IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CITY OF TEMPE, a municipal corporation, *Plaintiff/Appellee*,

v.

TEMPE FLOUR MILL, LLC, an Arizona limited liability corporation; and TEMPE FLOUR MILL INVESTMENTS, LLC, an Arizona limited liability corporation, *Defendants/Appellants*.

No. 1 CA-CV 15-0482
FILED 1-31-2017

Appeal from the Superior Court in Maricopa County
No. CV2013-014770
The Honorable David O. Cunanan, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Donn Kessler joined.

H O W E, Judge:

¶1 Tempe Flour Mill, LLC and Tempe Flour Mill Investments, LLC (collectively, "TFM") appeal the trial court's granting summary judgment in favor of the City of Tempe. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In July 2006, the City and TFM entered into a Development and Disposition Agreement ("DDA"). The DDA required the City to convey the historic Hayden Flour Mill property to TFM if certain conditions were met. "[I]n no event," however, could the close of escrow of the property occur later than 18 months following execution of the DDA, meaning January 25, 2008, though the parties later extended this date by agreement to April 2, 2008. The DDA also required that any further amendment or modification of the DDA had to be approved by the City Council. If either party materially breached the agreement, the breaching party would be deemed to be in default if the breach continued after a 180-day "cure period" after written notice of the breach. If a dispute between the City and TFM could not be mutually resolved, the parties had to submit to non-binding mediation. At the conclusion of mediation or 90 days after the parties "reach[ed] the first impasse on the subject matter of the dispute, whichever occur[ed] later," either party could initiate litigation. The prevailing party in such litigation would be entitled to attorneys' fees.

¶3 In March 2011, the City sent TFM a notice of termination, explaining that the City's obligation to convey the property "c[ould] never become operable" because the closing of escrow did not occur by the 2008 deadline. Thereafter, the parties exchanged several emails referencing "settlement negotiations," and the City moved forward with other planned uses for the property. In October 2013, the parties discussed the possibility of "reinstating" the DDA, but the City Council declined to do so; instead, the City issued a Request for Qualifications, seeking bids for lease or purchase of the property.

¶4 Pursuant to the DDA's requirement, TFM sent the City a notice of default that same month for failing to close escrow on the property. The City subsequently sued, seeking a declaration that TFM has no interest in the property and a determination of the parties' rights and obligations under the DDA. TFM answered and, after filing a notice of claim, counterclaimed that the City had breached the DDA. In its claim, TFM noted that despite its adverse position to the City's arguments and actions, it "remains ready, willing and able to mediate this dispute."

¶5 The City then moved for summary judgment, arguing that TFM's causes of action were barred by A.R.S. § 12–821, which requires that actions against a public entity be brought within one year after the cause accrues. TFM responded and cross-moved for summary judgment, positing that its claim had not yet accrued because the City had failed to comply with the DDA's notice and cure provision and dispute resolution provision. TFM further argued that in any event, termination of the DDA was a nullity based on the "legislative equivalency doctrine."

¶6 At the hearing on the motions, the City urged that the one-year limitation period had passed because TFM's cause of action accrued on either April 2, 2008, when the DDA expired, or on March 15, 2011, when the City sent the notice of termination. The trial court agreed with the City, granting the City's motion and denying TFM's cross-motion. The trial court subsequently entered a final judgment consistent with its ruling and TFM timely appealed.[1]

DISCUSSION

¶7 TFM appeals the trial court's granting summary judgment in the City's favor. A trial court must award summary judgment if the moving party proves that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a).

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[1] In May 2015, TFM moved for reconsideration of the summary judgment in the City's favor, suggesting the trial court "misread" the deadline provision. The trial court summarily denied the motion. TFM's notice of appeal indicates that it also appeals from the order denying this motion. However, we do not have jurisdiction over an appeal from the denial of a motion for reconsideration. *See Spradling v. Rural Fire Prot. Co.*, 23 Ariz. App. 549, 551, 534 P.2d 763, 765 (1975); *Arvizu v. Fernandez*, 183 Ariz. 224, 226–27, 902 P.2d 830, 832–33 (App. 1995). TFM concedes this point in its reply brief and has withdrawn its appeal from the denial of its motion for reconsideration.

Summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Parkway Bank & Tr. Co. v. Zivkovic*, 232 Ariz. 286, 289 ¶ 10, 304 P.3d 1109, 1112 (App. 2013). In doing so, we view the facts in the light most favorable to the non-moving party and will affirm summary judgment if correct on any basis supported by the record. *Mutschler v. City of Phx.*, 212 Ariz. 160, 162 ¶ 8, 129 P.3d 71, 73 (App. 2006). We will not consider arguments made for the first time in a motion for reconsideration to which the opposing party could not respond. *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, 137 ¶ 18, 235 P.3d 285, 290 (App. 2010). Because A.R.S. § 12–821 barred TFM's action, the trial court did not err by granting the City's motion for summary judgment.

1. Statute of Limitations

¶8 TFM argues the trial court erred by determining that its cause of action accrued in either 2008 or 2011 and is therefore time-barred. We review questions of law regarding statutes of limitations, including when a particular cause of action accrues, de novo. *Cook v. Town of Pinetop-Lakeside*, 232 Ariz. 173, 175 ¶ 10, 303 P.3d 67, 69 (App. 2013).

¶9 In Arizona, "all actions against any public entity . . . shall be brought within one year after the cause of action accrues and not afterward." A.R.S. § 12–821. A 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 that caused or contributed to the damage." A.R.S. § 12–821.01(B); *see Dube v. Likins*, 216 Ariz. 406, 421–22 ¶¶ 2–4, 167 P.3d 93, 108–09 (App. 2007) (suppl. op.) (applying statutory standard in A.R.S. § 12–821.01(B) to A.R.S. § 12–821). "Accrual" is construed in accordance with the common law discovery rule. *Little v. State*, 225 Ariz. 466, 469 ¶ 9, 240 P.3d 861, 864 (App. 2010). Under the discovery rule, the relevant inquiry is when the plaintiff's "knowledge, understanding, and acceptance in the aggregate provided sufficient facts to constitute a cause of action." *Doe v. Roe*, 191 Ariz. 313, 324 ¶ 36, 955 P.2d 951, 962 (1998). When discovery occurs and a cause of action accrues are usually questions of fact for the jury, *id.* at 323 ¶ 32, 955 P.2d at 961, but accrual may be determined as a matter of law when no genuine issues of material fact exist, *Thompson v. Pima Cty.*, 226 Ariz. 42, 46–47 ¶ 14, 243 P.3d 1024, 1028–29 (App. 2010).

¶10 TFM contends, as it did in the trial court, that the statute of limitations has yet to accrue because the City did not (1) comply with the legislative equivalency doctrine or (2) exhaust its contract remedies before terminating the DDA.[2] Neither argument casts doubt on the trial court's ruling.

1a. Legislative equivalency doctrine

¶11 TFM first posits that the City cannot terminate the DDA without legislative action by the City Council because of the legislative equivalency doctrine. That doctrine "dictates that existing legislation [can] be repealed or modified only by a legislative act equal to the procedure used to enact it." 8 McQuillin Mun. Corps. § 25.69 (3d ed. 2016); *see also* 82 C.J.S. Statutes § 338 (2016). TFM contends that the City's "termination" of the DDA is a nullity because the City Council did not act legislatively to terminate it and TFM's cause of action against the City thus has not yet accrued. But this doctrine has never been recognized in Arizona. Although TFM argues that the DDA's requirement that the City Council must approve any changes to the agreement recognizes the legislative equivalency doctrine, nothing in the DDA indicates that the parties intended to adopt this doctrine. Moreover, TFM provides no authority that an agreement requiring the approval of a governmental entity to amend it means that this doctrine governs the agreement. We thus decline to apply the doctrine here.

¶12 More important, however, the legislative equivalency is irrelevant because it has no effect on whether TFM's claim is barred under the statute of limitations. The statute of limitations runs against an injured party when it has notice of the injury—*e.g.*, that the other party has wrongfully or unlawfully terminated an agreement. In 2011, the City terminated the DDA without City Council action. Regardless whether the termination was valid under the legislative equivalency doctrine, if TFM wanted to challenge the City's termination of the DDA because the termination was not authorized by law, TFM needed to do so within one year of notice of that injury. Because TFM failed to do so within

[2] On appeal, the City denies that the failure to satisfy the closing deadline terminated the DDA, urging instead it expired by its terms. Because we affirm on the basis that TFM's claim is time-barred, we need not address this issue.

one year of the termination, the claim is barred under A.R.S. § 12–821, and the court did not err by granting the City's motion for summary judgment.

1b. Contract Remedies

¶13 TFM next argues that its cause of action has not accrued because the City did not exhaust the procedures and remedies that the DDA required. Specifically, TFM argues that because the City neither gave notice of breach and allowed for a "cure period" nor submitted to non-binding mediation, the time to bring a claim has tolled under A.R.S. § 12–821.01(C). We review issues involving statutory interpretation de novo. *Azore, LLC v. Bassett*, 236 Ariz. 424, 427 ¶ 8, 341 P.3d 466, 469 (App. 2014). We interpret statutes to give effect to the legislature's intent. *J.D. v. Hegyi*, 236 Ariz. 39, 40–41 ¶ 6, 335 P.3d 1118, 1119–20 (2014). In doing so, we look to the statute's plain language as the best indicator of that intent. *Azore*, 236 Ariz. at 427 ¶ 9, 341 P.3d at 469. If the statutory language is clear, we will apply it without resorting to other methods of statutory interpretation, unless application of the statute's plain meaning would lead to impossible or absurd results. *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, 303 ¶ 9, 93 P.3d 501, 503 (2004). Because the tolling statute is inapplicable here, the court did not err.

¶14 In Arizona, any person who has a claim against a public entity must file a notice of that claim with the public entity within 180 days of the action's accrual. A.R.S. § 12–821.01(A). A claim for breach of contract generally "accrues immediately upon the happening of the breach." *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 76 ¶ 13, 985 P.2d 556, 561 (App. 1998). However, A.R.S. § 12–821.01(C) states that any claim that must be submitted to a non-binding dispute resolution pursuant to a contractual term "shall not accrue" until all procedures or remedies have been exhausted. Further, "the time in which to give notice of a potential claim and to sue . . . shall run from the date on which a final decision . . . is issued in an alternative dispute resolution procedure." *Id.* The legislature's intent in codifying this tolling provision was to "preserve the public policies inherent in both" alternative dispute resolution procedures and the time limits of the claims statutes. *Stulce v. Salt River Project Agric. Improvement & Power Dist.*, 197 Ariz. 87, 92 ¶ 16, 3 P.3d 1007, 1012 (App. 1999). The intent was not to "negate by inference the accrual definition . . . or to extend the common law discovery rule that has been applied to A.R.S. § 12–821." *Id.*

¶15 This statute does not toll the statute of limitations in this case, however, because neither party invoked the DDA's mediation provision. When the City notified TFM that it terminated the DDA, TFM discussed

settling the dispute and when that was unsuccessful, notified the City that it had defaulted under the DDA by not closing escrow. Instead of invoking the DDA's mediation provisions, the City filed a declaratory judgment action against TFM. And instead of insisting on mediating the dispute under the DDA, TFM filed a counterclaim that the City had breached the DDA. TFM merely stated in its counterclaim that it "remain[ed] ready, willing and able to mediate this dispute." Because neither party invoked the DDA's mediation provision, they waived their rights to enforce it. *See Bolo Corp. v. Homes & Son Constr. Co.*, 105 Ariz. 343, 347, 464 P.2d 788, 792 (1970) (declaring that plaintiff who "sought redress through the courts, in lieu of the arbitration tribunal, and asked the court for exactly the same type of relief . . . which an arbitrator is empowered to grant" waived right to enforce arbitration clause). *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 582, 892 P.2d 1365, 1371 (App. 1994) (noting that filing an answer without invoking arbitration "would nearly always indicate a clear repudiation of the right to arbitrate"). Because the parties waived any rights to enforce the non-binding mediation provision by initiating litigation of their own claim, no remedies were left to "exhaust" before the claim's accrual under A.R.S. § 12–821.01(C). The trial court therefore did not err.

2. Attorneys' Fees

¶16 TFM requests its attorneys' fees on appeal pursuant to the DDA's attorneys' fees provision. The City also requests its attorneys' fees on appeal pursuant to the DDA's attorneys' fees provision and under A.R.S. § 12–341.01. Because the City is the successful party on appeal, we award it taxable costs and reasonable attorneys' fees on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶17 For the foregoing reasons, we affirm.

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