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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STEVEN BARSELL, *Plaintiff/Appellant*,

v.

MARICOPA COUNTY MUNICIPAL WATER CONSERVATION
DISTRICT NO 1, *Defendant/Appellee*.

No. 1 CA-CV 19-0242
FILED 2-20-2020

Appeal from the Superior Court in Maricopa County
No. CV2018-096444
The Honorable Janice K. Crawford, Judge

AFFIRMED

COUNSEL

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By David L. Abney
Co-counsel for Plaintiff/Appellant

Burnett Law Offices PLC, Mesa
By Thomas Burnett, Donal E. Burnett
Co-counsel for Plaintiff/Appellant

Titus Brueckner & Levine PLC, Scottsdale
By Bradley S. Shelts, Nathan B. Anderson, Jeffrey D. Harris
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the Court, in which Acting Presiding Judge David D. Weinzweig and Judge David B. Gass joined.

S W A N N, Judge:

¶1 Appellant Steven Barsell challenges the trial court's dismissal of his personal injury complaint for failure to properly serve Appellee Maricopa County Municipal Water Conservation District No. 1 (the "District") with a notice of claim as required by Arizona Revised Statutes ("A.R.S.") § 12–821.01(A). We reject his equitable estoppel, waiver, and equitable tolling arguments and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Barsell sued the District on August 31, 2018, alleging he suffered injury on a dock owned and operated by the District. He alleged he had "served a notice of claim on [the District]" on March 2, 2018. The notice of claim letter, dated February 27, 2018, was addressed to "Leyton Woolf, Board of Directors President," "Stan Ashby, Board of Directors Secretary," and "James Sweeney, General Manager."

¶3 The District moved to dismiss the complaint for improper service under Arizona Rule of Civil Procedure ("Rule") 4.1(h). The District admitted Barsell served a notice of claim on Woolf, its actual general manager, and a receptionist but contended none of them was its "chief executive officer, . . . official secretary, clerk, or recording officer," as required under Rule 4.1(h)(4)(B).

¶4 Barsell countered that the District waived any defense based on improper service and was "estopped to deny" proper service because a District representative told his process server that Ashby was the District's Secretary. Barsell offered supporting affidavits from the process server and his former counsel. The process server and his former counsel also testified that counsel mailed a copy of the notice of claim via certified mail to an address he had for Ashby and the process server unsuccessfully attempted to personally serve Ashby at two residential addresses. They also testified

the process server served a copy of the notice of claim on a District office receptionist, who said she "could accept service."

¶5 The trial court dismissed the complaint, finding Barsell failed to present "any evidence sufficient to show waiver or equitable estoppel" or "any persuasive legal or factual basis to apply equitable tolling." The trial court also found he "did not provide . . . any legal authority under which a claimant reasonably relied on a public employee's statement to a process server as to the identity of whom to serve[.]" Barsell appealed.

DISCUSSION

I. The Motion to Dismiss Should Have Been Converted into a Motion for Summary Judgment.

¶6 Barsell first contends the trial court should have treated the District's motion to dismiss as a motion for summary judgment. If matters outside the pleadings are presented to and not excluded by the court with a Rule 12(b) motion to dismiss, the motion "must be treated as one for summary judgment under Rule 56" and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Ariz. R. Civ. P. 12(d). The motion need not be converted, however, if the extraneous materials "neither add to nor subtract from the deficiency of the pleading[.]" *Belen Loan Investors, LLC v. Bradley*, 231 Ariz. 448, 451–52 ¶ 5 (App. 2012).

¶7 The District filed a copy of the notice of claim letter and its meeting minutes from December 10, 2017, and Barsell filed a second copy of the notice of claim letter and the above-referenced affidavits. The trial court did not exclude any of this evidence, and neither side contends it did not have a reasonable opportunity to present all relevant evidence. We therefore treat the District's motion as one for summary judgment and review the trial court's decision *de novo*, construing all facts and reasonable inferences therefrom in Barsell's favor. *See Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 59 ¶ 9 (App. 2010).

II. Barsell Did Not Properly Serve His Notice of Claim.

¶8 Before initiating an action for damages against a public entity, a claimant must provide notice of its claim to the entity. *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 294 ¶ 1 (2007). The notice of claim must be filed "with the person or persons authorized to accept service for the public entity . . . as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues." A.R.S.

§ 12–821.01(A). If a notice of claim is not properly filed, the claim is barred. *Lee v. State*, 218 Ariz. 235, 237 ¶ 6 (2008). Strict compliance is required; substantial compliance and actual notice do not suffice. *Falcon ex rel. Sandoval v. Maricopa Cty.*, 213 Ariz. 525, 527 ¶ 10 (2006); *Yahweh v. City of Phoenix*, 243 Ariz. 21, 23 ¶ 12 (App. 2017).

¶9 Barsell contends the District did not designate a person authorized to accept service on its behalf, meaning he could serve a notice of claim on its chief executive officer, secretary, clerk, or recording officer under Ariz. R. Civ. P. 4.1(h)(4). Barsell claims he satisfied this rule by serving the District's General Manager, which is equivalent to its chief executive officer.

¶10 Subsection (h)(4) applies to public entities other than the State, a county, or a municipal corporation. Ariz. R. Civ. P. 4.1(h)(1)–(3). The District is a municipal corporation subject to service under Rule 4.1(h)(3), which requires service on the District's "clerk." A.R.S. § 48–2901; Ariz. R. Civ. P. 4.1(h)(3). The District's clerk is its Secretary, not its General Manager. *See* A.R.S. § 48–2971 ("The officers of an irrigation district shall consist of a board of directors and a secretary appointed by the board."). For this reason, Barsell's service on the General Manager did not meet the requirements of Rule 4.1(h)(3).

III. **Barsell Did Not Show He Was Entitled to Equitable Relief.**

¶11 Barsell does not contend he served the District's actual Secretary, Henry Conklin. He instead contends equitable estoppel, waiver, and equitable tolling bar the District from seeking dismissal based on an improper service defense. The notice of claim statute is subject to each of these doctrines. *Jones v. Cochise Cty.*, 218 Ariz. 372, 379 ¶ 22 (App. 2008). We consider each in turn.

A. **Equitable Estoppel**

¶12 Equitable estoppel only applies if the party to be estopped engages in conduct inconsistent with its later position and the other party reasonably relies on that conduct to its detriment. *Valencia Energy Co. v. Ariz. Dep't of Revenue,* 191 Ariz. 565, 576–77 ¶¶ 35, 37 (1998). Because equitable estoppel is an affirmative defense, Barsell bears the burden of proving these elements. *See Lowe v. Pima Cty.*, 217 Ariz. 642, 650 ¶ 34 (App. 2008).

¶13 Equitable estoppel only applies against the government if there is some affirmative, authorized, formal act. *City of Tucson v. Clear*

Channel Outdoor, Inc., 218 Ariz. 172, 193 ¶ 78 (App. 2008). Though estoppel generally presents a fact-intensive inquiry, Arizona courts are not inclined to find equitable estoppel based on government conduct. *Pinal Cty. v. Fuller*, 245 Ariz. 337, 342 ¶ 18 (App. 2018); *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cty.*, 208 Ariz. 532, 537 ¶ 10 (App. 2004). "[T]he casual acts, advice, or instructions issued by nonsupervisory employees" do not create the level of needed action to support equitable estoppel. *Valencia Energy Co.*, 191 Ariz. at 577 ¶ 36; *see also Yahweh*, 243 Ariz. at 23 ¶ 12 ("Public entities in Arizona are not duty-bound to assist claimants with statutory compliance.").

¶14 Here, Barsell relied on the casual acts and advice of two nonsupervisory employees: (1) an unidentified "District representative" who told the process server Ashby was the Secretary, and (2) a receptionist who told the process server she could accept service. He presented no evidence to suggest either he or the process server did anything to confirm their statements, and his contention the receptionist did not say Ashby was not the Secretary—without any indication the process server asked her if Ashby was—is of no legal consequence.

B. Waiver

¶15 Waiver is a voluntary intentional relinquishment of a known right or conduct that warrants an inference of intentional relinquishment. *Havasupai Tribe of Havasupai Reservation v. Ariz. Bd. of Regents*, 220 Ariz. 214, 224 ¶ 33 (App. 2008). The party alleging waiver must show a clear intent to waive, as doubtful cases are decided against waiver. *Goglia v. Bodnar,* 156 Ariz. 12, 19 (App. 1987).

¶16 Barsell contends the District waived its notice of claim defense by "representing that [Ashby] was its official Secretary" and "accepting a notice of claim made out to the 'Board of Directors Secretary' in [Ashby's] name." As noted above, however, Barsell's former counsel obtained Ashby's name from another attorney, not the District, and the only District contact he cites is the unidentified "District representative" discussed above. One person misidentifying the Secretary does not establish an intent to waive notice of claim defenses, nor does the receptionist's acceptance of the notice of claim "for Mr. Ashby," as personal service on Ashby would not have satisfied Rule 4.1(h)(3). *See Falcon*, 213 Ariz. at 529 ¶ 24 (requiring strict compliance with service requirements because the rule "plainly lists the entities or persons who are authorized to accept service").

C. Equitable Tolling

¶17 Equitable tolling allows the court to extend an expired limitations period if sufficiently inequitable circumstances prevented the plaintiff from filing on time. *McCloud v. Ariz. Dep't of Public Safety,* 217 Ariz. 82, 87 ¶ 11 (App. 2007). The circumstances must be extraordinary, such as affirmative acts of fraud or concealment on the part of the defendant. *Id.* at 89 ¶ 20; *Porter v. Spader*, 225 Ariz. 424, 428 ¶ 11 (App. 2010). These circumstances must be established with evidence, not personal conclusions. *McCloud*, 217 Ariz. at 87 ¶ 13.

¶18 Barsell contends equitable tolling applies because "[t]he District assured [his] agents that it had identified the correct person as its Secretary, accepted service of a notice of claim made out to the 'Board of Directors Secretary,' and then asserted that service of the notice of claim was improper and untimely." Barsell offered no evidence of any such assurances; he instead again relies on the "District representative's" saying Ashby was the secretary. He offered no evidence to suggest the receptionist's statement was fraudulent or an attempt to conceal the Secretary's identity. Finally, Barsell cannot demonstrate his inadequate efforts substantially complied with or gave actual notice based on his "overriding purpose" of serving the Secretary. *Falcon*, 213 Ariz. at 527 ¶ 10.

CONCLUSION

¶19 We affirm summary judgment for the District. The District may recover its taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

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