IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 07/12/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

GREGORY BEST, Plaintiff/Appellant, v. ROBERT A. ZUMOFF; DIANE DAVENPORT, Defendants/Appellees.	)	No. 1 CA-CV 10-0465 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-003435

The Honorable J. Richard Gama, Judge

AFFIRMED

Gregory Best — Phoenix
Plaintiff/Appellant *in Propria Persona*

Thomas C. Horne, Attorney General — Phoenix
By W. Lloyd Benner, Assistant Attorney General
Attorneys for Defendants/Appellees

T H O M P S O N, **Judge**

¶1 Gregory Best appeals the superior court's grant of summary judgment in favor of Robert Zumoff and Diane Davenport

(collectively, defendants), employees of the State of Arizona (State).[1] For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In February 2009, Best filed a complaint against defendants, alleging that in December 2003, the City of Phoenix (City) adopted an urban development plan for an area in South Phoenix. Best's complaint alleged that he was an investor who entered into purchase contracts with many South Phoenix property owners in 2003 and 2004 in order to develop a portion of the South Phoenix area consistent with the City's plans. According to Best, the City and its employees devised a conspiracy, which was furthered by the State and its employees, to ensure Best's development plan would not succeed. Best alleged that in order to implement the conspiracy, City and State employees held meetings to destroy and defame Best, interfered with Best's contracts, and encouraged other property owners not to enter into contracts with Best. In 2006, the State filed a consumer fraud action against Best.[2]

[1] Zumoff is an Assistant Attorney General and Davenport is Zumoff's legal assistant.

[2] We can take judicial notice of procedural facts as "reflected in the records of another superior court action." *State v. Lynch*, 115 Ariz. 19, 22, 562 P.2d 1386, 1389 (App. 1977). *See State v. Best,* Cause No. CV2006-016293.

¶3 On April 11, 2007, Best filed a notice of claim ("2007 notice of claim") outlining his claims against the State, the City, and their respective employees, including defendants, relating to a purported "fraud scheme" to interfere with his land development plan. According to that notice, Best's claims accrued on February 22, 2007.[3] On April 11, 2008, Best filed a complaint against the State and the City, contending those entities were vicariously liable for the tortious conduct of their employees in defrauding and defaming him, conspiring against him, intentionally interfering with his contracts, maliciously prosecuting him, obstructing justice, and committing abuse of process ("first action" or "first complaint"). The superior court dismissed Best's complaint because he failed to file it within one year after his causes of action accrued as required by Arizona Revised Statutes (A.R.S.) § 12-821. In a memorandum decision issued on October 29, 2009, this court affirmed the dismissal, concluding Best's causes of action accrued on February 22, 2007. *Best v. State,* 1 CA-CV 08-0827, 2009 WL 3526586, at *3, 5, ¶¶ 8, 11, 16 (Ariz. App. Oct. 29, 2009) (mem. decision).

[3] Specifically, Best stated: "Irreversible damage to Mr. Best occurred on October 26, 2006. A culmination of the illegal efforts, by the below named, became known on February 22, 2007."

¶4 On August 11, 2008, one month after Best filed an amended complaint in the first action, Best filed another notice of claim ("2008 notice of claim") "to recover from damages suffered . . . as a direct result of a Fraud Scheme carried out by Employees/Officials of the City of Phoenix and the State of Arizona" in connection with his land development plan. Best filed a complaint against defendants and other State and City employees[4] on February 3, 2009. As amended on February 19, 2010, his complaint alleged claims for conspiracy to defraud, defamation, tortious interference with contracts, malicious prosecution, obstruction of justice, and abuse of process, among other claims ("second action" or "second complaint").

¶5 Defendants moved for summary judgment, contending Best's claims were the same as those in the first action, and therefore, the 2008 notice of claim and the second complaint were untimely under A.R.S. § 12-821.01(A) and A.R.S. § 12-821, respectively. After this court issued its decision affirming the dismissal of the first action as untimely, defendants further argued Best was collaterally estopped from contesting the accrual date for his claims. The superior court granted defendants' motion, dismissed the complaint against them, and entered judgment pursuant to Arizona Rule of Civil Procedure

[4] Those defendants are not parties to this appeal.

(Rule) 54(b).[5] Best timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

¶6 We review the superior court's entry of summary judgment de novo, viewing the facts and inferences in the light most favorable to the non-moving party. *Brookover v. Roberts Enters., Inc.,* 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). Summary judgment is appropriate when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c)(1). We determine de novo whether there are genuine issues of material fact and whether the superior court erred in applying the law. *Unique Equip. Co. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999).

¶7 A person with a claim against a public entity or public employee must file a notice of claim within 180 days after the cause of action accrues. A.R.S. § 12-821.01(A). Additionally, an action against a public entity or public employee must be filed within one year after the cause of action accrues. A.R.S. § 12-821. "[A] cause of action accrues when

[5] Although the superior court mistakenly cited Rule 54(g) instead of Rule 54(b), the judgment contains the necessary finality language to make it appealable. *See Grand v. Nacchio*, 214 Ariz. 9, 16, ¶ 17, 147 P.3d 763, 770 (App. 2006) (a judgment can be considered final without specifically referencing Rule 54(b) if appropriate finality language is contained in the judgment).

the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." A.R.S. § 12-821.01(B); *accord Thompson v. Pima Cnty.*, 226 Ariz. 42, __, ¶ 12, 243 P.3d 1024, 1028 (App. 2010).

¶8 Best argues he timely filed his 2008 notice of claim and his second complaint based on new evidence, specifically, a police report and emails between City officials, discovered on February 20, 2008, which gave rise to new causes of action not alleged in his first complaint. Therefore, he contends, the new causes of action accrued on February 20, 2008. Best does not specify which of the claims in his second complaint are based on the newly discovered evidence.

¶9 The police report, dated May 14, 2004, concerns an investigation of Best for alleged fraud and violation of real estate laws and states "there is no crime or civil violation." Best argues concealment of this police report led the State to file false claims against him, including the 2006 consumer fraud action. Based on the allegations in the second complaint and the 2008 notice of claim, it appears the corresponding causes of action for this claim are malicious prosecution, abuse of process, and defamation. *See Carroll v. Kalar,* 112 Ariz. 595, 596, 545 P.2d 411, 412 (1976) (identifying the elements of malicious prosecution); and *Bird v. Rothman,* 128 Ariz. 599, 602,

627 P.2d 1097, 1100 (App. 1981) (identifying the elements for abuse of process).

¶10 The record reveals, however, that the newly discovered evidence relates to claims contained in the first complaint, which was dismissed in October 2008. For instance, in the 2007 notice of claim Best stated a City employee "made [a] false police report for the use of having Best charged with fraud," and another City employee "initiated a false police report and perpetrated lies about Best in a scheme to defraud" Best. Best listed abuse of process and defamation as allegations he was "prepared to prove." Additionally, in the first complaint, Best alleged Zumoff "[m]aliciously [p]rosecuted to cause embarrassment and financial harm to" Best and committed "[m]alicious [d]efamation against [Best]". Best also alleged Davenport "falsified information regarding [Best] and [Best's] business interests to a Superior Court Judge and Clerk of the Court." *See Thompson,* 226 Ariz. at ___, ¶ 12, 243 P.3d at 1028 ("A plaintiff need not know *all* the facts underlying a cause of action to trigger accrual[,] [b]ut . . . must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury.") (quoting *Doe v. Roe,* 191 Ariz. 313, 323, ¶ 32, 955 P.2d 951, 961 (1998)); *cf. Dube v. Likins,* 216 Ariz. 406, 416, ¶¶ 30-33, 167 P.3d 93, 103 (App. 2007).

¶11 We understand Best's second complaint to allege he suffered damages as a result of defendants' "active concealment" of evidence. It is clear from the 2007 notice of claim, however, that Best knew of facts to support this claim when he stated all "individuals have possession of exculpatory evidence and are purposely suppressing it" and that Zumoff "has intentionally been keeping exculpatory evidence suppressed."[6] Further, we previously explained "regardless of whether Best continued to suffer additional damages beyond February 22, 2007, it is clear from the notice of claim that as of that date, he was aware he was being damaged and knew the cause or source of his damages." *Best*, 1 CA-CV 08-0827, 2009 WL 3526586 at *3, ¶ 10; *see* Arizona Rule of Civil Appellate Procedure 28(c) (although this court's memorandum decision does not create legal precedent, it may be used for the legal defenses of collateral estoppel, res judicata, and law of the case).

[6] Without citing any authority, Best argues no accrual runs when active concealment exists. This court rejected the same argument in Best's prior appeal because Best admitted he had actual knowledge of the fact he was damaged and the causes thereof on February 22, 2007. *Best*, 1 CA-CV 08-0827, 2009 WL 3526586 at *3, ¶ 11; *see Lennar Corp. v. Transamerica Ins. Co.*, 606 Ariz. Adv. Rep. 21, ¶ 12, 251 P.3d 421, 426 (App. Apr. 14, 2011) (the law of the case doctrine provides "once an appellate court has decided a legal issue, that decision is the law of that case in subsequent superior court proceedings and the decision will not be reconsidered in a second appeal, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested.").

¶12 Accordingly, because the allegations pertaining to the newly discovered police report are based on the same facts underlying Best's first complaint, Best's claims pertaining to the police report accrued on February 22, 2007. *Cf. Haab v. Cnty. of Maricopa,* 219 Ariz. 9, 13, ¶ 22, 191 P.3d 1025, 1029 (App. 2008) (a new notice of claim or amended notice of claim is required when a claim is not part of a continuing condition or theory described in a notice of claim and is "based on entirely different facts than the events described in the notice of claim").

¶13 Best also alleges that newly discovered emails revealed that City officials were carrying out a scheme to "prevent success of the area plans submitted by" Best. Even putting aside the fact the emails pertain solely to City employees, not defendants, the emails relate to the same causes of action underlying the first complaint. Moreover, according to the record, Best filed another notice of claim on July 21, 2008, with the City and three of its employees based on evidence "uncovered" January 28, 2008. That evidence includes the emails Best now references. Best filed the second complaint on February 3, 2009, more than one year after he discovered the emails, and consequently, any corresponding cause of action. Thus, Best's notice of claim and complaint were untimely under A.R.S. § 12-821.01(A) and A.R.S. § 12-821, respectively. The

superior court properly granted summary judgment in favor of defendants.

CONCLUSION

¶14 For the foregoing reasons, we affirm the grant of summary judgment in favor of defendants. As the prevailing parties, we award defendants their costs on appeal. A.R.S. § 12-341.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
MARGARET H. DOWNIE, Judge