack of prosecution. *See* Ariz. R. Civ. P. 38.1(d). However, the trial court issued its order in February and dismissed the case in March, less than a month later. Under the Rule, Yoder was entitled

to a two-month period on the inactive calendar before his case was subject to dismissal. Ariz. R. Civ. P. 38.1(d). Furthermore, the court dismissed the case with prejudice; Rule 38.1(d) requires that such cases "be dismissed without prejudice." Thus, we remand this matter to the trial court for placement on the inactive calendar, with directions that the case be dismissed without prejudice if it has remained on the inactive calendar for two months or longer.

¶8 Next, Yoder has repeatedly argued to the trial court that he was entitled to an entry of default judgment because Lachemann "did not refute or respond and had ample time and oppertunity[sic] to do so." But, Lachemann filed an answer to the original complaint on September 4, 2007. The court denied Yoder's motion for an entry of default judgment in December 2007, "not[ing] that an Answer ha[d] been previously filed by the Defendant and therefore Plaintiff may not seek a Default." *See* Ariz. R. Civ. P. 55(a) (application for default permitted when "party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend"). In February 2010, Yoder filed a "Notice to Clerk of Court" again requesting that the court decide the matter "by default and res []judicata in favor of Plaintiff," which the trial court again properly denied. Yoder again raised the issue on appeal, and filed a motion for judgment on the pleadings in this court in June 2010, which this court denied. Because we have already denied the motion, this matter is no longer properly before us.

Conclusion

¶9 For the reasons stated above, we remand this matter to the trial court so that it may place the case on the inactive calendar to be dismissed without prejudice if it has remained on the inactive calendar for two months or longer.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge