IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

YELLOW JACKET DRILLING SERVICES, LLC, an Arizona limited liability company, *Plaintiff/Appellant/Cross-Appellee*,

v.

CITY OF SEDONA, a political subdivision of the State of Arizona, *Defendant/Appellee/Cross-Appellant*.

No. 1 CA-CV 15-0487
FILED 5-4-2017

Appeal from the Superior Court in Yavapai County
No. V1300CV201480433
The Honorable Jeffrey G. Paupore, Judge Pro Tem

AFFIRMED

COUNSEL

Osborn Maledon PA, Phoenix
By Thomas L. Hudson, Eric M. Fraser
Co-counsel for Plaintiff/Appellant/Cross-Appellee

Palecek & Palecek PLLC, Scottsdale
By Karen A. Palecek
Co-counsel for Plaintiff/Appellant/Cross-Appellee

Dickinson Wright PLLC, Phoenix
By Stephen E. Richman, Anne L. Tiffen, Bradley A. Burns
Counsel for Defendant/Appellee/Cross-Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 Appellant Yellow Jacket Drilling Services, LLC (Yellow Jacket) appeals the dismissal of its amended complaint against Appellee City of Sedona (Sedona) for failure to comply with Arizona Revised Statutes (A.R.S.) § 12-821.01(A) (2016).[1] Yellow Jacket also contends it should have been given leave to amend its complaint a second time to allege Sedona either waived or was estopped from asserting its § 12-821.01(A) defense. Sedona cross-appeals the trial court's decision to decline to award attorneys' fees under the parties' contract. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 We state the well-pled facts from Yellow Jacket's amended complaint below and assume they are true for purposes of this appeal. *Blankenbaker v. Marks*, 231 Ariz. 575, 577, ¶ 6, 299 P.3d 747, 749 (App. 2013).

¶3 Yellow Jacket contracted with Sedona to perform drilling, casing and testing of an injection well. As the project progressed, Yellow Jacket discovered "unusual subsurface geological conditions" and "unstable formations of large volumes of sediment" that caused it to incur substantial additional costs. Yellow Jacket wrote to Sedona requesting additional compensation under the parties' contract on October 24, 2013. Yellow Jacket hand-delivered its letter to a Sedona engineering department employee as required by the parties' contract. The employee acknowledged receipt and stated that Yellow Jacket's request would be reviewed and distributed to the proper parties.

¶4 Yellow Jacket continued to work on the project through December 2013. It also delivered supplemental letters to Sedona's City Attorney and Sedona's outside counsel on December 19, 2013, February 28,

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[1] We cite the current version of the applicable statute unless revisions material to this decision have occurred since the events in question.

2014, and April 18, 2014, updating its claim for additional compensation. The project reached final completion on December 23, 2013. Sedona emailed Yellow Jacket on January 21, 2014 declining to release the full retention because Yellow Jacket's claim for additional compensation was "still in negotiation."

¶5 Yellow Jacket sued on November 20, 2014. Sedona moved to dismiss the complaint, arguing that Yellow Jacket did not allege compliance with Arizona's statutory notice of claim procedures. The trial court denied Sedona's motion without prejudice and allowed Yellow Jacket to file an amended complaint. Sedona then moved to dismiss the amended complaint, arguing that Yellow Jacket failed to serve any of its letters on the city clerk as required by A.R.S. § 12-821.01(A) and Arizona Rule of Civil Procedure 4.1(h). Yellow Jacket opposed the motion, contending Sedona waived proper service by responding to the October 25, 2014 letter without raising any alleged service defects.[2] Sedona contended in reply that Yellow Jacket's letters were not notices of claim at all, but rather requests for additional compensation under the parties' contract.

¶6 The trial court found (1) Yellow Jacket's claim accrued when Sedona refused to release the full retention, (2) the October 25, 2013 letter was not a statutory notice of claim because it predated the accrual of Yellow Jacket's claim, and (3) the letter instead was intended "to modify the terms of the [parties'] contract." The trial court also determined that "no amendment to [the amended] Complaint can change the facts" and dismissed the amended complaint with prejudice. The trial court entered final judgment pursuant to Arizona Rule of Civil Procedure 54(c) but declined to award attorneys' fees or costs to either party. Yellow Jacket timely appealed, and Sedona timely cross-appealed the denial of attorneys' fees. We have jurisdiction over Yellow Jacket's appeal and Sedona's cross-appeal pursuant to A.R.S. § 12-2101(A)(1) (2016).

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[2] Yellow Jacket also argued that Sedona's motion should be treated as a motion for summary judgment under Ariz. R. Civ. P. 56 and filed a separate statement of facts. The trial court did not consider the statement of facts; therefore, Sedona's motion was not converted. *See Belen Loan Inv'rs, LLC v. Bradley*, 231 Ariz. 448, 452, ¶ 7, 296 P.3d 984, 988 (App. 2012). Yellow Jacket does not challenge the trial court's refusal to convert Sedona's motion on appeal.

DISCUSSION

I. Yellow Jacket's Appeal

A. The Trial Court Properly Dismissed Yellow Jacket's Amended Complaint

¶7 We review the dismissal of a complaint under Ariz. R. Civ. P. 12(b)(6) de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). We accept all well-pled facts as true and give Yellow Jacket the benefit of all inferences arising therefrom. *Botma v. Huser*, 202 Ariz. 14, 15, ¶ 2, 39 P.3d 538, 539 (App. 2002). We will affirm the dismissal only if Yellow Jacket would not have been entitled to relief under any facts susceptible of proof in its amended complaint. *Coleman*, 230 Ariz. at 356, ¶ 8, 284 P.3d at 867.

¶8 Before initiating an action for damages against a public entity, a claimant must provide notice of its claim to the entity. *Deer Valley Unified School Dist. No. 97 v. Houser*, 214 Ariz. 293, 294, ¶ 1, 152 P.3d 490, 491 (2007). Notices of claim must comply with A.R.S. § 12-821.01(A), which provides as follows:

> Persons who have claims against a public entity, public school or a public employee shall file claims ***with the person or persons authorized to accept service for the public entity***, public school or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity, public school or public employee to understand the basis on which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim that is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

(Emphasis added). Compliance is "a mandatory and essential prerequisite to suit." *Salerno v. Espinoza*, 210 Ariz. 586, 588, ¶ 7, 115 P.3d 626, 628 (App. 2005). We review de novo a trial court's determination that a party's notice of claim did not meet the statutory requirements of A.R.S. § 12–821.01(A). *Jones v. Cochise Cty*, 218 Ariz. 372, 375, ¶ 7, 187 P.3d 97, 100 (App. 2008).

¶9 The only person authorized to accept service of a notice of claim for Sedona was its clerk. Ariz. R. Civ. P. 4.1(h). Yellow Jacket admits

that it did not serve any of its letters on Sedona's clerk; it instead delivered its first letter to an employee in Sedona's engineering department and its supplemental letters to Sedona's City Attorney and outside counsel. Yellow Jacket thus did not comply with A.R.S. § 12-821.01(A). *See Slaughter v. Maricopa Cty*, 227 Ariz. 323, 325, ¶ 10, 258 P.3d 141, 143 (App. 2011) (granting summary judgment because the plaintiff failed to properly serve his notice of claim pursuant to then-Rule 4.1(i)); *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 61, ¶ 21, 234 P.3d 623, 629 (App. 2010) (same); *see also Havasupai Tribe of Havasupai Reservation v. Arizona Bd. Of Regents*, 220 Ariz. 214, 223, ¶30, 204 P.3d 1063, 1072 (App. 2008) ("If a notice of claim is not properly served, the claim is barred"). The trial court did not err in dismissing Yellow Jacket's amended complaint.

B. The Trial Court Did Not Abuse Its Discretion in Declining Leave to File a Second Amended Complaint

¶10 Yellow Jacket next argues that the trial court should have given it leave to amend its complaint a second time to allege waiver and estoppel. Yellow Jacket did not request leave to amend a second time. Normally, we can affirm the trial court's ruling on that basis alone. *Blumenthal v. Teets*, 155 Ariz. 123, 131, 745 P.2d 181, 189 (App. 1987). Yellow Jacket contends, however, that it was deprived of the opportunity to seek leave to amend when the trial court immediately granted a Rule 54(c) judgment. Assuming without deciding this is true, we find no abuse of discretion on the merits of Yellow Jacket's belated request. *See Timmons v. Ross Dress For Less, Inc.*, 234 Ariz. 569, 572, ¶ 17, 324 P.3d 855, 858 (App. 2014) (Court of Appeals reviews denial of leave to amend a complaint for an abuse of discretion).

¶11 Yellow Jacket contends Sedona waived its improper service defense by "considering and processing the claim without raising the … defect." Yellow Jacket cites Sedona's response to its October 25, 2013 letter and Sedona's decision not to invoke mediation on June 14, 2014 as evidence of waiver. But "[c]onsideration of waiver starts with examining [the public entity's] conduct after the notice of claim deadline has passed." *Arpaio v. Maricopa County Bd. of Supervisors*, 225 Ariz. 358, 362, ¶ 13, 238 P.3d 626, 630 (App. 2010).[3]

[3] Yellow Jacket does not contend Sedona delayed in asserting the defense in this litigation. *See County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 597, ¶ 7, 233 P.3d 1169, 1176 (App. 2010) (compliance defense can be

¶12 Yellow Jacket does not challenge the trial court's finding that its claim accrued on January 21, 2014, meaning the deadline to properly serve a notice of claim was July 20, 2014, more than a month after the last response on which Yellow Jacket relies. A.R.S. § 12-821.01(A). Yellow Jacket cites nothing that occurred that could support either waiver or estoppel. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 537, ¶ 10, 96 P.3d 530, 535 (App. 2004) (explaining that estoppel requires, among other things, a showing of "affirmative acts inconsistent with a claim afterwards relied upon").

¶13 Yellow Jacket also relies on *Young v. City of Scottsdale*, 193 Ariz. 110, 970 P.2d 942 (App. 1998), *disapproved on other grounds by Deer Valley*, 214 Ariz. at 299, ¶ 21, 152 P.3d at 496. There, we found the City of Scottsdale waived a § 12-821.01(A) service defense by referring a notice of claim to an adjuster who denied the claim as untimely without raising the service issue. *Id*. at 111-12, 114, ¶¶ 3, 15, 970 P.2d at 943-44, 946. *Young* is distinguishable for two reasons. First, both the plaintiffs' notice and Scottsdale's denial in *Young* came after the deadline to properly serve a notice of claim. *Id*. Here, as noted above, the relevant correspondence came before the July 20, 2014 notice of claim deadline. *Cf. Little v. State*, 225 Ariz. 466, 471, ¶ 17, 240 P.3d 861, 866 (App. 2010) (finding no estoppel because plaintiff "failed to explain how a state adjuster's opening a file … should estop the state from relying on the notice-of-claim statute" when the claim had not yet accrued).

¶14 Second, unlike the city in *Young*, Sedona did not deny Yellow Jacket's claim on § 12-821.01(A) grounds. Yellow Jacket instead alleged that Sedona decided "to hold retention … until … the differing site condition claim/change orders was resolved."[4] Assuming this is true, it does not evince an intentional decision to relinquish an improper service defense.[5]

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waived if not asserted "either in a reply to the … claim or a motion filed pursuant to [Rule] 12(b)").

[4] Yellow Jacket also argues that the substance of their letters complied with both the contract and A.R.S. § 12-821.01(A). Even if this is true, it is irrelevant because Yellow Jacket did not serve any of the letters on Sedona's city clerk. *Slaughter*, 227 Ariz. at 325-26, ¶¶ 10-11, 258 P.3d at 143-44; *Simon*, 225 Ariz. at 61, ¶ 21, 234 P.3d at 629.

[5] For the same reason, we find *Teresta v. City of New York*, 108 N.E.2d 397 (N.Y. 1952) to be distinguishable. There, the city accepted an improperly

See, e.g., Brown v. Portland Sch. Dist. No. 1, 628 P.2d 1183, 1187 (Or. 1981) ("[P]ublic officials may well process and investigate alleged claims without intending to waive their objection to improper notice of such claims").

¶15 Yellow Jacket had approximately two months after its April 2014 letter to properly serve a notice of claim on Sedona's clerk. *See Drew v. Prescott Unified Sch. Dist.*, 233 Ariz. 522, 526, ¶ 16, 314 P.3d 1277, 1281 (App. 2013) ("[T]he notice of claim statute clearly places the burden on the claimant to make a statutorily compliant settlement offer."). It did not do so. The trial court did not abuse its discretion in denying leave to file a second amended complaint.

II. Sedona's Cross-Appeal

¶16 Sedona contends the trial court should have awarded it attorneys' fees under the parties' contract. It is an abuse of discretion to simply refuse to award fees under a contract. *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 133, ¶ 32, 272 P.3d 355, 364 (App. 2012). But Yellow Jacket argues that Sedona's fee request came too late in its reply in support of its motion to dismiss the amended complaint.

¶17 A Rule 12(b) movant must give notice of his intention to claim fees when it moves to dismiss. *Balestrieri v. Balestrieri*, 232 Ariz. 25, 26, ¶ 1, 300 P.3d 560, 561 (App. 2013). Sedona did not do so, but argues that *Balestrieri* only precludes fee claims made after a Rule 12(b) motion is granted. We disagree; *Balestrieri* clearly requires that a fee claim be made in the Rule 12(b) motion itself. *Id*. at 28, ¶ 11, 300 P.3d at 563; *see also Klesla v. Wittenberg*, 240 Ariz. 439, 442 n.2, ¶ 13, 380 P.3d 677, 680 n.2 (App. 2016) ("Contractual attorneys' fees must be pleaded and proved like any other contract claim, as part of the proponent's case in chief."). We therefore affirm the trial court's decision to decline to award fees. *See Parkinson v. Guadalupe Pub. Safety Ret. Local Bd.*, 214 Ariz. 274, 277, ¶ 12, 151 P.3d 557, 560 (App. 2007) ("We will affirm the superior court if its ruling was correct for any reason, even if that reason was not considered by the court.") (citation omitted).

III. Attorneys' Fees on Appeal

¶18 Sedona also requests attorneys' fees and costs incurred on appeal pursuant to the parties' contract. The contract states that in the event

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served notice of claim, then summoned the plaintiff to appear for, and conducted, a formal examination. *Id. at 442*. Yellow Jacket did not allege that Sedona took any similar steps here.

of a dispute "the prevailing party … shall be entitled to recover its attorneys' fees and costs incurred." Generally, we enforce a contractual attorneys' fees provision according to its terms but retain discretion to limit the fee award to a reasonable amount. *Geller v. Lesk,* 230 Ariz. 624, 627, ¶ 10, 285 P.3d 972, 975 (App. 2012). Sedona is the prevailing party in this appeal. We therefore will award Sedona reasonable attorneys' fees and taxable costs incurred on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶19 The judgment is affirmed.

AMY M. WOOD • Clerk of the Court
FILED: AA