IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MESQUITE POWER, LLC, *Plaintiff/Appellant*,

v.

ARIZONA DEPARTMENT OF REVENUE, *Defendant/Appellee*.

No. 1 CA-TX 20-0009
FILED 8-24-2021

Appeal from the Arizona Tax Court
No. TX2019-001759
The Honorable Danielle J. Viola, Judge

AFFIRMED

COUNSEL

Mooney, Wright, Moore & Wilhoit, PLLC, Mesa
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By Lisa Neuville (argued), Jerry A. Fries
Counsel for Defendant/Appellee

OPINION

Presiding Judge Paul J. McMurdie delivered the Court's opinion, in which Judge Cynthia J. Bailey and Judge Lawrence F. Winthrop joined.[1]

M c M U R D I E, Judge:

¶1 Mesquite Power, LLC ("Mesquite") appeals from the tax court's dismissal of its complaint against the Arizona Department of Revenue ("Department"). We hold that under A.R.S. § 42-14152(A), the Department's obligation to provide a taxpayer with the form on which the taxpayer must report information on the property's value was not a condition precedent excusing Mesquite's failure to submit that report timely. We hold, therefore, that under § 42-14152(D), by failing to submit a timely report, Mesquite forfeited its right to appeal the valuation and may not obtain the same relief through a claim for special action or declaratory relief. Thus, we affirm the tax court's judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mesquite operates an electric generation facility subject to an annual property tax. Although the facility was built long ago, Mesquite bought it in 2018. The Department assesses the value of an electrical generating plant based mainly on an annual report the plant owner submits using a Department-created form. By statute, the Department must send each plant owner a blank copy of that form by February 1 of each year. A.R.S. § 42-14152(A). Under A.R.S. § 42-14152(A), each plant owner must file its annual property tax report ("Report") by April 1 using that form. *See Siete Solar, LLC v. ADOR*, 246 Ariz. 146, 148, ¶ 3, (App. 2019). If a taxpayer fails to file the report by May 20, it "forfeits its right to appeal" the valuation. A.R.S. § 42-14152(D).

[1] Judge Lawrence F. Winthrop was a sitting member of the court when the matter was assigned to this panel. He retired effective June 30, 2021. In accordance with the authority granted by Article 6, Section 3, of the Arizona Constitution and A.R.S. § 12-145, the Chief Justice of the Arizona Supreme Court designated Judge Winthrop as a judge *pro tempore* for the Court of Appeals, Division One, to participate in resolving cases assigned to the panel during his term in office.

¶3 When the Department did not receive Mesquite's Report for the tax year 2020 by April 1, 2019, the Department estimated Mesquite's 2020 value per A.R.S. § 42-14152(C)(1) by setting it at $206,714,000—105 percent of the previous year's full cash value. The Department also assessed a penalty against Mesquite for failing to file its Report on time. A.R.S. § 42-14152(C)(2). On June 7, 2019**,** the Department sent notice to Mesquite of the estimated preliminary 2020 valuation. A.R.S. § 42-14152(C)(1).

¶4 Mesquite then filed its 2020 Report on July 8, 2019. Mesquite also submitted more information about its valuation and requested a meeting with the Department to persuade it to adopt a lower amount. The Department declined Mesquite's request to meet and did not reduce the valuation.

¶5 Mesquite challenged the valuation in the tax court by raising six claims for relief. In Count 1, Mesquite generally disputed the Department's valuation. In Counts 2 through 4, Mesquite alleged that the Department disregarded all available information when it determined the full cash value in compliance with A.R.S. § 42-14003. In Count 3, Mesquite also asserted that the Department ignored the information submitted in Mesquite's untimely filed report. In Count 4, Mesquite claimed that the Department incorrectly estimated the full cash value by relying on an estimate of the full cash value from the 2019 tax year because that value was under appeal. Along with challenging the valuation and the basis for it, Mesquite sought to circumvent the statute's appeal-forfeiture provision by asking the court to enter a declaratory judgment or grant special action relief[2] compelling the Department to reconsider its valuation.

¶6 The Department moved to dismiss Mesquite's complaint under Arizona Rule of Civil Procedure ("Rule") 12(b)(1) and Rule 12(b)(6), arguing that Mesquite forfeited its right to challenge the valuation by failing to file its Report by the May 20 statutory deadline. The Department attached to its motion an email receipt confirming it timely provided Mesquite with the required reporting form. The receipt listed the files attached to the

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[2] Mesquite refers to its special-action claim as a mandamus claim. But "[r]elief previously obtained . . . by writs of . . . mandamus . . . shall be obtained in an action under this Rule, and any reference in any statute or rule to any of these writs . . . shall be deemed to refer to the special action authorized under this Rule." Ariz. R.P. Spec. Act. 1(a). Given our supreme court rule, we refer to Mesquite's mandamus claim as a claim for special action.

email, one of them labeled "TY10 DOR Form 8250." Mesquite argued in response to the Department's motion that the attached image lacked any explanation, foundation, or "verification as to its authenticity." With its reply, the Department attached an employee affidavit. The employee asserted that he sent the tax form to Mesquite by secure email on January 18, 2019, at 2:49 p.m. The Department also submitted a receipt from its email system showing that Mesquite received the message on that date.

¶7 The tax court dismissed the complaint with prejudice. It held that Mesquite forfeited its right to appeal the valuation under A.R.S. § 42-14152(D) by failing to file the Report timely. It held that an appeal disputing the Department's valuation was the taxpayer's "exclusive remedy," so Mesquite could not seek alternative relief through declaratory judgment or special action. Mesquite appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

A. Mesquite Forfeited Its Appeal Rights by Failing to Comply with A.R.S. § 42-14152(A).

¶8 Mesquite argues it did not forfeit its right to appeal because the Department failed to comply with its statutory obligation to send a form by February 1. *See* A.R.S. § 42-14152(A) ("On or before February 1 of each year, the [D]epartment shall send by mail or by email to each company the forms for filing the report.") It contends the Department's performance of its duty to send the form timely is a condition precedent to a taxpayer's duty to file a report.

1. Mesquite's Obligation to Comply with A.R.S. § 42-14152(A) is Not Conditioned on the Department's Obligation to Provide Forms.

¶9 "Everyone is presumed to know the law." *Conway v. State Consol. Pub. Co.*, 57 Ariz. 162, 171 (1941); *Kincannon v. Irwin*, 64 Ariz. 307, 309–10 (1946) ("taxpayers are presumed to know that taxes levied must be paid"). Arizona Revised Statutes § 42-14152(A) requires the Department to send the reporting forms to property owners by February 1 and requires the property owners to file their reports with the Department by April 1. But nothing in the statute conditions a property owner's obligation to comply with A.R.S. § 42-14152(A) on the Department's obligation to send the form. *See id.*

¶10 Mesquite argues that such a condition exists because the Department, not the property owners, generates these forms, implying that the Department's compliance is a necessary condition precedent. But taxpayers may download these forms from the Department's website, Mesquite has used the forms to file its valuation reports in prior years, and Mesquite did not argue that it could not obtain the form by other means.[3] Thus, regardless of the Department's compliance with A.R.S. § 42-14152(A), Mesquite must file its report timely.

2. There Is No Genuine Dispute that Mesquite Received the Forms.

¶11 Even assuming, *arguendo*, that the Department's compliance with A.R.S. § 42-14152(A) was a condition precedent to Mesquite's obligation to file the Report, the Department did comply in this case.

¶12 The exhibits the Department filed in support of its motion to dismiss and reply memorandum converted the motion to one for summary judgment, which we review *de novo*. *See* Ariz. R. Civ. P. 12(d); *Siete Solar*, 246 Ariz. at 149, ¶ 9. On summary judgment, we review the facts and any reasonable inferences from the facts in the light most favorable to the party opposing the motion. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12 (2003). "The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). "When the party moving for summary judgment makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to show that an issue exists." *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 14 (App. 2000). A "genuine" issue of fact is one that a reasonable court could decide "in favor of the party adverse to summary judgment on the available evidentiary record." *Martin v. Schroeder*, 209 Ariz. 531, 534, ¶ 12 (App. 2005).

¶13 To show that it sent the forms, the Department presented a receipt for emails with attached forms sent to two email addresses supplied

[3] We take judicial notice of the property-tax-report form for electric-generating companies. ADOR, TY2022 Property Tax Form, (6/25/2021) https://azdor.gov/forms/property-tax-forms/electric-generation-companies-ty2021-property-tax-form. *See Roger S. v. James S.*, 1 CA-JV 20-0273, 2021 WL 2659431, at *5, ¶ 26, n.6 (Ariz. App. June 29, 2021) (court may take judicial notice of agency website).

by Mesquite and a supporting affidavit from a Department employee. In the affidavit, the employee asserted that he sent the emails, and the receipt generated by the system confirmed at least one of those emails was received. The employee also stated that he sent hard copies of the form via regular mail on the same day to the street address provided by Mesquite.[4] Thus, on summary judgment, if the Department's obligation to provide the form is a condition precedent, this evidence shifted the burden onto Mesquite to show that the Department did not send the form.

¶14 In response to the Department's motion, Mesquite did not provide evidence the Department failed to send or email the form. Instead, Mesquite merely asserted it did not *receive* the form. But at oral argument before the tax court, Mesquite acknowledged it received the Department's email with its attachments but that it got routed to Mesquite's "junk" folder. And Mesquite offered no evidence that the email from the Department that went to its junk folder lacked the form, was directed to the wrong recipient, or arrived on a different date than shown in the Department's receipt. In sum, although Mesquite maintains that the facts are in dispute, it offered no facts disputing the Department's evidence.

¶15 At oral argument before this court, Mesquite conceded it had not opened the email, asserting that the email's encryption prevented it from doing so. We find Mesquite's assertion waived. Mesquite did not argue in its briefing or the record below that it could not open the email. Instead, Mesquite referred to the encryption in the tax court only to assert that encrypted emails are generally automatically directed to its junk folders. The Department is not responsible for monitoring Mesquite's junk folders. If there was a problem opening the form, Mesquite should have alerted the Department or the tax court.

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[4] As Mesquite notes, it is generally improper to introduce new evidence in a reply memorandum. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 214, ¶ 20, n.3 (App. 2012). But unlike the movant in *Wells Fargo*, which attached "voluminous records," the Department attached a short affidavit authenticating a one-page image in the original motion. And, more importantly, Mesquite did not object to the material in the reply, move to strike the affidavit, or ask for a continuance to respond to it. Thus, Mesquite waived its objection to the court's consideration of the affidavit. *See Cullum v. Cullum,* 215 Ariz. 352, 355, ¶ 14, n.5 (App. 2007) ("As a general rule, a party cannot argue on appeal legal issues not raised below.").

¶16 Given Mesquite's concession that it received an email from the Department and its failure to affirmatively allege the email was not the one the Department attested, we conclude that the Department sufficiently demonstrated its compliance with A.R.S. § 42-14152(A). *See Orme Sch. v. Reeves*, 166 Ariz. 301, 310 (1990) ("[A] party moving for summary judgment need merely point out by specific reference to the relevant discovery that no evidence existed to support an essential element of the claim."); *Kelly,* 199 Ariz. at 286–87, ¶¶ 13–15.

B. By Failing to Comply with A.R.S. § 42-14152(A), Mesquite Forfeited its Right to Appeal the Valuation.

¶17 "If the report is not filed by May 20 of the valuation year, *the [Taxpayer] forfeits its right to appeal* the valuation and classification pursuant to § 42-14005." A.R.S. § 42-14152(D) (emphasis added). Section 42-14005 authorizes a property owner that is "not satisfied" with the Department's valuation to "appeal" the determination. And Mesquite concedes A.R.S. § 42-14152(D)'s forfeiture provision precludes further "valuation appeals."

¶18 Because Mesquite did not meet the statutory deadline, it forfeited its right to appeal to the Department's valuation. *See* A.R.S. § 42-14152(D). Thus, the tax court correctly dismissed Count 1 of the complaint with prejudice.[5]

C. Mesquite's Other Claims and Pleas for Relief Also Are Forfeited.

¶19 After dismissing Mesquite's valuation claim, the tax court then dismissed the other claims, ruling, "The nature of all the relief requested by Mesquite demonstrates that its [entire] Complaint is a valuation appeal." Mesquite asserts its other claims survive even though it forfeited its right to appeal the valuation under A.R.S. § 42-14152(D). We agree with the tax court's conclusion.

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[5] The tax court ruled Mesquite's failure to comply with the statute deprived the court of jurisdiction over the appeal. *See e.g.*, *Ader v. Estate of Felger*, 240 Ariz. 32, 44, ¶¶ 42–43 (App. 2016) (while older caselaw used the word jurisdiction loosely to describe a "court's inability to enter a valid judgment," we now consider jurisdiction to be the court's statutory or constitutional power to hear a particular type of case). Because we affirm the tax court's dismissal for failure to state a claim, we need not address the dismissal as a matter of jurisdiction. *See S&S Paving and Constr., Inc. v. Berkley Reg'l Ins. Co.*, 239 Ariz. 512, 514, ¶ 7 (App. 2016).

¶20 Counts 2 and 3 questioned whether the Department "consider[ed] all additional information" when it determined the market value and "statutory value" of the property.[6] A.R.S. § 42-14003(A). Count 4 challenged the Department's application of the statutory valuation formula, arguing the Department should have used a reduced stipulated amount as the basis. Because Counts 2 through 4 challenged the Department's property valuation, and Mesquite forfeited its right to appeal the valuation under A.R.S. § 42-14152(D), it could not seek the same relief by other means.

¶21 By filing its complaint in the tax court, Mesquite sought to engage in the appeal process contemplated in A.R.S. § 42-14152(A) as if it had adhered to the required statutory procedure. But the forfeiture penalty would be nullified and rendered meaningless if a taxpayer that missed the reporting deadline could nonetheless avail itself of the appeal process contemplated in A.R.S. § 42-14152(A). *ADOR v. S. Point Energy Ctr., LLC*, 228 Ariz. 436, 440, ¶ 17 (App. 2011) (the legislature intended "that a company that decides not to file the annual report gives up its right to challenge the valuation of its property."). Thus, we affirm the dismissal of Counts 2 through 4.

¶22 The same principle applies to Mesquite's claims for special action and declaratory relief. *See* A.R.S. §§ 12-1831 to -1846 (addressing the court's power to declare rights, status, and other legal relations by declaratory relief); Ariz. R.P. Spec. Act. 1(b). Mesquite argued that if the tax court ruled it had no viable remedy by appeal, it should grant special action relief, requiring the Department to undertake its statutory duties and correct the excessive valuation. Yet after forfeiting its statutory right to challenge the valuation, Mesquite cannot use special action as an alternate means to the same end. *See Thielking v. Kirschner*, 176 Ariz. 154, 156 (App. 1993) (party cannot avoid the requirements of a timely appeal "by seeking relief in the nature of mandamus or special action"); *Rosenberg v. Ariz. Bd. of Regents*, 118 Ariz. 489, 493 (1978) (Having had an adequate remedy at law, Appellant who missed a statutory deadline for appeal could not obtain relief through mandamus.).

¶23 Nor is declaratory relief a substitute for a forfeited right to appeal. Mesquite cites *Zuther v. State*, 197 Ariz. 45, 46, ¶¶ 1–2 (App. 1999), *as amended* (Jan. 31, 2000), *vacated on other grounds*, 199 Ariz. 104, (2000)),

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[6] "Statutory value" is not a defined term. *See* A.R.S. § 42-11001. We presume Mesquite means the result of applying the 105-percent formula in A.R.S. § 42-14152(C)(1).

arguing that it may seek legal declaratory relief on the Department's compliance with statutes such as A.R.S. § 42-14152(C)(1), even though it may be barred from seeking relief through A.R.S. § 42-14005.

¶24 In *Zuther,* the court determined a prisoner could seek declaratory relief, even though A.R.S. § 31-201.01(L) barred damages or equitable relief claims because a declaratory action is a legal remedy, not an equitable remedy. The issue was whether changes to a law governing the discharge of a prisoner retroactively applied to him. *Id.* This court ultimately determined that a declaratory relief claim did not fall within the statute's prohibition against legal actions seeking damages or equitable actions. *Id.*

¶25 Mesquite seeks to challenge the Department's valuation even though it has forfeited that specific right. *See Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 416–17, ¶¶ 48–49 (2006) (Where the statute granted 14 days from the date of the Arizona Citizens Clean Elections Commission's order issuing a civil penalty to appeal to the superior court, a party may not seek declaratory relief to replace a timely complaint.); *Thielking*, 176 Ariz. at 156 (declaratory relief is forfeited when the appeal is untimely). Thus, because Mesquite forfeited its statutory right to challenge the Department's valuation of its property under A.R.S. § 42-14152(D), it may not seek the same relief by any other means.

D. The Department Complied with the Procedure Prescribed by A.R.S. § 42-14152(C).

¶26 We likewise reject that Mesquite's appeal properly invokes the error-correcting statutes. *See* A.R.S. § 42-16251 to -16259. Those statutes do not apply when, as here, the record shows the Department's calculations complied with the tax code. Arizona Revised Statutes § 42-14152(C)(1) permits the Department to "[e]stimate the value of the property based on one hundred five percent of the preceding year's full cash value or on any information that is available to the department." Mesquite argues that the Department used an improper "full cash value" for 2019 to calculate the 2020 valuation because the parties remain in litigation over the 2019 valuation.

¶27 In prior litigation, the parties stipulated to a valuation of $99,714,000 for the 2018 tax year. For the tax year 2019, the Department placed the full cash value of Mesquite's property at $196,870,000. Mesquite disputed the Department's 2019 valuation (about twice the stipulated amount from 2018) as excessive. The litigation over the 2019 valuation is

continuing in the tax court. *See Mesquite v. ADOR,* TX2018-000928. When Mesquite failed to file its Report for the tax year 2020, the Department calculated the 2020 value at $206,714,000 based on its 2019 valuation according to A.R.S. § 42-14152(C)(1).

¶28 Mesquite argues that it was improper for the Department to use the still-disputed 2019 valuation to calculate the 2020 valuation. It also claims that the Department breached its duties under the statute to reconsider the valuation, given the stipulated 2018 valuation, information Mesquite submitted to the Department after it learned of the 2020 valuation, and the Department's failure to meet with Mesquite about the dispute.

¶29 Mesquite's arguments implicate several statutes beyond the valuation formula in A.R.S. § 42-14152(C)(1). First, under A.R.S. § 42-14002, the Department must notify the owner of the property's preliminary full cash value by June 15, and the owner has until July 15 to submit information and request to be heard. Second, A.R.S. § 42-14003(A) provides that "[i]n determining valuation . . . the department *shall consider all additional information* including information that is presented in an appeal and information that is otherwise available." (Emphasis added). Finally, "full cash value" for property tax purposes means "the value determined as prescribed by statute . . . [which] shall not be greater than market value." A.R.S. § 42-11001(6).

¶30 While A.R.S. § 42-14152(C)(1) requires the Department to arrive at a valuation by attributing a value of 105 percent of the preceding year's full cash value or by applying any available information, it does not address the significance, if any, of a negotiated valuation entered by stipulation in previous litigation. And A.R.S. § 42-14003(A) provides the Department "shall consider" all available information. "Consider" means "to think about, or to ponder or study and to examine carefully." Black's Law Dictionary, (2nd Ed.). Arizona Revised Statutes §§ 42-14152(C)(1) and -14003(A) give the Department significant discretion to determine the valuation. Under the statutes, the Department had to consider the information, but it did not have to change its valuation.

¶31 The Department asserted it considered all available information and concluded that its preliminary valuation in 2019 was correct. It contends that it had a valid basis for the valuation. And as explained in an affidavit by a Department employee, the information Mesquite offered was already known to the Department from the parties' ongoing litigation. Given the broad discretion the statutes grant the

Department, we cannot conclude the Department failed in its statutory duty.

¶32 Mesquite also asserts the Department acted contrary to law when it refused to meet, denied Mesquite an extension to file the Report, and did not consider its untimely submissions. To this end, Mesquite cites A.R.S. §§ 42-14002 and -14003.

¶33 A.R.S. § 42-14002(B) does not require the Department to meet with a property owner that disputes a valuation. Instead, it permits an owner to ask to meet with the Department. *Id.* The Department need not grant the request if the Department finds a meeting unnecessary.

¶34 As for the request for an extension, the Department has the discretion "[o]n written request and for good cause shown" to extend the time for filing the report. A.R.S. § 42-14152(B). Here, however, Mesquite's request came after the statute's May 20 deadline. At that point, Mesquite had forfeited its right to appeal but could and did file its Report and provided other information to the Department, which the Department stated it considered. *See* A.R.S. § 42-14003. For these reasons, we cannot conclude that the Department acted in a manner contrary to law.

E. Mesquite Received Due Process.

¶35 Finally, Mesquite asserts that it was denied due process under Article 2, Section 4 of the Arizona Constitution when the tax court dismissed its complaint with prejudice for failure to meet the statutory deadline. *See* A.R.S. § 42-14152(D). Property owners are entitled to "an opportunity to be heard on the issue of valuation before the property tax becomes fixed and final." *F. Dev., L.C. v. ADOR*, 192 Ariz. 90, 98 (App. 1997).

¶36 Mesquite contends that it filed its report late because it did not receive the form from the Department in time to challenge the preliminary valuation. But we have held that the Department's obligation to send a blank form to a property owner is not a condition precedent to the owner's statutory obligation to file its report timely. And, as discussed above, Mesquite failed to show a genuine dispute about whether it received the form on time. Nevertheless, Mesquite still argues that the Department denied it due process by refusing to discuss the 2020 preliminary valuation and consider the other information submitted after the Department informed Mesquite of its valuation. But Mesquite had forfeited its opportunity to be heard via an appeal. *See, e.g.*, *Seafirst Corp. v. ADOR*, 172 Ariz. 54, 59 (Ariz. Tax Ct. 1992) (taxpayer who failed to comply with the statute authorizing appeal forfeited right to appeal). Thus, because we

conclude that the Department did not have to meet with Mesquite and Mesquite forfeited further opportunity to be heard by failing to file timely its valuation, we find no error.

ATTORNEY'S FEES

¶37 Mesquite requests its appellate attorney's fees, costs, and other expenses under A.R.S. § 12-348(B). We deny the request because Mesquite did not prevail on the merits.

CONCLUSION

¶38 We affirm the tax court's judgment.

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