

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



DIVISION ONE
FILED: 04-06-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

) No. 1 CA-CV 09-0298
GUSTAVO A. VARGAS AND VICTORIA L.)
VARGAS, Trustees of the Gustavo) DEPARTMENT D
A. Vargas and Victoria L. Vargas)
Revocable Trust, dated April 18,) **MEMORANDUM DECISION**
1997,)
) (Not for Publication -
Plaintiffs/Appellants,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
v.)
)
TOWN OF CLARKDALE, an Arizona)
municipal corporation,)
)
Defendant/Appellee.)
)

Appeal from the Superior Court in Yavapai County

Cause No. V-1300-CV-0820080202

The Honorable David L. Mackey, Judge

REVERSED AND REMANDED

Law Office of William P. Ring, P.C.
By William P. Ring
Attorneys for Appellants

Flagstaff

Moyes, Sellers & Sims, Ltd.
By Jeffrey T. Murray
Attorneys for Appellee

Phoenix

J O H N S E N, Judge

¶1 Gustavo A. and Victoria L. Vargas appeal the superior court's dismissal of their claims against the Town of Clarkdale. For the following reasons, we reverse and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 The Vargases own "Tract O" in the Mingus Shadows Subdivision. Tract O originally was dedicated as a public park. In March 2004, the Vargases submitted an application to replat Tract O into seven residential lots and a park. The Town Attorney advised the Town Planning Commission that because the existing plat and the public report specified that Tract O was a park, the Town could approve the Vargases' application only with the consent of each of the owners in the subdivision. The Planning Commission denied the Vargases' application. The Vargases appealed the denial to the Town Council, which, according to the minutes of a meeting held on June 22, 2004, adopted the following resolution:

[U]pon submittal of the requested redesigned Preliminary Plat and the initial design for a park, Council return this application to the Planning Commission for a public hearing, review and possible action. The Planning Commission may then choose to recommend to the Council approval of the Preliminary Plat as an avenue for the applicant to gather signatures from 100 percent of the current residents of the subdivision in support of the replat of this

tract, a requirement specified by the Town's attorney. If the Planning Commission approves the replat, that it include the stipulation requiring signatures be obtained prior to beginning of construction.

¶13 According to their complaint, the Vargases then attempted to secure the required signatures but were unable to do so. In September 2006, they submitted a new application to subdivide Tract O into eight residential lots. According to meeting minutes, the Planning Commission denied the application and "recommended [that the] Town Council clarify/justify the required 100% approval from residents in Mingus Shadows." After the Town Council conducted a public hearing on the Vargases' application on January 9, 2007, the Vargases asked for more time to gain the required homeowner consents. After the Vargases were unable to obtain the consents, they asked the Council to set another public hearing, and the matter was put on the Council's agenda for September 11, 2007.

¶14 According to the minutes of that meeting, the Town Attorney advised the Council that the Town lacked the authority to consider the Vargases' application unless each of the homeowners in the subdivision consented. According to the minutes, the Town Attorney reported that he had met with the Vargases and the other property owners "to try and assist resolution." He told the Council that "progress had been made and if the applicant continued to work with the owners he might

still be able to obtain the required 100% signatures of the property owners." On the attorney's advice, and based on the fact that the application was not supported by each of the property owners, the Town Council took no action on the Vargases' application.

¶15 Pursuant to Arizona Revised Statutes ("A.R.S.") section 12-821.01 (2003), the Vargases filed a notice of claim on December 7, 2007, to which the Town did not respond. On August 8, 2008, they filed a complaint against the Town, alleging an action in mandamus,¹ two claims for declaratory judgment, claims alleging violations of due process and equal protection, a claim alleging a taking without just compensation, a claim alleging violation of 42 United States Code § 1983, and a claim alleging misrepresentation. All of the claims were based on the Town's refusal to grant the Vargases' request to change the use of Tract 0 because their proposal lacked the consent of 100 percent of the subdivision's homeowners. The Vargases' complaint attached copies of the minutes referred to above.

¶16 The Town moved to dismiss the complaint for failure to state a claim, arguing the complaint was barred by limitations

¹ We will refer to this count as a special action. Ariz. R.P. Spec. Act. 1(a) ("Relief previously obtained against a body, officer, or person by writs of . . . mandamus . . . shall be obtained in an action under this Rule").

and that the Vargases failed to file a timely notice of claim pursuant to A.R.S. § 12-821.01. After a hearing, the superior court dismissed the complaint. It reasoned "that all claims asserted regarding action or inaction by [the Town] relate to the Town Council's decisions on June 22, 2004. Since the time has long since passed to challenge the action taken at that meeting, the claims regarding subsequent action that applied those decisions cannot now be addressed."

¶17 The Vargases timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

A. Standard of Review.

¶18 "We review an order granting a motion to dismiss for abuse of discretion." *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). "[W]e assume the truth of the allegations set forth in the complaint and uphold dismissal only if the plaintiffs would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996). We do not favor dismissal for failure to state a claim. *Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997). A claim may be dismissed on limitations grounds only when "it appears from the complaint

that the claim is barred." *McCloud v. State*, 217 Ariz. 82, 85, ¶ 8, 170 P.3d 691, 694 (App. 2007).

B. The Complaint Is Not Barred by Limitations.

¶9 "All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." A.R.S. § 12-821 (2003); see also *Flood Control Dist. of Maricopa County v. Gaines*, 202 Ariz. 248, 252, ¶ 10, 43 P.3d 196, 200 (App. 2002) (§ 12-821's one-year limitations period is a reasonable, constitutional restriction on actions against public entities).² A cause of action does not accrue under A.R.S. § 12-821 until "a plaintiff discovers or reasonably should have discovered the injury was caused by" the government's action. *Stulce v. Salt River Project Agric. Improvement and Power Dist.*, 197 Ariz. 87, 90, ¶ 10, 3 P.3d 1007, 1010 (App. 1999); see also *Gaines*, 202 Ariz. at 254, ¶ 17, 43 P.3d at 202.

¶10 The Town argues the Vargases' claims accrued on June 22, 2004, when the Council, acting on its lawyer's advice, declined to grant the replat application. According to the minutes attached to the complaint, however, the Council in June 2004 did not vote to reject the Vargases' application. According to the minutes, the council referred the matter back

² Because of the manner in which we resolve this appeal we need not address the Vargases' argument that A.R.S. § 12-821 does not apply to claims for declaratory relief.

to the Planning Commission and suggested that body recommend approval of the Vargases' application "as an avenue for the applicant to gather signatures" from the homeowners. The Council also instructed that if the Planning Commission decided to approve the replat, it should condition its approval on a requirement that the homeowners' consents be obtained prior to the start of construction.

¶11 Even if we accept the proposition that the Town Council announced in June 2004 that it would apply a strict unanimous consent rule to the Vargases' application, as alleged in the complaint, their claims did not accrue at that point because they then had not been damaged; a unanimous consent requirement would not prevent approval of the application if they could provide the required consents. The Vargases would not be damaged (and their claim would not accrue, for purposes of limitations) unless and until they tried but failed to obtain the homeowner consents and the Town rejected their application for that reason. See *W. Cas. & Sur. Co. v. Evans*, 130 Ariz. 333, 337, 636 P.2d 111, 115 (App. 1981) (limitations period does not necessarily begin to run at the moment a justiciable controversy arises; limitations on insurance bad-faith action did not begin to run upon insurer's reservation of rights but only upon insurer's denial of coverage).

¶12 A fair reading of the complaint is that the Vargases attempted to obtain approvals from the homeowners beginning in June 2004 and that effort continued into 2007, when they finally gave up and asked the Town Council to approve their application in spite of the fact that not all of the homeowners consented.³ As alleged in the complaint, it was only at that point, when the Town Council rejected the Vargases' application because they could not show it was supported by all of the subdivision's homeowners, that they were damaged by the alleged illegal rule the Town applied to their application. See *Stulce*, 197 Ariz. at 90, ¶ 10, 3 P.3d at 1010.⁴

¶13 Because the Vargases filed their complaint within one year of the September 11, 2007 meeting of the Town Council, the allegations of their complaint are sufficient to overcome a motion to dismiss based on limitations pursuant to A.R.S. § 12-821.⁵

³ Indeed, according to the Town Council's minutes, the Town Attorney reported to the Council during its September 11, 2007 meeting that if the Vargases continued to work with the owners, they might still be able to obtain "the required 100% signatures of the property owners."

⁴ The Council effectively rejected the Vargases' application by declining to consider their appeal from the Planning Commission's denial of the application.

⁵ The Vargases complied with the notice-of-claim statute, A.R.S. § 12-821.01 (to the extent it applies to their claims), by filing their notice on December 7, 2007, within 180 days after the Town Council's meeting on September 11.

C. The Claim for Special Action Relief.

¶14 The superior court has discretion to decline to accept jurisdiction of a non-statutory special action complaint initiated in that court. *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (App. 1979). The superior court declined to accept jurisdiction of the Vargases' mandamus (special action) claim, in part because it concluded that the claim was time-barred because it arose out of the Town Council's action in June 2004. In view of our conclusion that, based on the allegations in the complaint, the Vargases' claims did not accrue until the September 11, 2007 meeting of the Town Council, we reverse the portion of the superior court's order declining to accept jurisdiction of the special action claim and remand the issue for further consideration by the court.

D. Attorney's Fees.

¶15 The Vargases seek their attorney's fees and costs on appeal, citing A.R.S. §§ 12-341 (2003), -348 (2003), -349 (2003) and -2030 (2003), and 42 U.S.C. § 1988. Without prejudice to either party's request for attorney's fees at the conclusion of the litigation, we decline to grant the Vargases' request for fees.

CONCLUSION

¶16 For the foregoing reasons, we reverse the superior court's dismissal of the complaint and remand for further proceedings. We award the Vargases their costs on appeal contingent on their compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/ _____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/ _____
PATRICIA A. OROZCO, Presiding Judge

/s/ _____
JON W. THOMPSON, Judge