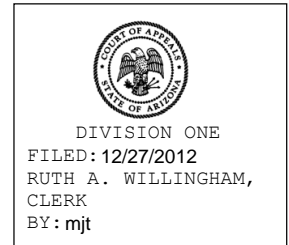


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



SONDRA BRUNSO, an unmarried woman,) 1 CA-CV 11-0778
)
) DEPARTMENT B
Plaintiff/Appellant,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
CITY OF PRESCOTT; OLSON PRE-CAST,) of Civil Appellate
an Arizona business entity;) Procedure)
)
FIRST DUE CONSTRUCTION, L.L.C.;)
3 GIFTS-KDG, L.L.C. dba SERVICE)
MASTER OF PRESCOTT; STATE FARM)
FIRE & CASUALTY, a foreign)
Corporation,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV201001464

The Honorable Warren R. Darrow, Judge Pro Tempore (Retired)

AFFIRMED

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O R O Z C O, Judge

¶1 Sondra Brunso appeals the trial court's order dismissing her claims against the City of Prescott (City), Olson Pre-Cast (Olson), First Due Construction, L.L.C. (First Due), 3 Gifts-KDG, L.L.C. dba Service Master of Prescott (Service Master), and State Farm Fire and Casualty Company (State Farm). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 In 2007, the City authorized the maintenance of a sewer line and hired Asphalt Paving and Supply, Inc. (Asphalt)² as its general contractor. Asphalt subsequently hired Olson and Atlantis as subcontractors.

¶3 In September 2008, Olson performed an air vacuum test on a manhole near Brunso's house. This test caused a sewer backup, and as a result, Brunso's house was flooded with raw sewage. Atlantis hired Service Master to remove the sewage from Brunso's house, and Service Master began its clean-up efforts.

¶4 Brunso served a notice of claim with the City in March 2009. After learning that a notice of claim had been served, Service Master stopped working; it did not return to finish removing the sewage until several weeks later.

¶5 Meanwhile, Brunso contacted her insurance company, State Farm, to file a claim. Brunso's State Farm agent did not immediately open a claim for Brunso because the agent hoped that the City would clean up the sewage. However, a week later, State

¹ When reviewing an order granting a motion to dismiss, we treat the allegations in the complaint as true and view the facts in the light most favorable to the plaintiff. *Johnson v. McDonald*, 197 Ariz. 155, 157, ¶ 2, 3 P.3d 1075, 1077 (App. 1999).

² Brunso also sued Asphalt and one of its subcontractors, Atlantis Construction and Development, Inc. (Atlantis), and she appealed the trial court's dismissal of her claims against them. After filing this appeal, Brunso settled with both parties and dismissed her appeal against them.

Farm opened a claim for Brunso. Based on State Farm's recommendation, Brunso hired First Due to restore her home to its pre-sewage flood condition.

¶16 In September 2010, Brunso filed a complaint against the Defendants,³ alleging various tort and contract claims and asserting that her home had not been restored and was still unlivable. Several of the Defendants filed motions to dismiss the complaint.

¶17 After reviewing the motions, the trial court filed an order on March 15, 2011, granting Brunso leave to amend her complaint. The court also requested that Brunso provide more specifics in her amended complaint regarding her claims against the Defendants, dismissed Brunso's statutory claims, and struck the compensatory and punitive damage amounts pursuant to Arizona Rule of Civil Procedure 8(g).

¶18 Brunso filed an amended complaint. The City and State Farm moved to dismiss the amended complaint, and Atlantis, First Due, and Service Master joined State Farm's motion. The trial court determined that the amended complaint did not comply with Arizona Rules of Civil Procedure 8(a), 8(e), 8(g), and 10(b). It also found that Brunso failed to state a claim upon which relief

³ Although Atlantis and Asphalt are no longer parties to this appeal, we refer to all of the defendants included in the original and amended complaints collectively as "Defendants."

could be granted, and it dismissed the amended complaint with prejudice as to the Defendants.

¶9 Brunso timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.A.1 (Supp. 2011).

DISCUSSION

¶10 We review the dismissal of a complaint under Arizona Rule of Civil Procedure 12(b)6 de novo, *Coleman v. City of Mesa*, 230 Ariz. 352, ___, ¶ 7, 284 P.3d 863, 866 (2012), and we affirm only if a plaintiff "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. Ariz. Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998).

¶11 A pleading must comply with Arizona Rule of Civil Procedure 8 and provide the defendants with "fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956); *see, e.g., McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996) (dismissing a complaint after determining that it was difficult for the court and the defendants to determine who was being sued and what theories were being advanced against each defendant). If the pleading does not comply with Rule 8, the opposing party may move to dismiss the action under Rule 12(b)6 for failure to state a claim. *Cullen v.*

Auto-Owners Ins. Co., 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008).

Dismissal of Brunso's Amended Complaint

¶12 Brunso contends that the trial court erred in dismissing her amended complaint because it complied with Rule 8 and included sufficient detail to apprise the Defendants of the claims against them. We first note that Brunso's amended complaint is disjointed and difficult to follow. This is due, in large part, to the fact that the claims against the Defendants are scattered throughout the amended complaint,⁴ Brunso makes numerous claims that the Defendants are jointly and severally liable for different reasons, and the amended complaint contains various inconsistent statements.

¶13 In light of the foregoing, this court had considerable difficulty determining which claims should be applied to which defendant. We describe some of the amended complaint's defects below.

Failure to Comply with Arizona Rules of Civil Procedure

¶14 In its July 29, 2011 order dismissing Brunso's amended complaint, the trial court noted that the amended complaint

⁴ For example, Brunso included claims against the City in several sections: Legal Analysis-The City; Legal Analysis-Defendants [Asphalt], Atlantis, & Olsen (sic); and Plaintiff's Legal Claims Against the City.

failed to comply with several of the Arizona Rules of Civil Procedure; after our independent review, we agree.

¶15 First, Brunso did not comply with Rule 10(b), which requires that each numbered paragraph "be limited as far as practicable to a statement of a single set of circumstances." Instead, many of Brunso's paragraphs are approximately a page long and contain numerous claims. For example, one paragraph contains allegations that State Farm made intentional misrepresentations and committed breach of contract, breach of the implied covenant of good faith and fair dealing, and tort-based bad faith.

¶16 Brunso also failed to comply with Arizona Rule of Civil Procedure 8(a)2, which requires "[a] short and plain statement of the claim showing that the pleader is entitled to relief" and Rule 8(e), which requires each averment to be "simple, concise, and direct." While the amended complaint is only about thirty pages long,⁵ it does not contain a short, plain statement of each claim showing that Brunso is entitled to relief. Instead, it contains repetitive arguments, inconsistencies, and speculative legal conclusions. It lacks the concise, simple and direct allegations required by Rule 8.

⁵ The amended complaint is actually fifty-two pages because Brunso incorrectly believed that she was required to attach and strike through the deleted text from the original complaint, as is required for a motion for leave to amend pursuant to Arizona Rule of Civil Procedure 15(a)2.

¶17 Finally, Brunso also included dollar amounts for her damages in violation of the trial court's March 15, 2011 order and Arizona Rule of Civil Procedure 8(g).

Joint and Several Liability

¶18 In the amended complaint, Brunso alleged that the Defendants acted in concert to deny her the benefits to which she was entitled; therefore, all of the Defendants should be held jointly and severally liable. See A.R.S. § 12-2506 (2003). There are several problems with Brunso's request for joint and several liability.

¶19 First, at the beginning of the amended complaint, Brunso stated, "The allegations set for (sic) above and below, incorporate by reference each and every allegation against all defendants in the Amended Complaint." However, Brunso also alleged that smaller groups of the Defendants should be held jointly and severally liable for certain claims because they agreed to act in concert to commit an act. For example, she alleged that State Farm and First Due acted in concert to misrepresent that First Due was the only local contractor qualified to perform restoration work and that the City and State Farm acted in concert because each party agreed to deny its responsibility to repair the damage caused to Brunso's house. The amended complaint is replete with similar claims.

¶20 We are unable to determine if those causes of action that describe the joint and several liability of the smaller groups of the Defendants should be applied to all parties, as Brunso initially stated, or whether we should only apply them to the group of the Defendants that Brunso claims acted in concert. This defect in the amended complaint makes it difficult for the Defendants to determine which claims are being advanced against them.

¶21 Furthermore, we find that Brunso failed to include any specific facts in the amended complaint that give rise to a "conscious agreement to pursue a common plan or design to commit an intentional tort" as is required to prove the Defendants acted in concert under A.R.S. § 12-2506.F.1. In a later section dedicated to joint and several liability, Brunso stated that the Defendants acted in concert because they were all "seeking the same pathetic goal: to evade their contractual and legal obligations to [Brunso] in order to avoid financial responsibility for her damages." She alleged that the Defendants knew that if they did not honor their duties to Brunso, she would be forced to seek compensation from another source, and this amounted to a "scheme to defraud." However, merely stating that the Defendants individually tried to avoid their contractual and legal obligations is insufficient to show a concerted effort by the Defendants.

¶22 Moreover, “[a]cting in concert does not apply to any person whose conduct was negligent.” *Id.* Brunso alleged that several parties committed acts of negligence, yet she stated that every claim should be incorporated against all of the Defendants because they acted in concert. Brunso’s request does not comply with § 12-2506.

¶23 Because Brunso failed to plead with specificity her claim that the Defendants acted in concert and also included various allegations that some or all of the Defendants were jointly and severally liable, we find that Brunso placed an undue burden on the Defendants to determine which claims applied to them.

Defects in the Claims Against the City and Olson

¶24 In addition to the aforementioned defects, Brunso’s amended complaint contained deficiencies in the sections dedicated to claims against the City and Olson. We discuss the defects we discovered during our de novo review of the amended complaint below.

1. The City

¶25 A person who has a claim against a public entity is required to file a notice of claim with the entity within one hundred eighty days after the cause of action accrues. “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." A.R.S. § 12-821.01.A (Supp. 2012).⁶ The only cause of action in the notice of claim filed with the City was negligence.

¶126 Brunso's amended complaint included negligence, but it also included claims that were not in the notice of claim, such as fraudulent concealment, fraudulent misrepresentation, common law fraud, contract and tort-based bad faith, aiding and abetting, breach of contract, and breach of the covenant of good faith and fair dealing. Therefore, all of the claims not included in the notice of claim are barred.

¶127 While Brunso's claim of negligence was included in the notice of claim, Brunso did not comply with A.R.S. § 12-821 (2003). This section requires that "[a]ll actions against any public entity or public employee . . . be brought within one year after the cause of action accrues and not afterward." A.R.S. § 12-821. Based on the facts included in the amended complaint, Brunso's cause of action for negligence accrued in September 2008 when Brunso's house was flooded with sewage; however, Brunso did not file suit until September 2010. As a result, Brunso's negligence claim against the City was also barred.

¶128 The trial court did not address the fact that Brunso's claims against the City were barred by §§ 12-821 and -821.01. Instead, it dismissed all of her claims against the Defendants

⁶ We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

pursuant to Arizona Rule of Civil Procedure 12(b)6. However, this court will affirm the trial court's decision if it is correct for any reason, even if that reason was not considered by the trial court. *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986). Therefore, we affirm the trial court's dismissal of the City because Brunso failed to comply with the requirements of A.R.S. §§ 12-821 and -821.01.

2. Olson

¶129 We note that there is no affidavit of service or any other evidence in the record that would indicate that Olson has been served in this matter. Pursuant to Arizona Rule of Civil Procedure 4(i), the trial court could have properly dismissed Brunso's claims against Olson without prejudice because she failed to serve Olson within 120 days after filing the complaint. As previously stated, we will affirm the trial court's decision if it is correct for any reason, even if we base our decision on a reason not considered by the trial court. *Glaze*, 151 Ariz. at 540, 729 P.2d at 344. Therefore, we affirm the trial court's decision to dismiss the claims against Olson based on Brunso's failure to serve Olson with a copy of the complaint.⁷

⁷ The trial court dismissed Olson with prejudice. Had the trial court dismissed Olson based on Brunso's failure to serve Olson, the dismissal would have been without prejudice pursuant to Arizona Rule of Civil Procedure 4(i). However, because we also affirm the dismissal for failure to state a claim, we also affirm the dismissal with prejudice.

¶130 Based on the defects in the sections dedicated to the City and Olson, as well as the undue burden placed on the other Defendants to determine which claims were advanced against them, we affirm the trial court's order dismissing Brunso's amended complaint against the Defendants.

Attorney Fees

¶131 Finally, we address the parties' requests for attorney fees and costs on appeal. Brunso is not entitled to her attorney fees or costs because she is not the prevailing party. However, State Farm, First Due, Service Master, and the City, as the prevailing parties, are entitled to costs on appeal upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

¶132 Additionally, State Farm, Service Master, and First Due request their attorney fees incurred in this appeal pursuant to A.R.S. § 12-341.01 (2003). While they are the prevailing parties on appeal, our authority to award fees under § 12-341.01 is discretionary. *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 164, 876 P.2d 1190, 1199 (App. 1994). In the exercise of our discretion, we deny their requests for attorney fees.

CONCLUSION

¶33 For the foregoing reasons, we affirm.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

RANDALL M. HOWE, Judge