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: 12/13/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TOWN OF GILBERT, a political subdivision of the State of Arizona

Plaintiff/Counterdefendant/Appellee,

v.

ESTATE OF WAYNE A. AND HELEN ENLOE; JEAN MACVITTIE AND JOHN OSBORNE, Trustees,

Defendants/Counterclaimants/Appellant.

1 CA-CV 12-0129

DEPARTMENT E

MEMORANDUM DECISION
(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2011-009480

The Honorable Michael J. Herrod, Judge

AFFIRMED

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J O N E S, Judge[1]

¶1 This timely appeal arises out of the superior court's dismissal of counterclaims alleged by Appellant, the Estate of Wayne A. and Helen Enloe ("Estate"), against Appellee, the Town of Gilbert ("Town"). On appeal, the Estate argues the superior court should not have dismissed its claims because it was entitled to a trial on whether it had filed its notice of claim within 180 days of accrual of its causes of action as required by statute. *See* Ariz. Rev. Stat. ("A.R.S.") § 12-821.01(A) (2003) ("Persons who have claims against a public entity . . . shall file claims . . . within one hundred eighty days after the cause of action accrues."). Alternatively, the Estate argues, even if it failed to file a claim within the statutory period, it was entitled to a trial on whether the Town was equitably estopped from raising the Estate's noncompliance as a defense. For the reasons discussed below, we disagree with both arguments and affirm the superior court's dismissal of the Estate's counterclaims.

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[1]Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Kenton D. Jones, Judge of the Arizona Superior Court, to sit in this matter.

FACTS AND PROCEDURAL BACKGROUND[2]

¶2 On May 8, 1950, Wayne A. Enloe conveyed an easement for a "lateral ditch 20 feet in width" ("property") to Roosevelt Water Conservation District ("Roosevelt"). In 2002, Roosevelt abandoned the easement, and accordingly, the property interest reverted to the Estate, as successor in interest because Enloe had passed away. The property bordered land that Vanderbilt Farms, LLC, ("Vanderbilt") developed into a residential housing subdivision.

¶3 Vanderbilt constructed a street and associated improvements over the property, then dedicated other adjoining property it owned to the Town. The record reflects that at this point, the Town assumed the dedication included the property even though Vanderbilt could not dedicate the property to the Town because it had no interest in it. Eventually, the Town discovered the Estate owned the property and the property had not been included in Vanderbilt's dedication.

¶4 By letter dated September 22, 2009, the Town offered the Estate $12,219 to purchase the property as a precursor to condemnation. On December 23, 2009, the Estate estimated the

[2]We review the superior court's factual and legal determinations on a grant of summary judgment de novo, viewing the evidence and reasonable factual inferences in a light most favorable to the Estate as the non-moving party. *Mutschler v. City of Phoenix*, 212 Ariz. 160, 162, ¶ 8, 129 P.3d 71, 73 (App. 2006) (citation omitted).

property's fair market value was $86,873, and rejected the Town's offer, asserting the Town had improved the property. On January 19, 2010, the Town sent the Estate a letter and denied responsibility for improving the property, declared the improvement was not the Town's "error or problem," stated Vanderbilt was responsible for the property's improvement, and offered to purchase the property for $17,000. On March 29, 2010, the Town reiterated its offer of $17,000.

¶5 Nearly two and a half months later, on June 11, 2010, the Estate rejected the Town's offer, requested the Town advise it whether the Town intended to "clear title" through eminent domain, and stated "[i]f not, the [Estate would] file [its] Notice of Claim pursuant to A.R.S. § 12-821.01" and if its "Notice of Claim [was] denied, the [Estate] intend[ed] to file a claim against the Town for the taking of [its] Property under the Fifth Amendment to the U.S. Constitution and Article 2, Section 17 of the Arizona Constitution," and offered to settle for $35,000. Although the record contains no evidence of oral communications between the Town and the Estate or the Estate and Vanderbilt, the Estate asserted in the superior court that it "continued to communicate with respect to the cause or source that contributed to the [improvement of the property] until approximately March, 2011."

¶6 Even though the Estate had threatened to file a Notice of Claim with the Town in its June 11, 2010 letter, it did not do so until over nine months later, on March 21, 2011, when it filed its Notice of Claim with the Town.

¶7 On May 4, 2011, the Town sued the Estate to condemn the property. On July 13, 2011, over a year after the Estate had threatened to file its Notice of Claim, the Estate answered and counterclaimed against the Town, alleging categorical taking, "[t]emporal [t]aking," and trespass – ab initio claims. The superior court dismissed the Estate's counterclaims on the Town's motion for summary judgment.

DISCUSSION

I. Notice of Claim

¶8 On appeal, the Estate argues that "issues of fact as to when [its] cause of action accrued precluded summary judgment." We disagree.

¶9 "The determination of when a cause of action accrues requires an analysis of the elements of the claim presented." *Glaze v. Larsen,* 207 Ariz. 26, 29, ¶ 10, 83 P.3d 26, 29 (2004). To prove a taking claim, a party must show the government physically invaded its property. *Dos Picos Land Ltd. P'ship v. Pima Cnty,* 225 Ariz. 458, 461, ¶ 7, 240 P.3d 853, 856 (App. 2010). To prove a trespass claim, a party must show the

defendant invaded its land without permission. *See State ex rel. Purcell v. Superior Court In & For Maricopa Cnty,* 111 Ariz. 582, 584, 535 P.2d 1299, 1301 (1975) (trespass at common law was "any unauthorized physical presence on another's property"). Accordingly, the Estate's taking and trespass claims required the Estate to prove the Town had physically invaded the property without permission.

¶10 The record is undisputed that the Estate discovered the Town had physically invaded its property no later than December 23, 2009, when the Estate rejected the Town's offer, and in doing so asserted the Town had improved the property. Although the Town denied responsibility for the property's improvement in its January 19, 2010 letter, it never denied it was using the property as a public street. Yet, the Estate did not file its Notice of Claim with the Town until March 21, 2011, almost 15 months after the Estate's December 23, 2009 letter.

¶11 Nevertheless, because the Town and Vanderbilt each argued the other was responsible for the unauthorized use, the Estate argues its causes of action could not have accrued until it knew "the cause, source, act, event, instrumentality or condition which caused or contributed to the damage," *see* A.R.S. § 12-821.01(B), which it asserts did not happen until the Town

sued it to condemn the property, and thus, confirmed it was the "cause" and "source" of the Estate's damage. We disagree.

¶12 Whether Vanderbilt or the Town improved the property, and whether it did so purposefully or by accident is irrelevant because the Town was using the property as a public street and the Estate knew of this adverse use no later than December 23, 2009. Thus, the Estate knew of the "cause," "event," or "act" -- the use of its property as a public street -- and the "who" -- first Vanderbilt, then the Town -- no later than December 23, 2009. *See id.; see also Walk v. Ring,* 202 Ariz. 310, 316, ¶ 22, 44 P.3d 990, 996 (2002) (in negligence action, to put plaintiff on notice to investigate whether fault may have caused injury, plaintiff must know "what" and "who").

¶13 Further, even though the Town continued to deny responsibility for the property's improvement, it offered to buy the property from the Estate. Its offers essentially constituted acknowledgment it was obligated to compensate the Estate for the taking of the property. U.S. Const. amend. V; Ariz. Const. art. 2, § 17.

¶14 Moreover, because we agree with the superior court that the Estate's Notice of Claim was untimely, we also agree with the court the Estate failed to timely sue the Town within one year after its claims accrued. A.R.S. § 12-821 (2003) ("All

actions against any public entity . . . shall be brought within one year after the cause of action accrues and not afterward.”); *see also Little v. State,* 225 Ariz. 466, 469, ¶ 8, 240 P.3d 861, 864 (App. 2010) (failure to timely file notice of claim prohibits claim against government entity).

II. Equitable Estoppel

¶15 Next, the Estate argues the Town should be equitably estopped from asserting the Notice of Claim was untimely under A.R.S. § 12-821, because the Town induced the Estate’s delay in filing its Notice of Claim and claims. We disagree.

¶16 The Estate argues the Town’s actions in blaming Vanderbilt for improving the property, and -- according to the Estate -- directing it to resolve the matter with Vanderbilt misled the Estate and thus induced its delay. Although, as discussed, in opposing summary judgment, the Estate argued it had “prolonged discussions” with Vanderbilt at the Town’s direction, it presented no admissible evidence as to the scope, duration, or frequency of such discussions, or that such communications with Vanderbilt had actually occurred. Further, in the Estate’s December 23, 2009 letter to the Town, it asserted the property “is occupied by Town improvements,” thus demonstrating it knew the Town had taken and was using the property as a public street. Any alleged misdirection was

irrelevant because the Town was using the Estate’s property as a public street -- no settlement with Vanderbilt would address the Estate’s obvious taking claim against the Town.

¶17 Even though the Town disputed its responsibility for improving the property, the Town never denied using it and indeed, as noted above, acknowledged its obligation to pay for the property’s use. As discussed, the Estate knew of the Town’s use no later than December 23, 2009, yet did not file a Notice of Claim or sue the Town until over a year later. The Estate failed to offer evidence sufficient to create a disputed issue of material fact in support of its contention that the Town induced the Estate’s delay in filing its Notice of Claim. Thus, we agree with the superior court that the Estate is not entitled to a trial on whether the Town is equitably estopped from arguing the Estate’s claims fail because its Notice of Claim was untimely under A.R.S. § 12-821.

CONCLUSION

¶18 For the foregoing reasons, we affirm the superior court's judgment dismissing the Estate's counterclaims against the Town.

/s/
KENTON D. JONES, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Acting Presiding Judge

/s/
JON W. THOMPSON, Judge