DIVISION ONE
FILED: 5/9/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AREK FRESSADI, an unmarried man, Plaintiff/Appellant, v. TOWN OF CAVE CREEK, an Arizona municipality, Defendant/Appellee.	No. 1 CA-CV 12-0238 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2009-050821 and CV2010-004383 (Consolidated)

The Honorable Alfred M. Fenzel, Judge

AFFIRMED

Arek Fressadi — Tucson
In Propria Persona

Sims Murray Ltd. — Phoenix
By Jeffrey T. Murray
Kristin M. Mackin
Attorneys for Defendant/Appellee

G O U L D, Judge

¶1 Plaintiff/appellant Arek Fressadi appeals from the superior court's decision granting summary judgment to defendant/appellee Town of Cave Creek ("the Town") because his

claims against the Town were time barred. We agree with the superior court and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

¶2 Fressadi owned Lots 211-10-010(A), (B), and (C), in Cave Creek, Arizona. Cybernetics Group, of which Fressadi was president, owned parcel 211-10-003, the northern border of which was contiguous to the southern borders of Lots 211-10-010(A) to the east, and (B) to the west.

¶3 On February 13, 2002, Fressadi, on behalf of both himself and Cybernetics Group, Ltd., requested annexation into the Town's sewer district. He further requested that they enter into a development agreement with the Town whereby Fressadi and Cybernetics would replace a nonstandard sewer line with an eight-inch line in exchange for a waiver of impact fees associated with their parcels.

¶4 In March 2002, Fressadi recorded documents that included easements for ingress, egress and public utilities over Lot 211-10-010.

¶5 By letter dated June 28, 2002, the Town Manager for Cave Creek advised Fressadi that a development agreement would not be "viable." Specifically, the Town Manager informed Fressadi "the developer/subdivider is responsible for building the infrastructure to convey wastewater from the development to the nearest connection point to the Town's sewer system,"

"there are no designated charges or assessments that would be available from subsequent customers hooking to your line extension to provide for payback of some of your costs," therefore "it does not appear that any form of development agreement is viable."

¶6 On July 3, 2002, Fressadi recorded a document granting use of Lot 211-10-010D, the east twenty-five feet of Lot 211-10-010, "in its entirety, as an easement for the purposes of ingress, egress and public utilities." About the same time, Fressadi applied for permits to install the sewer line extension and the Town granted Fressadi a permit for the "off-site" sewer line installation, which authorized him to connect to the Town's public sewer.

¶7 In August 2002, the Town's Council denied the request of the Cybernetics Group, represented by Fressadi, to split parcel 211-10-003, because of concerns that Fressadi's ownership and lot split of parcel 211-10-010 and his ownership interest in Cybernetics would make the splitting of the 003 parcel a subdivision, for which Fressadi had not met the qualifications.

¶8 In October 2002, the Town issued permits for the extension of the public sewer line for Lots 010A, 010B, and 010C, after Fressadi submitted the legal descriptions with the recorded easements for ingress, egress, and public utilities for those lots.

¶9 At the end of March and the beginning of April 2003, Fressadi exchanged e-mails with a Town employee regarding extending the sewer to parcel 211-10-003, noting that the public sewer that would serve that parcel runs in the easement and that Keith Vertes, who would shortly purchase parcel 211-10-003, was seeking an extension of the public sewer to serve the three lots on that parcel. On April 12, Fressadi offered to reduce the price of the 211-10-003 parcel to Keith Vertes in consideration of Vertes completing the sewer lines and other work to that parcel.

¶10 About April 24, 2003, Fressadi completed construction of the sewer lines on Lots 010A, 010B, and 010C. Fressadi was told in June that the Town Manager, with whom he had been negotiating a reimbursement agreement, did not have the authority to enter into such an agreement without an authorizing Town ordinance.

¶11 Cybernetics sold parcel 211-10-003 to Keith Vertes on approximately July 1, 2003, and, soon after, the Town Council approved Vertes's request to split that parcel into three lots. Fressadi was aware of the work extending the sewer line to the 003 lots and the location of those lines.

¶12 On October 15, 2003, Building Group, of which Vertes was President, and Michael Golec, his business partner, sold lot 211-10-003A to Jocelyn Kremer. The following day, Fressadi and

GV Group, LLC, entered into a reciprocal easement agreement for the 003 and 010 lots for ingress, egress, maintenance and related utilities.[1] Fressadi sold lot 010C to Salvatore and Susan DeVincenzo.

¶13 In December 2003, the Town amended its Town Code with respect to sewers to add Section 50.016, which provided for the Town to enter into repayment agreements where a property owner constructs a main sewer line.[2] Cave Creek, Ariz., Town Code § 50.016 (2003). After the Town did not execute an agreement with him under the new ordinance, on February 21, 2004, Fressadi submitted an invoice to the Town Mayor, Town Manager, and Town Council for $79,533.75 for construction of the sewer extension. In the accompanying letter, Fressadi explained that he had contacted the Town Manager in February 2002 about entering into a development agreement and the Town Manager had suggested that Fressadi draft such an agreement, but after the fifth or sixth draft, "it became obvious that the Town Manager was bargaining in bad faith" and "cut off negotiations." Fressadi contended that installing the line was expensive and time consuming and that he had tried unsuccessfully to discuss compensation with the Town Manager and the Town Attorney several times.

---

[1] How the property was transferred from Vertes to Building Group and Golec and then to GV Group is not clear. Vertes and Golec were both managers and members of GV Group. Vertes was also president and principal shareholder of Building Group.

[2] The Town repealed the ordinance in 2009.

¶14 In March, June, and October 2005, the Town approved the permits for the owners on the 003 lots to connect to the sewer.

¶15 On October 2, 2006, Fressadi sued GV Group, Vertes and his company Building Group, and Golec and his company MG Dwellings, as the owners of Lots 003B and 003C for disputes arising over the reciprocal easement agreement.

¶16 On June 21, 2007, Fressadi sent a document titled "Memorandum" to the Town Engineer and others, in which he stated that he had been attempting to obtain a development agreement with the Town since 2002, that the sewer extension he constructed was serving various Town residents, and that the Town was collecting fees from those users. Fressadi asserted that the Town "needed to pay" him for the cost of the sewer extension and threatened to remove the line if the Town did not resolve the matter by September 1, 2007.

¶17 On June 26, 2007, the Town Engineer responded, reminding Fressadi that it was Fressadi who had approached the Town about installing a sewer line and also pointing out that the Town's ordinance "is quite clear . . . in that the developer is responsible for all costs of installation and the facilities in Town Right-Of Way or easement become the property of the Town."

¶18 Fressadi delivered his statutory notice of claim to the Town on October 27, 2008, and filed this action against the Town and the owners of the 003 lots on February 10, 2009.[3]

¶19 Fressadi's complaint asserted that the Town had violated Town Code Section 50.016 by refusing to enter into a repayment agreement with him to reimburse him for the cost of the sewer construction. Against the Town, he sought declaratory judgment that the sewer line was his exclusive property until the Town entered into a repayment agreement. He also sought a declaratory judgment that the Town had incorrectly interpreted the subdivision ordinance and so improperly classified his property as a subdivision; Fressadi sought a declaration that the split of his property by himself or a subsequent purchaser into fewer than four parcels could not be classified as a subdivision. Fressadi also alleged that the Town was aiding and abetting the owners of the 003 lots in trespassing because the owners were using the sewer line without his permission or legal authority and that the Town was unjustly enriched.

¶20 The Town moved for summary judgment,[4] and argued Fressadi's claims against the Town were barred by Arizona

---

[3] The owners at the time of filing were Kremer, the owner of Lot 003A, Golec, the owner of Lot 003B, and Real Estate Equity Lending, Inc. ("REEL"), which had become owner of Lot 003C through foreclosure.

[4] REEL also filed a motion for summary judgment, arguing equitable estoppel, laches, statute of limitations, and judgment

Revised Statutes ("A.R.S.") section 12-821.01, which requires a claimant to give notice to a public entity within 180 days after the cause of action accrues, and by A.R.S. § 12-821, which requires all actions against a governmental entity be filed within one year of when the cause of action accrues. The Town argued that Fressadi's February 21, 2004, letter containing the $79,533.75 invoice, and his June 21, 2007, Memorandum to the Town Engineer demanding to be paid, demonstrated that he was aware at those times that he had a claim against the Town. The Town argued that his cause of action therefore accrued at the latest in June 2007, requiring Fressadi to present his notice of claim six months from that time, and file his complaint within one year of that time, which he failed to do.

¶21 After oral argument, the court granted summary judgment to the Town for the reasons stated in the Town's motion. Fressadi timely appealed.

DISCUSSION

¶22 Summary judgment may be granted when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and

---

as a matter of law on the merits. Kremer filed a motion for partial summary judgment and joined in the summary judgment motions of the Town and REEL. The court granted both of the motions. Only the Town is involved in this appeal.

whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Alosi v. Hewitt*, 229 Ariz. 449, 452, ¶ 14, 276 P.3d 518, 521 (App. 2012). We review the decision on the record made in the trial court, considering only that evidence presented to the court at the time the motion was considered. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994); *GM Dev. Corp. v. Community Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990).

¶23 The court granted the Town's motion for summary judgment at least in part because Fressadi had failed to timely file both his statutory notice of claim pursuant to A.R.S. § 12-821.01(A) and his complaint pursuant to A.R.S. § 12-821. Section 12-821.01(A) requires those with a claim against a public entity to file notice of that claim within 180 days after the cause of action accrues. This statutory notice of claim requirement does not apply to declaratory judgment actions not involving a claim for damages. *Martineau v. Maricopa County*, 207 Ariz. 332, 337, ¶ 24, 86 P.3d 912, 917 (App. 2004). Section 12-821, however, requires that "all actions" against a public entity be brought within one year after the cause of action

accrues. *See Flood Control Dist. of Maricopa County v. Gaines*, 202 Ariz. 248, 252, ¶ 9, 43 P.3d 196, 200 (App. 2002) ("the word means all and nothing less than all") (quoting *Estate of Tovrea v. Nolan*, 173 Ariz. 568, 572, 845 P.2d 494, 498 (App. 1992)). Under both statutes, the cause of action accrues when the injured party "realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." A.R.S. § 821.01(B); *Dube v. Likens*, 216 Ariz. 406, 421, ¶ 2, 167 P.3d 93, 108 (2007) (Supplemental Opinion)(applying statutory standard in A.R.S. § 12-821.01(B) to A.R.S. § 12-821). Accrual is based on the claimant's knowledge of the facts underlying the cause of action. *Doe v. Roe*, 191 Ariz. 313, 322, ¶ 29, 955 P.2d 951, 960 (1998). To trigger accrual, the claimant need not know all the facts, but must have "a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Id.* at 323, ¶ 32, 955 P.2d at 961. It is the knowledge of the facts and not the legal significance of those facts that determines accrual. *Insurance Co. of N. America v. Superior Court*, 162 Ariz. 499, 502, 784 P.2d 705, 708 (App. 1989) *vacated on other grounds by* 166 Ariz. 82, 800 P.2d 585 (1990). Although whether a cause of action has accrued is usually a question of fact for the jury, it may properly be determined as a matter of law when no disputed issue

of fact exists as to the plaintiff's knowledge regarding who caused the injury and when. *See Thompson v. Pima County*, 226 Ariz. 42, 46-47, ¶ 14, 243 P.3d 1024, 1028-29 (App. 2010).

¶24 Most of Fressadi's claims against the Town are based on his position that the Town wrongly refused to enter into a development agreement with him for reimbursement, wrongly refused to otherwise compensate him for constructing the sewer line extension, and wrongly allowed others to connect to the line he installed.

¶25 For Fressadi's notice of claim, filed on October 27, 2008, to be timely, his claims seeking damages must have accrued on or after, but not before, April 30, 2008. *See* A.R.S. § 12-821.01(A). Because he filed his complaint on February 10, 2009, all his claims must have accrued on or after February 10, 2008.

¶26 The record shows several instances before the relevant accrual dates where Fressadi knew or reasonably should have known that the Town would not enter into a development agreement, would not compensate him, and would connect his neighbors to the sewer extension. As early as June 2002, he was reminded that the developer is responsible for the cost of infrastructure to connect to the Town's sewer, that in his case no charges would be available from subsequent customers to compensate him, and that therefore no development agreement in "any form" was viable. In June the following year, after the

sewer had been completed, Fressadi was told that the Town Manager had no authority to execute a development agreement. On February 21, 2004, when the Town failed to enter into a development agreement after passing an ordinance allowing for such agreements, Fressadi sent an invoice to the Town, which the Town did not pay. Finally, on June 26, 2007, more than two years after the first of his neighbors was connected to the sewer line, Fressadi sent a "Memorandum" to the Town Engineer, demanding payment by September 1; the Town did not pay.

¶27 We need not decide which specific event caused the action to accrue. Obviously, all of these events occurred before April 30, 2008, and February 10, 2008 -- the earliest points at which the cause of action could accrue in order for Fressadi's notice of claim and complaint, respectively, to be timely. Certainly, at the latest, Fressadi knew that the Town would not compensate him for the extension when the Town, under threat, failed to pay by September 1, 2007, and again told him that the developer was responsible for the cost. Fressadi's notice of claim was not filed until nearly fourteen months later and his complaint was not filed until nearly eighteen months later.

¶28 Fressadi does not dispute this factual record. He appears to argue, however, that equitable tolling, waiver, and equitable estoppel should apply to permit the late filing.

Statutes of limitation and notices of claim are subject to equitable tolling, waiver, and estoppel. *Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990).

¶29 Under the doctrine of equitable tolling, a plaintiff may file a complaint after the limitations period has expired if the plaintiff was prevented from timely filing the complaint because of sufficiently inequitable circumstances. *McCloud v. Ariz. Dep't of Public Safety*, 217 Ariz. 82, 87, ¶ 11, 170 P.3d 691, 696 (App. 2007). The circumstances must be extraordinary. *Id.* at 89, ¶ 20, 170 P.3d at 698. In addition, the extraordinary circumstances must be established with evidence, not personal conclusions. *Id.* at 87, ¶ 13, 170 P.3d at 696. We review for an abuse of discretion a trial court's decision not to apply equitable tolling. *Id.* at 87, ¶ 10, 170 P.3d at 696.

¶30 Fressadi contends he is entitled to equitable tolling because he is a pro se plaintiff against legal professionals experienced in representing municipalities, has been "inundated with litigation," and was not notified of the applicable limitations period. These do not constitute extraordinary circumstances warranting the tolling of the notice of claim and statute of limitations. Fressadi himself recognizes that the Town was not obligated to notify him of the limitations period. Moreover, civil litigants representing themselves are held to the same standards as those represented by counsel and are

expected to be as familiar with court procedures, statutes, rules, and legal principles as a lawyer. *Higgins v. Higgins*, 194 Ariz. 266, 270, ¶ 12, 981 P.2d 134, 138 (App. 1999). Fressadi's status as a pro se litigant does not justify applying equitable tolling.

¶31 Fressadi further argues that the Town has effectively waived the notice of claim and the statute of limitations because the Town's Zoning Ordinance provides that each day of a continued violation of that ordinance constitutes a separate offense. Cave Creek, Ariz., Zoning Ordinance § 1.7(A) (Jan. 6, 2003). He appears to argue that, since each day is a separate offense, the cause of action continues to accrue. Section 1.7(A) refers to violations of "this Ordinance," meaning the Zoning Ordinance. Even assuming this section could be construed as waiving a limitations period for a zoning ordinance violation, Fressadi's complaint is based on the Town's alleged failure to enter into a repayment agreement under former section 50.016 of the Cave Creek Town Code, the Town's alleged misinterpretation of its Subdivision Ordinance, and the Town's authorization of Fressadi's neighbors to connect to the sewer line; the complaint includes no claim based on a zoning violation. The provision does not waive the notice of claim and statute of limitations requirements for Fressadi's complaint.

¶32 Fressadi also appears to contend that the Town should be estopped from asserting the defense of the notice of claim and the statute of limitations based on concealment and misrepresentation. "Wrongful concealment sufficient to toll a statute of limitations requires a positive act by the defendant taken for the purpose of preventing detection of the cause of action." *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 162, 871 P.2d 698, 709 (App. 1993). Silence by the defendant is not sufficient; the defendant must engage in some trick or contrivance "intended to exclude suspicion and prevent inquiry." *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 130, 412 P.2d 47, 63 (1966).

¶33 Fressadi argues that Cave Creek "intentionally concealed the unlawful status of the 010 lots, the void status of the permits, [and] the Town's waiver of the statute of limitations to mislead the court and obtain judgment." The relevant question with respect to whether estoppel applies to toll the limitations period is not whether the Town engaged in conduct after the matter was filed in court, but rather whether the Town engaged in conduct prior to the filing that prevented Fressadi from filing the action within the limitations period. Fressadi's allegations appear to relate to a newly raised, and

therefore waived, "unlawful subdivision" claim.[5] Even if the allegations are true, these claims do not explain or excuse any delay by Fressadi in bringing his cause of action for the Town's failure to compensate him for the sewer line or for the Town's allowing his neighbors to connect to the sewer. Fressadi fails to assert any affirmative act by the Town that could be construed as concealing the existence of a cause of action related to the sewer. The record contains letters from the Town to Fressadi clearly stating that the developer was responsible for the costs of the sewer infrastructure and that the Town would not or could not enter into an agreement; it contains no evidence that the Town affirmatively represented otherwise to Fressadi. For estoppel to apply, the "estopped" party must have engaged in some conduct that a person could reasonably interpret

[5] Fressadi spends considerable time in his opening brief asserting that the Town exacted a fourth lot from both the 010 and 003 parcels, 211-10-010D and 211-10-003D, blocking legal and physical access to Lots 010A, B, and C and Lots 003A, B, and C, resulting in the creation of illegal subdivisions. Consequently, he argues, the lots were not entitled to building permits under the Town's subdivision ordinance, and therefore the sewer permits for the 003 and 010 lots were null and void. Precisely how this relates to the trial court's ruling or more generally to this action, in which he seeks a declaration that the sewer extension is his property or compensation for its construction, is unclear. In any event, although this appears to bear some similarity to Fressadi's "ultra vires" argument in his response to the Town's motion for summary judgment, it is a new argument not presented to the superior court. We therefore do not address it. *See CDT Inc. v. Addison, Roberts & Ludwig, CPA, P.C.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000) (this court considers only those arguments, theories, and facts properly presented in the trial court).

to mean that his claim was being accepted. *Kelley v. Robison*, 121 Ariz. 229, 230, 589 P.2d 472, 473 (App. 1978). Fressadi has not asserted any such conduct on the part of the Town. Equitable estoppel does not apply.[6]

¶34 Fressadi does not appear to challenge the superior court's summary judgment on his declaratory judgment action regarding the classification of his property as a subdivision. He has therefore abandoned that issue. *See Torrez v. Knowlton*, 205 Ariz. 550, 552 n.1, 73 P.3d 1285, 1287 n.1 (App. 2003).

[6] Fressadi's briefing on appeal includes a discussion of governmental immunity and rescission, but neither topic concerns the issues encompassed by the superior court's ruling. We therefore have not addressed these issues.

CONCLUSION

¶35 Fressadi's cause of action accrued at the latest on September 1, 2007, his self-imposed deadline for the Town to agree to compensate him for the costs of the sewer extension construction. Fressadi failed to file his notice of claim within 180 days after that date and failed to file his complaint within one year after that date. The superior court correctly held his complaint was time barred. Accordingly, we affirm its judgment.[7]

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
RANDALL M. HOWE, Judge

[7] We deny as moot Fressadi's motion to suspend rules and supplement the record (filed January 28, 2013), as well as his motion to stay (filed April 30, 2013).