IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/09/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

SALLY I. SCHAER, an unmarried woman, Plaintiff/Appellant, v. EDWARD STANLEY MOONEY, JR. and ANDREA JANE MOONEY, individually and/or as husband and wife; CITY OF BULLHEAD CITY, ARIZONA, a municipal entity; CITY OF BULLHEAD CITY POLICE DEPARTMENT; RODNEY B. HEAD, Chief, Bullhead City Police Department, Defendants/Appellees.	No. 1 CA-CV 10-0770 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. CV2009-2369

The Honorable Lee F. Jantzen, Judge

AFFIRMED

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B R O W N, Judge

¶1 Sally I. Schaer appeals from the trial court's grant of summary judgment in favor of Bullhead City, Bullhead City Police Department (the "Department"), police officer Edward Stanley Mooney, Jr., and Chief of Police Rodney Head (collectively "the City"). For the following reasons, we affirm.

BACKGROUND

¶2 On October 25, 2008, Officer Mooney's patrol car collided with Schaer's vehicle, causing injuries to Schaer. On April 22, 2009, Schaer's attorney signed a notice of claim and sent it by overnight delivery to a process server in Bullhead City, requesting that the notice be served on the City and Officer Mooney the following day, April 23, 2009. Although the parties dispute why the process server was unable to serve these defendants on April 23, it is undisputed that neither Officer Mooney nor the City received the notice of claim until 181 days after the accident.

¶3 In October 2009, Schaer sued the City, asserting claims of negligence, respondeat superior, negligent supervision, and negligence per se. In its answer, the City

asserted that Schaer's claims were barred because she failed to serve a notice of claim within 180 days of the accident as required by Arizona Revised Statutes ("A.R.S.") section 12-821.01 (2003). Additionally, the City asserted that Schaer failed to serve the Department or the Chief of Police with any notice of claim.

¶4 In April 2010, the City moved for summary judgment, asserting that Schaer's claims were barred because she failed to comply with the statutory time limits for serving a notice of claim as set forth in § 12-821.01. The City supported its motion with an affidavit stating that Schaer failed to file a timely response to the City's requests for admissions, which had requested, in part, that Schaer admit she failed to timely serve the notice of claim on both Officer Mooney as well as the City. Because Schaer failed to respond within forty days, the requests for admissions were deemed admitted.

¶5 In her response, Schaer did not controvert the City's argument that her notice of claim was untimely. Nevertheless, she argued that a material issue of fact existed because, *inter alia*: (1) the process server failed to properly discharge his duties despite Schaer's diligence in attempting to serve the City; (2) discovery was necessary to determine whether the City deliberately avoided, or otherwise wrongfully refused, service of process; and (3) the City had waived its right to assert the

timeliness defense due to their participation in the litigation for approximately six months before raising it. In her controverting statement of facts, Schaer also asserted that the City wrongfully refused to accept service of the notice of claim during normal business hours, relying solely on two affidavits from the process server.

¶6 Following oral argument, the trial court granted the City's motion, finding that the material facts were not in dispute and that A.R.S. § 12-821.01 requires strict compliance. The court then explained that although it "would like to hear this case on the merits," the notice of claim had to be served within 180 days:

> The Plaintiff wanted to serve the documents on the last day but the process server did not share the attorney's sense of urgency. One hundred eighty days is sufficient time to get the proper parties served in a case like this and the deadline created by the legislature takes that into account. By literally waiting until the last minute and relying on the stubbornness, or the lack thereof, of the process server to get the job done, the Plaintiff ended up failing to meet the deadline.

The court later signed a formal order and Schaer timely appealed.

DISCUSSION

¶7 Schaer asserts that the trial court erred when it granted the City's motion for summary judgment.[1] More specifically, she asserts the City was estopped from claiming Schaer's notice of claim was untimely because the City refused service of process during normal business hours. In the alternative, Schaer argues that the City waived any requirement for strict compliance with the 180-day requirement in the notice of claim statute because the City made compliance "impossible."

¶8 Because Schaer failed to raise these arguments below, however, she has waived them on appeal. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) (noting that a party waives any argument not properly presented in the trial court); *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990). In Schaer's response to the motion for summary judgment, she asserted that the City waived its argument that the notice of claim was untimely because it participated in the case for "seven months" before raising the timeliness defense; therefore, she contended that the City took "substantial action to litigate the merits of the claim that

[1] Schaer did not present any evidence in the trial court that she served Rodney Head or the Department with a notice of claim, nor does she contend on appeal that the court erred in granting summary judgment as to those defendants. Thus, Schaer has waived any arguments as to Rodney Head and the Department.

would not have been necessary had the entity promptly raised the defense." *See City of Phoenix v. Fields*, 219 Ariz. 568, 575, ¶ 30, 201 P.3d 529, 536 (2009) (citation and quotation omitted). But that procedural argument is far different from the "waiver" she now raises on appeal——that the City waived its right to assert non-compliance with the claim statute because it refused to accept service of process. Nor did Schaer develop any argument in the trial court that the City should be estopped from asserting its defense that she failed to file a timely notice of claim. Accordingly, we find that Schaer did not preserve her arguments relating to estoppel and waiver.[2]

¶9 Even assuming, however, that these arguments were not waived, the trial court properly granted summary judgment. Summary judgment is appropriate when the moving party shows that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1). We determine de novo whether the non-moving party established any genuine issues of material fact and whether the court properly applied the law. *Mousa v. Saba*, 222 Ariz. 581, 585, ¶ 15, 218 P.3d 1038, 1042 (App. 2009). We view the facts and the inferences to be drawn from those facts in the light most

[2] Because Schaer failed to provide us with a transcript of the oral argument on the City's summary judgment motion, we presume that the transcript supports our conclusion that Schaer failed to raise these arguments. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

favorable to the party against whom summary judgment was entered. *Id.*

¶10 Section 12-821.01 requires plaintiffs with claims against public entities or employees to file a notice of claim with the public entity, employee, or agent authorized to accept service within 180 days after the cause of action accrues. A.R.S. § 12-821.01. The term "file," as set forth in the statute, requires delivery of the notice of claim by mail or service of process to the appropriate person within the statutory time period. *Lee v. State*, 218 Ariz. 235, 239, ¶¶ 7, 19, 182 P.3d 1169, 1173 (2008). By affidavit, the City established that Schaer failed to file the notice of claim with the City and Officer Mooney within the 180-day statute of limitations.[3] This was sufficient to entitle the City to summary judgment in its favor. *See Thompson v. Pima Cnty.*, 226 Ariz. 42, ___, ¶ 15, 243 P.3d 1024, 1029 (App. 2010).

[3] The City's affidavit stated that Schaer failed to respond to the City's requests for admission within forty days. Included in the requests for admission was a statement that Schaer did not file her claim with the Officer within "180[] days after the motor vehicle accident" and that her notice of claim "was not received by the City of Bullhead City until [the 181st day after the accident]." As a result, the statements in the request for admissions were deemed admitted. *See* Ariz. R. Civ. P. 36(a) (Requests for admission are "admitted unless, within (40) days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection[.]").

¶11 To rebut this evidence, Schaer had the burden of showing available, competent evidence that would justify a trial. *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 156, 871 P.2d 698, 703 (App. 1993)*; State v. Mecham*, 173 Ariz. 474, 478, 844 P.2d 641, 645 (App. 1992). A party "cannot rely solely on unsupported contentions that a dispute exists to create a factual issue that would defeat summary judgment." *Mecham*, 173 Ariz. at 478, 844 P.2d at 645; *see also Portonova v. Wilkinson*, 128 Ariz. 501, 502, 627 P.2d 232, 233 (1982) ("[W]hen the moving party presents sworn proof of specific facts negating the adverse party's pleadings, the adverse party must respond with proof of specific facts showing a genuine issue of fact for trial."). Rather, the non-moving party must set forth facts supporting issues of material fact in an affidavit or deposition; "unsworn and unproven assertions are not facts." *Mecham*, 173 Ariz. at 478, 844 P.2d at 645; *see also Molever v. Roush*, 152 Ariz. 367, 370-71, 732 P.2d 1105, 1109-10 (App. 1986) (finding that plaintiff's mere statement asserting negligence in a response to a motion for summary judgment, without affidavits or depositions, was "insufficient to rebut [defendant's] prima facie showing").

¶12 In Schaer's response and statement of supporting facts, she asserted generally that the City wrongfully refused service of process of the notice of claim during normal business

hours. However, because she provided no "evidence" to support this assertion, it was insufficient to rebut the City's motion. *See Mecham*, 173 Ariz. at 478, 844 P.2d at 645. Although Schaer provided affidavits signed by the process server regarding his attempted service, these affidavits do not support Schaer's assertions that the City refused service. In one affidavit, dated April 24, 2009, the process server stated that the notice of claim regarding the City was received "too late to serve" on April 23, 2009. We do not discern from this affidavit any facts supporting Schaer's assertions that the server was refused by the City. In the second affidavit, also dated April 24, 2009, the process server attempted to serve the Officer at his place of work at 4:50 pm on April 23, 2009, but the server "was informed [Officer Mooney] would not be in until Friday (4/24/09)." This affidavit similarly fails to show any impropriety on behalf of the City. Moreover, pursuant to § 12-821.01, Schaer was required to deliver the notice of claim to Officer Mooney personally, an individual of suitable age and discretion residing with Officer Mooney, or Officer Mooney's appointed agent. *See Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 61, ¶ 20, 234 P.3d 623, 629 (App. 2010); *see also* Ariz. R. Civ. P. 4.1(d). Thus, neither of the process server's affidavits present any issue of material fact that the City wrongfully refused service of process.

¶13 Relying on *Johnson v. Svidergol*, 157 Ariz. 333, 335, 757 P.2d 609, 611 (App. 1988), and its progeny, however, Schaer asserts that the City has waived any objections to her statement of facts and supporting affidavits because the City never moved to strike these documents. *See also Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 112, ¶ 26, 158 P.3d 232, 241 (App. 2007); *Ancell v. Union Station Assocs., Inc.*, 166 Ariz. 457, 460, 803 P.2d 450, 453 (App. 1990) ("Deficiencies in supporting documents attached to summary judgment pleadings can be waived.").

¶14 In *Johnson*, the trial court granted summary judgment to plaintiffs and defendants appealed, arguing that the trial court decision was in error. 157 Ariz. at 334, 757 P.2d at 610. Plaintiffs disagreed, arguing that defendants failed to submit legally sufficient documentation in support of their statement of facts in opposition to the motion for summary judgment because defendants' discovery responses were unsigned and unverified. *Id.* at 334-35, 757 P.2d at 610-11. As a result, plaintiffs argued that defendants' documents could not be considered in determining whether an issue of material fact existed. *Id.* at 335, 757 P.2d at 611. Plaintiffs, however, failed to object at trial and failed to move to strike the insufficient documents. *Id.*

¶15 This court found that "[w]hen insufficient supporting documents are submitted, a motion to strike is appropriate." *Id.* We therefore held that because no "objection or motion to strike was made by the [plaintiffs] after the [defendants'] opposition was filed[,]" plaintiffs waived "any objections [plaintiffs] may have had to the documents submitted by the [defendants] as part of their opposition." *Id.* We reasoned that an "[o]bjection to insufficient documentation is required so that the offering party may have an opportunity to cure the alleged defects." *Id.*

¶16 We reject Schaer's contention that the City somehow waived its right to question the sufficiency of Schaer's affidavits. In its reply, the City stated: "There is absolutely no evidence to suggest that [the City] in any way caused the failures of [Schaer's] attorney or her process server." In support of this statement, the City referenced the process server's affidavits, noting that these did not prove any intentional avoidance of service and that Schaer's statement of facts "embellishe[d] and misstate[d] [the contents of the affidavits]."

¶17 Although Schaer appears to assert that the City must have objected by way of a motion to strike, *Johnson* merely requires either an "objection *or* motion to strike" to prevent application of waiver. *Id.* (emphasis added). Moreover, the

City's objection provided Schaer with an opportunity to cure the defects. In fact, after the City filed its reply, the court permitted Schaer to file additional exhibits in support of her response. Despite this opportunity, Schaer failed to provide any additional evidence to prove up her claim that the City wrongfully refused service. Accordingly, the City did not waive its objection to the insufficiency of Schaer's affidavits.

CONCLUSION

¶18 For the foregoing reasons, we affirm the trial court's order granting summary judgment.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DONN KESSLER, Judge