IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HOJJATALLAH (DAVID) FARAJI, *Plaintiff/Appellant*,

v.

CITY OF PHOENIX, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0303
FILED 4-26-2018

Appeal from the Superior Court in Maricopa County
No. CV2014-053408
The Honorable Susan M. Brnovich, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

COUNSEL

Hojjatallah (David) Faraji, Phoenix
Plaintiff/Appellant

Campbell Yost Clare & Norell, PC, Phoenix
By Margaret F. Dean
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jennifer M. Perkins joined.

C A T T A N I, Judge:

¶1 Hojjatallah Faraji appeals from the superior court's entry of summary judgment in favor of the City of Phoenix. For reasons that follow, we affirm in part, reverse in part, and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 From June 2007 through mid-2014, the City had a contract with certain companies to provide on-demand limousine transportation service at Phoenix Sky Harbor International Airport. In 2014, the City notified the limousine companies that on-demand limousine service would not be offered at the airport after the contract expired on May 31, 2014, and offered to enter into a new contract with the companies to provide pre-arranged limousine service instead.

¶3 Faraji was a limousine driver affiliated with at least one such company and had been providing on-demand limousine service at the airport. On May 23, Faraji sent a letter titled "Notice of Claim and Demand per A.R.S. 12-821.01" to the director of the City's aviation department objecting to the end of on-demand limousine service, explaining that pre-arranged service alone would be insufficient to sustain limousine businesses and drivers, and "reserv[ing] the right to amend . . . to set forth my exact damages following termination." Ten days later, the City Attorney's Office sent Faraji a letter informing him that the director of the aviation department "is not authorized to accept service of notices of claim as required under A.R.S. § 12-821.01." Faraji never submitted another notice of claim.

¶4 On May 28—three days before the contract was due to expire—Faraji filed a complaint seeking damages and injunctive relief against the City. Faraji alleged that the City's action in disallowing on-demand limousine service violated his constitutional due process and other civil rights guarantees as well as federal and state antitrust principles.

¶5 Over the next year, the City litigated procedural matters—challenging service of the complaint, securing dismissal of the second named defendant, successfully opposing other drivers' requests to intervene as plaintiffs—culminating in dismissal of the complaint based on procedural rules related to failure to prosecute. Faraji appealed the dismissal, and this court reversed and remanded.

¶6 After remand—and before engaging in discovery—the City moved for summary judgment, urging that Faraji's claims for damages were barred by his failure to properly serve a notice of claim that complied with statutory requirements and that his claims for injunctive relief were moot because the contract had expired (and on-demand limousine service ceased) two and a half years before. After Faraji opposed summary judgment based in part on an assertion that his complaint raised a federal civil rights claim that was not subject to Arizona's notice of claim procedures, the City's reply urged that the complaint failed to allege facts that would support such a claim.

¶7 The court granted the City's motion and entered judgment in its favor on all claims, and Faraji timely appealed. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).

DISCUSSION

¶8 Summary judgment is proper if there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). We review the grant of summary judgment de novo, viewing the facts in the light most favorable to the party against whom judgment was entered. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 14 (App. 2012).

¶9 Faraji's appeal originally challenged the superior court's resolution as to all of his claims. In his reply, however, Faraji concedes that the superior court correctly dismissed as moot his claims for injunctive relief. And he further concedes that the superior court lacked authority to consider federal antitrust claims. Accordingly, we address only Faraji's claims for damages based on (1) Arizona's antitrust provisions and (2) federal civil rights guarantees under 42 U.S.C. § 1983.

I. Notice of Claim: Arizona Antitrust Claim and Any Other State-Law Claim.

¶10 Faraji argues the superior court erred by concluding that he had failed to properly submit a compliant notice of claim to the City, the basis for summary judgment on his state-law antitrust claim for damages (and any other state-law claims). He asserts both that the City official to whom service was due actually received the notice of claim letter (and that the City had actual knowledge of his claim) and that, in any event, a dispute of fact precluded summary judgment as to whether the City waived its notice of claim defense.

¶11 A notice of claim that satisfies A.R.S. § 12-821.01 is a necessary prerequisite to filing a lawsuit against a public entity. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295, ¶ 6 (2007). The notice of claim must contain a "specific amount for which the claim can be settled" as well as a sufficient description of the factual basis for the asserted liability. A.R.S. § 12-821.01(A). The statute directs that the prospective litigant must, within 180 days after the cause of action accrues, file the notice of claim "with the person or persons authorized to accept service for the public entity . . . as set forth in the Arizona rules of civil procedure." A.R.S. § 12-821.01(A). The Arizona Rules of Civil Procedure, in turn, direct that service on a municipal corporation is effected by delivery to the clerk of the municipal corporation. Ariz. R. Civ. P. 4.1(h)(3).

¶12 Here, Faraji acknowledged that he sent the notice of claim letter only to the director of the City's aviation department, not to the City Clerk as required under § 12-821.01(A) and Rule 4.1(h)(3). He asserts, however, that the aviation director forwarded the letter to the City Attorney's Office so the "right person" eventually received it, and that, in any event, the City had actual notice of his claim. But the City Clerk, not the City Attorney's Office, is the person that must be served, and neither substantial compliance nor actual notice excuse strict compliance with the statutory notice of claim requirements. *Slaughter v. Maricopa County*, 227 Ariz. 323, 325, ¶ 8 (App. 2011); *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 62, ¶ 23 (App. 2010). Moreover, although it was not obligated to do so, *see Backus v. State*, 220 Ariz. 101, 107, ¶ 28 (2009), the City promptly informed Faraji that the aviation director was not authorized to accept a notice of claim, but Faraji never resubmitted the letter to correct the defective filing. Accordingly, the superior court did not err by determining that Faraji had failed to comply with the notice of claim requirements of § 12-821.01.

¶13 Faraji asserts, however, that the City waived its notice of claim defense by failing to assert it until two and a half years had passed, or alternatively that issues of fact precluded summary judgment on the issue of waiver. Noncompliance with the notice of claim statute is an affirmative defense that a public entity must assert in its answer (or a Rule 12 motion to dismiss); failure to do so waives the defense. *City of Phoenix v. Fields*, 219 Ariz. 568, 574, ¶ 27 (2009). Even after preserving the defense in an answer, the public entity may waive the defense by conduct if it "take[s] substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense." *Id.* at 574–75, ¶¶ 29–30 (quoting *Jones v. Cochise County*, 218 Ariz. 372, 380, ¶ 26 (App. 2008)). Although generally a question of fact, waiver may be resolved on summary

judgment if the undisputed facts support resolution as a matter of law. *See Fields*, 219 Ariz. at 575, ¶ 32; *Jones*, 218 Ariz. at 380–81, ¶¶ 28–29.

¶14 Here, the City preserved the defense by specifically raising Faraji's noncompliance with the notice of claim statute as an affirmative defense in its answer to the complaint. *See Fields*, 219 Ariz. at 574, ¶ 27. Faraji's only basis for urging waiver by conduct thereafter was the passage of time. But waiver by conduct requires not just the passage of time, but "acts inconsistent with an intent to assert the right," such as proceeding to litigate the claim on the merits. *Jones*, 218 Ariz. at 379, ¶¶ 23–24 (citation omitted). Although almost two and a half years passed before the City moved for summary judgment on the notice of claim issue, the City had litigated only procedural matters in the interim. And that timeframe included the yearlong appeals process after the initial dismissal of Faraji's claim for technical rule violations related to failure to prosecute.

¶15 After this court's reversal, the City asserted noncompliance with the notice of claim statute in a dispositive motion within a matter of months, before engaging in any substantial discovery on the merits. *Compare Fields*, 219 Ariz. at 575, ¶ 31 (finding waiver by conduct because a public entity "substantially participated in this litigation" through extensive briefing on class certification, various substantive merits-based motions, and substantial discovery over more than four years); *Jones*, 218 Ariz. at 380, ¶ 27 (finding waiver by conduct based on the public entity "actively investigat[ing] and proactively defend[ing] the claim" by conducting substantial discovery). Accordingly, the superior court did not err by concluding, as a matter of law, that the City had not waived the notice of claim defense because it had not "taken substantial action to litigate the merits of the claim." *See Fields*, 219 Ariz. at 575, ¶ 30.

II. Federal Civil Rights Claim.

¶16 Faraji argues the superior court erred by dismissing his § 1983 claim, which asserted that the City's elimination of on-demand limousine service at the airport violated his substantive and procedural due process rights, constituted an unlawful taking, violated the interstate commerce clause, and denied him equal protection of the law. A cause of action under § 1983 provides redress for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person (including a municipality) acting under color of law. 42 U.S.C. § 1983; *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978); *see also Mulleneaux v. State*, 190 Ariz. 535, 538–39 (App. 1997).

¶17 The only bases for summary judgment raised in the City's motion were that Faraji had failed to comply with notice of claim requirements and that his claims for injunctive relief were moot. As Faraji notes, however, Arizona's notice of claim requirements do not apply to federal civil rights claims under § 1983. *See Felder v. Casey*, 487 U.S. 131, 138 (1988); *accord Mulleneaux*, 190 Ariz. at 540. And the City's mootness argument was directed only to claims for injunctive relief and is inapplicable to this claim for damages.

¶18 The superior court nevertheless dismissed the § 1983 claim on the basis that it was "vaguely and insufficiently pled" and that Faraji "does not have a liberty interest or protected right to provide on-demand limousine services" at the City's airport. But the City did not argue failure to state a claim for damages under § 1983 until its reply in support of its motion for summary judgment, which deprived Faraji of any opportunity to respond to this new argument. *See* Ariz. R. Civ. P. 7.1(a)(3) ("[T]he moving party may file a reply memorandum, which may address only those matters raised in the responsive memorandum."); *cf. Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15 (App. 2006) (noting unfairness of considering argument to which opposing party had no opportunity to respond); *Varsity Gold, Inc. v. Porzio*, 202 Ariz. 355, 357, ¶ 9 (App. 2002) (noting arguments on appeal first raised in reply brief improperly deprive opposing party of opportunity to respond).

¶19 Moreover, the City's reply addressed only the claim as it related to an occupational liberty interest, whereas Faraji's complaint arguably asserted deprivation of both liberty and property in violation of substantive and procedural due process guarantees, as well as equal protection and interstate commerce violations. Although we take no position on the merits or ultimate sufficiency of Faraji's allegations, we conclude that he was improperly denied a meaningful opportunity to respond in support of his claim, and we thus reverse the judgment as to the § 1983 claim.

CONCLUSION

¶20 We reverse the superior court's judgment as to Faraji's federal civil rights claim under 42 U.S.C. § 1983. Based on Faraji's concessions on

appeal and his failure to properly file a notice of claim, we affirm in all other respects.

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