DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

P. BRENT DANA, a married man dealing with his sole and separate property; COUNTRY CLUB HONDA, INC., an Arizona corporation, Plaintiffs/Appellants, v. CITY OF YUMA, a municipal corporation and political subdivision of the State of Arizona; ROBERT L. STULL and JANE DOE STULL, husband and wife, Defendants/Appellees.	No. 1 CA-CV 10-0321 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200901242

The Honorable Maria Elena Cruz, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

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T I M M E R, Judge

¶1 Brent Dana and Country Club Honda, Inc. (collectively "Dana") appeal the trial court's dismissal of their complaint against the City of Yuma ("Yuma") and city employee Robert L. Stull for failing to file a notice of claim in compliance with Arizona Revised Statutes ("A.R.S.") section 12-821.01(A) (2003). For the reasons that follow, we affirm the court's dismissal of the complaint against Stull, but we reverse the dismissal of the complaint against Yuma and remand for additional proceedings.

BACKGROUND

¶2 Dana's complaint seeks damages arising from his unsuccessful application to obtain Yuma's approval for construction of a bank branch on a parcel of land. Prior to filing suit, Dana filed a notice of claim with Yuma's Risk Management Division and provided a copy to the City Attorney. Neither Yuma nor Stull responded, and Dana initiated this lawsuit.

¶3 Yuma and Stull (collectively, "Defendants") moved to dismiss the complaint pursuant to Arizona Rule of Civil Procedure ("Rule") 12(b)(6) based on Dana's purported violation

of A.R.S. § 12-821.01(A) by failing to serve the notice of claim on either Yuma's Mayor or City Clerk and by failing to serve Stull individually. Dana responded he had fulfilled the statutory requirement by serving Yuma's Risk Management Department as directed by Yuma City Code ("Code") § 38-16 (1996). Alternatively, he claimed that equitable principles required the court to deny the motion. He additionally argued Stull was not entitled to receive a separate notice because the claim against him arose from the same operative facts underlying the claim against Yuma. Following oral argument, the trial court granted the motion. After entry of judgment, this timely appeal followed.[1]

DISCUSSION

[1] After oral argument before this court, Defendants filed a renewed motion to dismiss Dana's appeal as untimely because he filed his initial notice on April 22, 2010, before the court ruled on Defendants' attorney fee application. Defendants rely on the supreme court's recent decision in *Craig v. Craig*, ___ Ariz. ___, ___, ¶ 13, 253 P.3d 624, 626 (2011), which reiterated that a notice of appeal is ineffective if filed while non-ministerial tasks are pending before the court. In this case, however, Defendants did not file their application for fees until *after* Dana filed his April 22 notice of appeal. Defendants' prior request for fees in its motion to dismiss was denied by the court's failure to address it in the judgment dismissing the complaint. *See State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993) ("A motion that is not ruled on is deemed denied by operation of law."); *see also Modla v. Parker*, 17 Ariz. App. 54, 58, 495 P.2d 494, 498 (1972) (holding that "granting of judgment may be considered as a denial of the motion to amend and thus dispositive of the entire argument"). Therefore, there were no pending motions before the court when Dana filed his April 22 notice of appeal. We therefore deny Defendants' renewed motion to dismiss.

¶4 A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the complaint's legal sufficiency. *Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997). Dismissal is warranted when the complaint fails to allege sufficient facts to support a legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Although we review the grant of a motion to dismiss for an abuse of discretion, *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006), we review statutory interpretation issues de novo. *Green v. Garriott*, 221 Ariz. 404, 408, ¶ 9, 212 P.3d 96, 100 (App. 2009). We accept as true all facts stated in the complaint and resolve inferences in favor of the plaintiff. *Sw. Paint & Varnish Co. v. Ariz. Dep't of Envtl. Quality,* 191 Ariz. 40, 41, 951 P.2d 1232, 1233 (App. 1997) approved in part, 194 Ariz. 22, 976 P.2d 872 (1999). The trial court appropriately dismisses a complaint only when certain the plaintiff cannot prove facts entitling it to relief. *Id.*; *see also Fid. Sec. Life Ins. Co. v. State, Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998) (stating that dismissal for failure to state a claim is appropriate only if "as a matter of law . . . plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof").

I. Service on Yuma

¶5 Arizona's notice-of-claim statute requires a person with a claim against a public entity, including municipalities, to file that claim with the entity within 180 days after the cause of action accrues. A.R.S. §§ 12-820(7), -821.01(A); *City of Tucson v. Fleischman*, 152 Ariz. 269, 272, 731 P.2d 634, 637 (App. 1986). Section 12-821.01(A) directs service on "the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona [R]ules of [C]ivil [P]rocedure." Compliance with A.R.S. § 12-821.01(A) is "a 'mandatory' and 'essential' prerequisite to [a damages] action" against an Arizona public entity or employee. *Salerno v. Espinoza*, 210 Ariz. 586, 588, ¶ 7, 115 P.3d 626, 628 (App. 2005) (citations omitted).

¶6 Rule 4.1(i) directs how service of a notice of claim is made on a municipality. The rule provides that service "shall be effected by delivering a copy of the summons and of the pleading to the chief executive officer, the secretary, clerk, or recording officer thereof." The Yuma City Charter declares the Mayor as its chief executive officer and provides for a Clerk; Yuma does not have a secretary or recording officer. *See* Yuma City Charter, Art. VI, § 3; Art. VII, §§ 2(a), (d). To satisfy A.R.S. § 12-821.01(A) as a prerequisite to filing a lawsuit, therefore, a claimant against Yuma is

required to serve an appropriate and timely notice of claim on either the Mayor or City Clerk.

¶7 Although Dana concedes he did not directly serve the Yuma Mayor or City Clerk, he argues he complied with § 12-821.01(A) because Yuma expressly designated the Director of Risk Management to serve as the Mayor's agent for purposes of receiving notices of claim. To evidence this agency relationship, Dana cites Code § 38-16, which provides:

> All claims for damages against the city shall be filed with the Director of Risk Management in writing and under oath, within 180 days after the occurrence, event or transaction from which the damages allegedly arose, or within such shorter time as is otherwise provided by law, and shall set forth in detail the name and address of the claimant, the time, date and place of circumstances of the occurrence and the extent of the injuries or damages sustained and the specific amount for which the claim can be settled and the facts supporting that amount.
>
> ('80 Code, § 2-4) (Ord. 2080, passed 7-21-82; Ord. O96-59, passed 6-19-96)
>
> ***Statutory reference:***
>
> *Authorization of claim against public entity or public employee, see A.R.S. § 12-821.01.*

¶8 To create an agency relationship, the principal and agent must manifest an agreement that the agent will act on the principal's behalf and subject to his control. *Dawson v. Withycombe*, 216 Ariz. 84, 100, ¶ 43, 163 P.3d 1034, 1050 (App.

2007). The party asserting the existence of the agency bears the burden of proving it. *Brown v. Ariz. Dep't of Real Estate*, 181 Ariz. 320, 326, 890 P.2d 615, 621 (App. 1995).

¶9 Dana failed to prove the Yuma Mayor and Director of Risk Management agreed the Director would serve as the Mayor's agent and subject to his control for purposes of receiving notices of claim pursuant to A.R.S. § 12-821.01(A). The Yuma City Council – not the Mayor - enacted Code § 38-16. *See* Yuma City Charter, Art. XIII, § 8 ("The City Council shall prescribe, by ordinance, the manner in which claims or demands against the City shall be presented, audited and paid and may impose reasonable requirements with regard to notice and prompt presentation as a condition of payment."); *see also* Yuma City Charter, Art. VII, § 7 ("All claims or demands against the City of Yuma shall be presented in the manner and according to the limitations of time prescribed by ordinance of the City Council."). Although the Mayor is a voting member of the Council, the Council was the enacting entity, nevertheless. *See* Yuma City Charter, Art. VII, § 2(b). Indeed, the Mayor's vote was not needed as long as a majority voted to enact Code § 38-16. *See* Yuma City Charter, Art. VII, § 6(c). Additionally, nothing in the Code provision manifests assent by the Director of Risk Management to act subject to the Mayor's control or even

suggests the Director's awareness of this purported relationship.

¶10 Because Dana failed to present any evidence that the Yuma Mayor, as principal, expressly or impliedly entered an agency relationship with the Director of Risk Management for the purpose of facilitating a claimant's compliance with A.R.S. § 12-821.01(A), the trial court correctly ruled that Code § 38-16 did not constitute a delegation of that authority. In light of our conclusion, we need not decide whether the Mayor possesses the legal ability to appoint an agent to serve as the recipient of notices of claim served pursuant to A.R.S. § 12-821.01(A).

¶11 Dana alternatively contends Yuma is equitably estopped from asserting noncompliance with § 12-821.01(A) as a basis for dismissing the complaint because Code § 38-16 mandates service of a claim on the Director of Risk Management.[2] Yuma responds that equitable estoppel is not an available defense to the motion to dismiss because the supreme court has held that claimants must strictly comply with § 12-821.01(A), making the reasonableness of Dana's actions irrelevant. Assuming estoppel

[2] Dana additionally bases his estoppel argument on Yuma's filing instructions to claimants, which he attaches to his opening brief. Because the instructions are not part of the trial court record, however, we cannot consider them. *See* ARCAP 11(a)(1); *Davies v. Beres*, 224 Ariz. 560, 561 n.1, 233 P.3d 1139, 1140 n.1 (App. 2010) (disregarding appendix to opening brief because documents not in trial court record). Consequently, we grant Yuma's request to strike the appendix, which also contains an additional document not in the trial court record.

principles apply, Yuma argues that the existence of Code § 38-16 cannot support Dana's contention because Yuma was entitled to enact a parallel provision.

¶12 We reject Yuma's argument that it is not subject to the equitable estoppel doctrine because § 12-821.01(A) "rejects a 'reasonableness standard.'" The cases relied on by Yuma held only that the requirements of § 12-821.01(A) must be strictly complied with by a claimant. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 299, ¶ 21, 152 P.3d 490, 496 (2007) (rejecting contention that § 12-821.01(A) includes a "reasonableness standard" when considering the sufficiency of a recitation of the specific amount a claimant would be willing to take in settlement of a claim); *Falcon ex rel. Sandoval v. Maricopa Cnty.*, 213 Ariz. 525, 527, ¶ 10, 144 P.3d 1254, 1256 (2006) ("Actual notice and substantial compliance do not excuse failure to comply with the statutory requirements of A.R.S. § 12-821.01(A)."). Neither case discusses the applicability of equitable doctrines to governmental entities asserting failure to comply with § 12-821.01(A) as a defense.

¶13 Our supreme court has held that compliance with § 12-821.01(A) is subject to equitable defenses, including estoppel. *Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990) (holding procedural requirement of the predecessor to § 12-821.01(A) is "subject to waiver, estopppel and equitable

tolling"); *see also Little v. State*, 225 Ariz. 466, 471, ¶ 16, 240 P.3d 861, 866 (App. 2010) (same); *Jones v. Cochise Cnty.*, 218 Ariz. 372, 379, ¶ 22, 187 P.3d 97, 104 (App. 2008) (same). We therefore consider whether Dana's assertion that Yuma is equitably estopped from seeking dismissal of the complaint based on a failure to properly serve Yuma is susceptible of proof. See *Fid. Sec. Life Ins. Co.*, 191 Ariz. at 224, ¶ 4, 954 P.2d at 582.

¶14 "Equitable estoppel applies if (1) the party to be estopped intentionally or negligently induces another to believe certain material facts, (2) the induced party takes actions in reliance on its reasonable belief of those facts and (3) the induced party is injured by so relying." *Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcon. Ins. Co.*, 218 Ariz. 13, 21, ¶ 30, 178 P.3d 485, 493 (App. 2008). Dana's contention that these factors apply to defeat Yuma's motion to dismiss is susceptible to proof. The complaint alleges that Dana filed a notarized notice of claim "as required to [by] law and the city ordinances of the City of Yuma." Code § 38-16 requires filing a sworn notice of claim with the Director of Risk Management and cites § 12-821.01 as authority for asserting such claims. The substance and timing of the claim under Code § 38-16 are nearly identical to the substance and timing mandated by § 12-821.01(A). A claimant seeking to properly file a notice of

claim against Yuma pursuant to A.R.S. § 12-821.01 could believe that service on the Director of Risk Management as directed by Code § 38-16 satisfied the statutory requirement.

¶15 Dana adequately pled reliance on the Code provision by alleging he filed his notice pursuant to that provision; injury is demonstrated by the ramifications of failing to serve the correct person - dismissal of the complaint. All that remains to be determined is whether Dana's reliance was reasonable and whether Yuma induced that reliance negligently or intentionally. Dana was not required to submit evidence demonstrating these factors in a response to a motion to dismiss; all that matters is that these factors are susceptible of being proved by him to establish equitable estoppel.[3] *Compare* Rule 56(c) (requiring opposing memoranda and affidavits in response to motion for summary judgment). Indeed, Dana asserted additional facts bearing on these factors in his response to the motion and asked

[3] We are not aware of any authorities requiring a plaintiff to anticipate all defenses to its claims and plead all facts in its complaint necessary to counter these defenses in order to defeat a motion to dismiss pursuant to Rule 12(b)(6). We need not dally on this issue, however. In his response to the motion to dismiss, Dana requested leave to amend his complaint as necessary to assert equitable estoppel. Assuming the complaint failed to allege sufficient facts to assert equitable estoppel to defeat the motion to dismiss, the trial court should have granted Dana leave to amend his complaint. *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, ¶ 26, 990 P.2d 26, 33 (App. 1999) ("Before the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects.").

for leave to conduct discovery to prove them. The trial court should have permitted Dana to attempt to prove equitable estoppel. Accordingly, we reverse dismissal of the complaint against Yuma and remand for additional proceedings. In light of our decision, we need not address Dana's arguments concerning waiver.

II. Service on Stull.

¶16 Dana also challenges the dismissal of the claim against employee Stull. "When a person asserts claims against a public entity and public employee, the person 'must give notice of the claim to *both* the employee individually and to his employer.'" *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 351, ¶ 25, 160 P.3d 223, 230 (App. 2007) (emphasis in original) (quoting *Crum v. Super. Ct.*, 186 Ariz. 351, 352, 922 P.2d 316, 317 (App. 1996)). Rule 4.1(d) provides the applicable procedures for individual service. Ariz. R. Civ. P. 4.1(d).

¶17 Dana's complaint is devoid of any allegation of individual service upon Stull. Nevertheless, although Dana acknowledges the general requirement for individual service, he relies on this court's decision in *Havasupai Tribe v. Ariz. Bd. of Regents*, 220 Ariz. 214, 231, ¶ 66, 204 P.3d 1063, 1080 (App. 2008) to argue that no separate notice upon Stull was required because the claims against him rest upon the same set of facts forming the claim against the City. Dana misunderstands the

holding in *Havasupai Tribe.* In that case, the claimants served notices of claim upon both the public entity and the public employee individually and thus complied with the service requirement. *Id.* at 231, ¶¶ 66-67, 204 P.3d at 1080. The holding in *Havasupai Tribe* addressed the claimants' failure to "assert separate settlement demands against each" of the defendants. *Id.* at ¶ 66. In no way does *Havasupai Tribe* excuse the failure to deliver individual notice to Stull. We therefore affirm the dismissal of the complaint against him.

ATTORNEYS' FEES ON APPEAL

¶18 Defendants request an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003). Because Yuma did not prevail on appeal, we deny its request. Although Stull prevailed on appeal, we deny his request as well. Section 12-341.01(A) grants a court discretion to award reasonable attorneys' fees to the successful party in a contested action arising out of contract, express or implied. The action's nature and the surrounding circumstances determine whether the claim is one arising out of contract. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 14, ¶ 21, 6 P.3d 315, 319 (App. 2000). Importantly, the contract must have "some causal connection with the claim to support an award of fees." *Id.* (citation omitted).

¶19 Dana's claim for intentional interference with a contractual relationship arises out of law, not contract. *See Bar J Bar Cattle Co. v. Pace*, 158 Ariz. 481, 485-86, 763 P.2d 545, 549-50 (App. 1988). Likewise, his claim for breach of any implied covenant of good faith and fair dealing does not arise out of a contract in this case; there was no contract between Dana and Stull and/or Yuma.

CONCLUSION

¶20 For the foregoing reasons, we affirm the judgment insofar as it dismisses the complaint against Stull. We reverse the judgment insofar as it dismisses the complaint against Yuma, and we remand for further proceedings. We deny Defendants' request for an award of attorneys' fees on appeal.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

/s/
Lawrence F. Winthrop, Chief Judge