IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ROBERT THOMAS KYLE NELSON, *Plaintiff/Appellant*,

v.

SCOTT A ALLEN, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0041
FILED 3-22-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-002780
The Honorable Arthur T. Anderson, Judge
The Honorable Daniel J. Kiley, Judge

AFFIRMED

COUNSEL

Wilenchik & Bartness, P.C., Phoenix
By Dennis I. Wilenchik, John D. Wilenchik, Colleen C. Thomas
Counsel for Plaintiff/Appellant

Jennings Strouss & Salmon, P.L.C., Phoenix
By Brian Imbornoni
Counsel for Defendants/Appellees

Sims Murray, LTD, Phoenix
By Jeffrey T. Murray
Counsel for Amicus Curiae Town of Paradise Valley

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Peter B. Swann joined.

B E E N E, Judge:

¶1 Plaintiff Robert Thomas Kyle Nelson ("Nelson") appeals the superior court's dismissal of his claims against Defendants Scott A. Allen and Catherine Allen (collectively the "Allens"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Nelson and the Allens own adjacent real property in Paradise Valley. In February 2013, the Allens purchased their property, which is directly north of Nelson's. Nelson bought his property in October 2013. Directly east of Nelson's property is the property in dispute here; a 25-foot-wide strip of land that Nelson uses for ingress and egress ("Roadway").

¶3 In 1956, the original owner and Nelson's predecessor-in-interest deeded the Roadway to Maricopa County. That area was later incorporated into the Town of Paradise Valley ("Town"). Nelson alleges that in 1962, his predecessor-in-interest, the McMahons, requested the Town abandon the Roadway and vest title in them. This request was passed and adopted by the Town as Resolution 11 ("Resolution"). The McMahon property was deeded through a series of successive owners and eventually deeded to Nelson. Nelson claims that the Town abandoned the Roadway to the McMahons in 1962 through the Resolution and, as the McMahons' successor-in-interest, he alone holds fee simple title to the Roadway.

¶4 Nelson alleged that from as early as February 2013,[1] the Allens began using the Roadway; use that "has continued unabated from then to the present date and has impeded and impaired [Nelson's] use and

[1] Although Nelson's complaint stated that the Allens began interfering with his use and enjoyment of the Roadway as early as February 2013, Nelson did not purchase the property until October 2013. Thus, we read Nelson's claims as beginning in October 2013.

enjoyment of the [Roadway]." Among other things, Nelson alleged that the Allens (1) used the Roadway as a service entrance and parking lot for their service vehicles, (2) removed landscaping and a boundary fence, (3) built a retaining wall, and (4) paved the Roadway. To pave the Roadway, on December 2, 2013, the Allens were granted a right-of-way permit from the Town to install a "sandset brick driveway."

¶5 In January 2014, Nelson's counsel sent a cease and desist letter to the Allens claiming ownership of the Roadway, but the Allens continued to make improvements on the Roadway. Nelson's counsel then sent the Allens a quit claim deed and $5.00, pursuant to the fee-shifting statute, requesting the Allens disclaim all interest in the Roadway. The Allens did not respond.

¶6 Also in January 2014, Nelson's counsel emailed the Town, advising that Nelson owned the Roadway pursuant to the Town's abandonment under the Resolution and challenging the December 2013 permit the Town issued to the Allens. Nelson's email included the permit number and date of issuance. On February 20, 2014, the Town's counsel responded, advising that the Town claimed ownership of the Roadway as a public right-of-way because the Resolution "simply recognized that an abandonment **request** had been made," and no documentation showed that the Roadway had in fact been abandoned or even provided direction as to whom it should be abandoned. (Emphasis in original).

¶7 On February 18, 2015, Nelson filed a complaint against the Allens and the Town for quiet title, declaratory judgment, and trespass as to the Allens only.

¶8 In March 2015, the Town moved to dismiss, arguing Nelson's claims were barred by the applicable statute of limitations. Later that month, the Allens also moved to dismiss, adopting the Town's arguments. After full briefing but before the motions were heard by the superior court, on July 13, 2015, Nelson voluntarily dismissed, without prejudice, all claims against the Town and his claim for declaratory judgment against all defendants (the claims against the Allens for quiet title and trespass remained).

¶9 Shortly after dismissing the Town, Nelson's counsel sent the Town a quit claim deed and the requisite $5.00, requesting the Town relinquish all claims to the Roadway. The Town did not respond and, after the 20-day statutory period expired, on August 19, 2015, Nelson moved for leave to amend his complaint to add the Town back into the litigation on

the quiet title claim. After full briefing and oral argument, in January 2016, the superior court denied Nelson's motion for leave to amend, finding it would be futile. The court found that Nelson's claims were barred by the statute of limitations because he had "not been in undisturbed possession" of the Roadway and his claims accrued no later than February 20, 2014. Nelson unsuccessfully moved for reconsideration twice. The Allens then supplemented their motion to dismiss, arguing that the Town was a necessary and indispensable party. The court agreed, and in October 2016, the court dismissed Nelson's action.

¶10 Nelson timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶11 Nelson's only argument on appeal is that the superior court erred in denying his motion to amend the complaint by finding that his claims against the Town were time-barred. Specifically, Nelson asserts that the statute of limitations did not accrue against him because he was in actual possession of the Roadway and his possession was not disturbed by the party claiming title, here the Town. We disagree.

¶12 We review the denial of a motion to amend a pleading for clear abuse of discretion. *First-Citizens Bank & Tr. Co. v. Morari*, 242 Ariz. 562, 566-67, ¶ 12 (App. 2017). But we review questions of law concerning the statute of limitations, including when a cause of action accrues, *de novo*. *Cook v. Town of Pinetop-Lakeside*, 232 Ariz. 173, 175, ¶ 10 (App. 2013).

¶13 A complaint against any public entity must be filed within one year after the cause of action, including actions to quiet title, accrues. A.R.S. § 12-821; *Cook*, 232 Ariz. at 175, ¶ 9. A cause of action accrues against a public entity "when the damaged 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, *supp. op.*, 216 Ariz. at 421, ¶ 2 (App. 2007) (definition of accrual in § 12-821.01(B) applies to both filing of notice of claim and filing of action under § 12-821). Accrual of a cause of action is based upon a claimant's knowledge of the facts underlying the cause of action and is triggered when the claimant possesses "a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 32 (1998). The claimant "need not know *all* the facts underlying a cause of

action to trigger the accrual of the action." *Id*. But, a party may not "hide behind its ignorance when reasonable investigation would have alerted it to the claim." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 290, ¶ 12 (App. 2010) (citing *Doe*, 191 Ariz. at 324, ¶ 37 (explaining that "plaintiffs have an affirmative duty of due diligence to investigate potential claims")). Accrual 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 Cty.*, 226 Ariz. 42, 46-47, ¶¶ 12-14 (App. 2010).

¶14 "A quiet title action seeks a judicial determination of adverse claims in order to clear the title of disputed property." *Cook*, 232 Ariz. at 176, ¶ 13 (citing 74 C.J.S. *Quieting Title* § 1 (2013)). The statute of limitations does not accrue against a plaintiff bringing a quiet title action, however, "who is in undisturbed possession of his property." *Id.* at ¶ 15. This so called "true quiet title" action must be brought pursuant to a claim of ownership under existing title. *Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, 266-67, ¶ 13 (App. 2013) (citing *Bangerter v. Petty*, 225 P.3d 874, 877 (Utah 2009) ("If the action is a true quiet title action, meaning an action merely to 'quiet an *existing* title against an adverse or hostile claim of another,' then the statute of limitations will not bar the claim.") (emphasis in original; citation omitted). If, however, a plaintiff's quiet title claim is dependent on success of an underlying claim, such as declaratory judgment, the "true quiet title" exception is inapplicable. *Rogers*, 233 Ariz. at 267, ¶¶ 13, 15 (citing *In re Hoopiiaina Tr.*, 144 P.3d 1129, 1137 (Utah 2006)).

¶15 Here, Nelson's quiet title claim against the Town was barred by the one-year statute of limitations. First, by Nelson's own admission, his claim accrued no later than February 20, 2014 when the Town's counsel responded to his email and advised that the Town claimed ownership of the Roadway as a public right-of-way because no documentation showed it in fact had been abandoned, only that a request was made. In Nelson's response to the Town's motion to dismiss, he stated that "[i]t was not until February 20, 2014, that [the Town's counsel] finally took an adverse position to [Nelson], *thus triggering the statute of limitations on the declaratory judgment, and consequently quiet title, claim against the Town*." (Emphasis added). No later than February 20, 2014, Nelson was on notice that ownership of the Roadway was in dispute because the Town was asserting a claim adverse to his own. Thus, by that date, Nelson knew he had been damaged and knew or reasonably should have known the source of that damage. *See* A.R.S. § 12-821.01(B). Nelson timely filed his original complaint on February 18, 2015. However, he chose to voluntarily dismiss the Town from the suit on July 13, 2015 pursuant to Arizona Rule of Civil Procedure

41(a)(1), thereby retriggering the running of the statute of limitations. *See* 9 Fed. Prac. & Proc. Civ. § 2367 (3d ed.) (citing case law under Federal Rule 41(a), "[A]s numerous federal courts have made clear, a voluntary dismissal without prejudice under Rule 41(a) leaves the situation as if the action never had been filed," and "it seems well settled in the case law that the statute of limitations is not tolled by bringing an action that later is dismissed voluntarily under Rule 41(a)."); *Vicari v. Lake Havasu City*, 222 Ariz. 218, 223, ¶ 19 (App. 2009) (because Arizona Rule 41(a)(1) was modeled after Federal Rule 41(a)(1), courts look to federal law for guidance). When Nelson moved to amend the complaint on August 19, 2015, 18 months after the statute of limitations accrued, his claims were time-barred. *See Toy v. Katz*, 192 Ariz. 73, 89 (App. 1997) ("The filing of the Motion to Amend constituted commencement of the action for purposes of the statute of limitations.").

¶16 Second, Nelson's assertion that the statute of limitations did not accrue because his possession of the Roadway was not disturbed by the Town, but by a third party (the Allens), lacks merit. First, Nelson cites to a California case, *Muktarian v. Barmby*, to stress the public policy that disturbance by a third party does not trigger the running of the statute of limitations because "even if, as here, the party in possession knows of such a potential [adverse] claimant, there is no reason to put him to the expense and inconvenience of litigation until such a claim is pressed against him." 407 P.2d 659, 661 (Cal. 1965). Nelson's reliance on this case is misplaced. The party claiming ownership, the Town, in fact pressed a claim against Nelson by asserting its right of ownership of the Roadway. Nelson was on notice of the Town's adverse claim and had an affirmative duty to defend against such claim. *See Doe*, 191 Ariz. at 324, ¶ 37.

¶17 Furthermore, the record reflects that Nelson's possession was disturbed by both the Allens and the Town. "Undisturbed possession" is "uninterrupted possession" — possession that is "peaceful," having not been "invaded, disturbed, or infringed in any way." *Cook*, 232 Ariz. at 176, ¶ 15 n.4. Nelson's own allegations show that as early as February 2013, the Allens used the Roadway as a service entrance and parking lot for their service vehicles, paved it, removed landscaping and a boundary fence, and built a retaining wall. By February 20, 2014, Nelson knew not only that the Allens were granted a permit from the Town to pave the Roadway, but also that the Town claimed ownership of the Roadway, stating that it "never ceased to be Town right-of-way[.]" In reliance on the permit, the Allens subsequently paved the Roadway. These actions were not mere clouds on title; they were visible disturbances to the physical land itself. As reflected in Nelson's own complaint, he was aware of who was invading his possession of the Roadway and in what way. *See* A.R.S. § 12-821.01(B).

¶18 Last, Nelson's action is not a "true quiet title" because his possession was in dispute. *See Bangerter*, 225 P.3d at 877 (true quiet title action means action brought under *existing* title). The 1962 Resolution showed only that a request was made to abandon the Roadway. The Town claimed ownership as a public right-of-way because no evidence showed it was actually abandoned and, if so, to whom. Moreover, every deed in the chain of ownership from the McMahons in 1988 to Nelson in 2013 specifically excludes the Roadway, stating "EXCEPT the East 25 feet thereof." Ownership of the Roadway was disputed and that issue was not addressed or adjudicated by the superior court. Thus, because Nelson's quiet title claim was contingent upon the success of his underlying claim that he alone held fee simple title to the Roadway, it was not brought under existing title, the statute of limitations applied, and his claims were time-barred. *See Rogers*, 233 Ariz. at 267, ¶¶ 13, 15.

¶19 We conclude as a matter of law that Nelson's claims accrued no later than February 20, 2014 because he knew who caused his injury, when, and in what way. Nelson's claims were time-barred under A.R.S. § 12-821 and the superior court did not abuse its discretion in denying his motion to amend the complaint filed August 19, 2015 — 18 months after the statute of limitations accrued.

CONCLUSION

¶20 For the foregoing reasons, we affirm the superior court's dismissal of Nelson's claims.

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