IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MOUNTAINSIDE MAR LLC, *Plaintiff/Appellant*,

v.

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

No. 1 CA-CV 18-0049
FILED 7-18-2019

Appeal from the Superior Court in Coconino County
No. S0300CV201700177
The Honorable Jacqueline Hatch, Judge *Retired*

REVERSED

COUNSEL

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By Jeffrey D. Gross
Counsel for Plaintiff/Appellant

Flagstaff City Attorney's Office, Flagstaff
By Kevin R. Fincel, Christina C. Rubalcava
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Paul J. McMurdie joined.

C A T T A N I, Judge:

¶1 Mountainside Mar, LLC appeals from the superior court's dismissal of its complaint against the City of Flagstaff, its Treasurer, and its City Council (collectively, the "City"). For reasons that follow, we reverse.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mountainside is the developer of an apartment complex in Flagstaff. This dispute centers on the status of certain City-assessed fees that Mountainside paid under protest. The City designated the fees as water and wastewater capacity fees. Mountainside alleges that the fees were in fact development fees that had not been adopted in accordance with Arizona Revised Statutes ("A.R.S.") § 9-463.05 and thus could not lawfully be assessed.[1]

¶3 The City first sent Mountainside an invoice for the disputed fees on August 19, 2015. Mountainside did not pay. The City later increased the amount of its capacity fees and sent Mountainside a second invoice for the increased amount (now $1,024,991) on July 13, 2016. Because the City would not provide water or sewer services or issue a certificate of occupancy for Mountainside's development until the second invoice was paid, Mountainside paid under protest on August 22, 2016.

¶4 Mountainside filed a notice of claim with the City on November 7, 2016. The notice of claim explained Mountainside's theory that the disputed fees were development fees in disguise, stated that the City was "required to refund such fees," and declared that Mountainside's claim was "in the amount of $1,024,991.00 for unlawfully assessed and collected development fees" and "for any interest earned by the City from

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[1] Section 9-463.05 authorizes development fees to offset costs to the municipality associated with providing necessary public services to a development, and imposes requirements and conditions for imposing such fees.

the date of payment . . . to the date of refund." The parties did not settle, and Mountainside sued the City on April 13, 2017.

¶5 Mountainside's complaint asserted causes of action for declaratory judgment, mandamus, and generalized special action relief, all seeking a refund of the disputed fees. The City moved to dismiss, arguing that Mountainside's claims had accrued on the date of the first invoice, so the complaint was barred by the one-year statute of limitations. *See* A.R.S. § 12-821. The City also argued in the alternative that dismissal was warranted because Mountainside's notice of claim had failed to state a specific amount for which the claim could be settled. *See* A.R.S. § 12-821.01(A).

¶6 The superior court dismissed the case as time barred, and Mountainside timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Accrual Date and Statute of Limitations.

¶7 Arizona law requires that any action against a public entity be filed "within one year after the cause of action accrues and not afterward." A.R.S. § 12-821. "[A] cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause . . . [of] the damage." A.R.S. § 12-821.01(B). Although the plaintiff need not know all the details underlying the claim, "the plaintiff must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury" to trigger accrual. *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 32 (1998). We review the superior court's determination of the accrual date and its application of a statute of limitations de novo. *Cook v. Town of Pinetop-Lakeside*, 232 Ariz. 173, 175, ¶ 10 (App. 2013); *Dube v. Likins*, 216 Ariz. 406, 411, ¶ 5 (App. 2007).

¶8 The superior court concluded that, at the latest, Mountainside's claims accrued when the City issued the first invoice for the fees on August 19, 2015, because by that point Mountainside was aware the so-called capacity fees "would be assessed" against it. But Mountainside's claims all seek a *refund* of the fees that, although invoiced, it was under no obligation to pay until it wished to connect water and sewer services. And until it paid the fees on August 22, 2016, Mountainside had not yet suffered the damage for which it now seeks redress, so its claims did not accrue until that date. *See Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 10 (2004) (accrual date depends on the elements of the claim actually presented); *cf. Canyon del Rio*

Inv'rs, L.L.C. v. City of Flagstaff, 227 Ariz. 336, 342, ¶¶ 23–25 (App. 2011) (declaratory judgment action does not accrue until related damages claim accrues).

¶9 The City relies on our memorandum decision in *Home Builders Ass'n of Central Arizona v. City of Surprise*, No. 1 CA-CV 14-0466, 2015 WL 7454104 (Ariz. App. Nov. 24, 2015) (mem. decision) for the notion that a cause of action challenging an allegedly improper assessment of development fees accrues on the assessment date. But there, the parties apparently did not dispute that assessment triggered the limitations period, and the court did not address that issue. *See id.* at *2, ¶¶ 7–8. We decline to afford even persuasive weight to an issue neither presented nor decided in an unpublished decision.

¶10 Mountainside's claims for refund accrued only when it paid the disputed fees on August 22, 2016, and its April 13, 2017 complaint was filed within the one-year limitations period triggered on that date. Because the complaint was timely filed, the superior court erred by dismissing the complaint on this ground.

II. Notice of Claim.

¶11 The superior court did not address the sufficiency of Mountainside's notice of claim. We nevertheless address this issue because it was fully briefed in superior court and on appeal and because we could affirm dismissal if correct for any reason. *Sw. Non-Profit Hous. Corp. v. Nowak*, 234 Ariz. 387, 391, ¶ 10 (App. 2014). We consider de novo whether a notice of claim complies with statutory requirements. *See Jones v. Cochise County*, 218 Ariz. 372, 375, ¶ 7 (App. 2008).

¶12 A notice of claim satisfying A.R.S. § 12-821.01 is a 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); *see also* A.R.S. § 12-821.01(A).[2]

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[2] For the first time on appeal, Mountainside contends that its claims seeking declaratory judgment and mandamus relief are not subject to the notice of claim requirement. But Mountainside waived this argument by failing to present it before the superior court. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, 349, ¶ 17 (App. 2007). Moreover, although case law has exempted claims for *non-monetary* declaratory or injunctive relief from the notice of claim requirement, *see State v. Mabery Ranch, Co.*, 216 Ariz. 233, 245, ¶¶ 52–53 (App. 2007*); Martineau v. Maricopa County*, 207 Ariz. 332, 336–37,

The statute must be construed, however, in light of the overarching policy objective that public entities are liable for acts and omissions of public employees; thus, "the rule is [governmental] liability and immunity is the exception." *Backus v. State*, 220 Ariz. 101, 104, ¶¶ 8–9 (2009) (alteration in original and citation omitted).

¶13 Section 12-821.01 is designed to "provide the government entity with an opportunity to investigate the claim, assess its potential liability, reach a settlement prior to litigation, [and] budget and plan." *Havasupai Tribe v. Ariz. Bd. of Regents*, 220 Ariz. 214, 223, ¶ 30 (App. 2008). The notice of claim thus must contain a description of the facts underlying the entity's alleged liability, together with a "specific amount for which the claim can be settled." A.R.S. § 12-821.01(A); *see also Deer Valley*, 214 Ariz. at 296, ¶ 9. Accordingly, the notice of claim must "include a particular and certain amount of money that, if agreed to by the government entity, will settle the claim." *Deer Valley*, 214 Ariz. at 296, ¶ 9. Similarly, the settlement offer encapsulated in the notice of claim must reflect a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Yollin v. City of Glendale*, 219 Ariz. 24, 31, ¶ 19 (App. 2008) (quoting Restatement (Second) of Contracts § 24 (1981)).

¶14 Mountainside's notice of claim referenced § 12-821.01, described the factual underpinnings of the fees paid, and explained in some detail Mountainside's theory that the fees were improper development fees in disguise. The notice asserted that the City "is required to refund such fees" and contained a short statement of Mountainside's "claim against the City":

> Mountainside MAR, LLC's claim against the City is in the amount of $1,024,991.00 for unlawfully assessed and collected development fees. Mountainside MAR, LLC also makes a claim for any interest earned by the City from the date of payment by Mountainside MAR, LLC of the unlawfully assessed fees to the date of refund.

¶15 The City contends that this formulation did not present a compliant notice of claim because it failed to include any language expressing a willingness to settle and did not designate a sum-certain settlement amount. Generally, a notice of claim that "[s]imply recit[es] the

¶¶ 20, 24 & n.7 (App. 2004), Mountainside's claims all seek a refund of the disputed fees: a monetary award subject to the strictures of § 12-821.01.

amount a claimant will demand in a complaint" does not satisfy § 12-821.01(A) because a statement of overall damages alleged "does not express a willingness to accept a specific sum in settlement." *Yahweh v. City of Phoenix*, 243 Ariz. 21, 23, ¶ 8 (App. 2017). But when Mountainside's notice of claim is considered as a whole, *see Jones*, 218 Ariz. at 375, ¶ 11, the statement of a "claim in the amount of $1,024,991.00 [the full amount paid] for unlawfully assessed and collected development fees" in conjunction with the assertion that the City "is required to refund such fees" is sufficient to glean an all-or-nothing demand as to the refund itself. And, although Mountainside's notice could have more simply indicated an interest rate or an overall amount of interest demanded, the notice provided the City a way to compute a precise settlement amount based on information uniquely available to the City and with no indication that Mountainside could reject the City's calculation. Thus, the notice adequately complied with the statute. *See A. Miner Contracting, Inc. v. City of Flagstaff*, No. 1 CA-CV 14-0249, 2015 WL 5770613, at *2, ¶ 12 (Ariz. App. Oct. 1, 2015) (mem. decision) (noting that the specific amount requirement may be satisfied "by requesting an unspecified amount of additional accrued interest if the method for calculating the additional interest is clearly identified in the notice," thus giving the public entity a "meaningful opportunity to consider its financial planning and budgeting when considering whether to settle the claim").

CONCLUSION

¶16 For the foregoing reasons, we reverse the decision of the superior court and remand for further proceedings consistent with this decision.

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