IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 11/03/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

COMMUNITY ASSOCIATION UNDERWRITERS OF AMERICA, INC., a Delaware corporation, as subrogee of NORTHERN MANOR WEST TOWNHOUSE ASSOCIATION,	1 CA-CV 10-0797
	DEPARTMENT B
	MEMORANDUM DECISION
Plaintiff/Appellant,	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
SALT RIVER PROJECT AGRICULTURAL & IMPROVEMENT POWER DISTRICT,	
Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-051874

The Honorable Michael R. McVey, Judge

AFFIRMED

DeConcini McDonald Yetwin & Lacy, P.C. Tucson
By Gary F. Urman and Marian C. LaLonde
Attorneys for Plaintiff/Appellant

Jennings, Strouss & Salmon, P.L.C. Phoenix
By Eric D. Gere and John J. Egbert
Attorneys for Defendant/Appellee

K E S S L E R, Judge

¶1 Plaintiff/Appellant, Community Association Underwriters of America, Inc. ("CAU") appeals the superior court's grant of summary judgment in favor of Defendant/Appellee, Salt River Project Agricultural Improvement and Power District ("SRP") for CAU's failure to abide by Arizona's notice of claim statute. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The material facts are not in dispute. On September 7, 2009, a fire located at the insured property caused damage. Counsel for CAU contacted SRP and exchanged emails with Dean Hodgen of the SRP Claims Services Department about the fire and scheduling a site visit. On September 10, 2009, Hodgen emailed CAU's counsel to memorialize a conversation the men had earlier that day. The substance of that conversation does not appear in the record. Hodgen requested that CAU's expert contact him to schedule a site visit and informed counsel that SRP would bring a fire expert and engineer. CAU responded and asked whom Hodgen "represented." Hodgen replied, "Salt River Project (SRP), we are the company that provides the electricity." In the same email chain Hodgen also acknowledged that "this possible claim" included several addresses and requested the additional addresses.

¶3 On December 1, 2009, CAU's counsel sent a letter to Hodgen stating CAU believed SRP was liable for the damage to the insured property based on incidents of similar fires at the same location in the past. The letter indicated that counsel enclosed photographs of the damaged property, an estimate for repairs ($179,717.65) and an invoice for repair ($1,461.02). The letter stated: "Barring any supplements, CAU has completed its adjustment of this loss, and it totals $181,178.67. This assumes, in accordance with Arizona law, that CAU is entitled to payment of the full repair costs." The next day CAU's counsel emailed Hodgen and attached the letter stating: "I don't know if you remember me, but I'm subrogation counsel for the insurer . . . . I sent you the [attached] letter yesterday . . . but wanted to clear up when the prior fires mentioned therein occurred. . . . and again invite you to call me . . . to discuss resolution of this matter."

¶4 On December 8, 2009, CAU's counsel sent another email to Hodgen: "Thank you for reaching out to me this morning . . . . I appreciate your company's decisive attitude about my proposal. Per our discussion, I will be filing suit as soon as possible, and simply ask if you will be kind enough to accept

service on SRP's behalf."[1] Hodgen replied by informing counsel, "I am unable to accept service on behalf of [SRP]. Service can be accepted by SRP's statutory agent, Terrill Lonon, who is the Corporate Secretary. Please feel free to call." Thereafter in late January 2010, Hodgen emailed counsel with the date of SRP's site inspection.

¶5 CAU filed a complaint against SRP on May 7, 2010. CAU made no allegation that it filed a notice of claim. On May 26, 2010, SRP appeared in the action by filing a motion to dismiss the complaint. SRP argued inter alia: (1) it had no reason to believe the December letter to Hodgen was a notice of claim; and (2) Hodgen was not authorized to accept service of a notice of claim for SRP.

¶6 In response, CAU attached the December letter and the emails exchanged between counsel and Hodgen, arguing that it was a properly filed notice of claim. CAU contended: (1) Hodgen was "identified as an administrator of SRP Claims Service, an SRP department established specifically to deal with claims against the entity" and he was able to accept service under the Arizona Rules of Civil Procedure; (2) Hodgen was held out as a person with the authority to accept service; (3) SRP failed to claim

[1] The "proposal" to which counsel referred is unclear, but CAU's response to the motion to dismiss contends that Hodgen rejected the "claim as presented in its notice of claim letter dated December 1, 2009."

the notice was deficient, and SRP's conduct (via Hodgen) in investigating the claim waived SRP's affirmative defense to any alleged defects in the notice and its service; and (4) the contents of the notice complied with the statute.

¶7 The superior court entered judgment in favor of SRP and CAU timely filed a notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(B) (2003).

ISSUES ON APPEAL

¶8 In its briefs, CAU contends that it complied with A.R.S. § 12-821.01 (2003) because the contents of its notice of claim were complete and the notice was properly served under Arizona Rule of Civil Procedure 4.1(j). Alternatively, CAU contends there are unresolved fact questions that should be resolved by a jury pertaining to: (1) its compliance with the statute; (2) Hodgen's authority to accept service of a notice of claim; and (3) SRP's waiver of the statutory requirements. CAU argues that under *Lee v. State*, 225 Ariz. 576, 579-80, ¶ 13, 242 P.3d 175, 178-79 (App. 2010), these outstanding fact issues must be resolved by a jury, and therefore, the court erred in granting summary judgment.

¶9 SRP asserts there are no material fact issues in dispute, but only questions of law. SRP argues that Hodgen was not authorized to accept service. Rather, service under Rule

4.1(j) was improper because SRP is a subdivision of the state and service must be made under Rule 4.1(i). SRP also argues that its pre-litigation conduct did not waive its affirmative defense to the deficient notice of claim because it did not know the December letter was a notice of claim and it did not engage in "acts inconsistent with an intent to assert the right."

STANDARD OF REVIEW

¶10 Because CAU attached documents outside of the record to its response, SRP's motion to dismiss was converted into a motion for summary judgment. *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 59, ¶ 9, 234 P.3d 623, 627 (App. 2010); *see* Ariz. R. Civ. P. 12(b). We review *de novo* whether summary judgment is warranted including whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We construe all facts in favor of the nonmoving party. *Yollin v. City of Glendale*, 219 Ariz. 24, 27, ¶ 6, 191 P.3d 1040, 1043 (App. 2008). We also "review *de novo* a trial court's determination that a party's notice of claim failed to comply with § 12-821.01." *Jones v. Cochise Cnty.*, 218 Ariz. 372, 375, ¶ 7, 187 P.3d 97, 100 (App. 2009) (emphasis added).

DISCUSSION

I. For purposes of A.R.S. § 12-821.01, CAU was required to serve a notice of claim on SRP pursuant to Rule 4.1(i), Arizona Rules of Civil Procedure.

¶11 Before a lawsuit may be filed against a public entity, prospective litigants must file a notice of claim with the entity: "Persons who have claims against a public entity . . . shall file claims with the person or persons authorized to accept service for the public entity . . . as set forth in the Arizona [R]ules of [C]ivil [P]rocedure within one hundred eighty days after the cause of action accrues."[2] A.R.S. § 12-821.01(A). In its briefs, CAU contends that it properly served SRP with a notice of claim in accordance with Rule 4.1(j) of the Arizona Rules of Civil Procedure.[3] SRP maintains that service must be effected under the procedure prescribed in Rule 4.1(i) which is entitled "Service of Summons Upon a County, Municipal Corporation or Other Governmental Subdivision" and requires service to "be effected by delivering a copy of the summons and

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[2] There is no dispute that the cause of action accrued on the date of the loss in September 2009. Thus, the notice of claim period expired in March 2010.

[3] Rule 4.1(j) governs the "Service of Summons Upon Other Governmental Entities" and provides, "[s]ervice upon any governmental entity not listed above shall be effected by serving the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity." Ariz. R. Civ. P. 4.1(j). If there is a "'group' or 'body' responsible for the administration of the entity," service on any member of the group is sufficient. *Id*.

of the pleading to the chief executive officer, the secretary, clerk, or recording officer thereof."

¶12 CAU's complaint correctly asserts that SRP "is a political subdivision within the State of Arizona." CAU conceded at oral argument on appeal that service on SRP had to be made pursuant to Rule 4.1(i). We agree because SRP is expressly considered to be a "subdivision" of the state. *See Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 214, ¶ 76, 16 P.3d 757, 775 (2001) (quoting *Local 266, Int'l Brotherhood of Elec. Workers v. Salt River Project Agric. Improvement & Power Dist.*, 78 Ariz. 30, 35, 275 P.2d 393, 396 (1954)); *City of Mesa v. Salt River Project Agric. Improvement & Power Dist.*, 92 Ariz. 91, 97, 373 P.2d 722, 726 (1962); *Salt River Valley Water Users' Ass'n v. Giglio*, 113 Ariz. 190, 193, 549 P.2d 162, 165 (1976); *accord Ball v. James*, 451 U.S. 355, 358 (1981).

¶13 CAU did not properly file any notice of claim under Rule 4.1(i). CAU only served Hodgen, a claims services employee for SRP. CAU does not claim that Hodgen was the CEO, secretary, clerk or recording officer of SRP for purposes of Rule 4.1(i).

II. SRP did not waive its notice of claim affirmative defense by conduct.

¶14 CAU contends that SRP waived its defense of improper service though Hodgen's conduct. We disagree. First, CAU's argument that "[t]he Claims Services Department has administrative and managerial responsibility within SRP and for purposes of the notice of claim statute," is unsupported by the record. The only document which CAU points to is a description of SRP's Claims Services Department, which does not address filing notice of claims under A.R.S. § 12-821.01 with the department.

¶15 Second, CAU broadly contends that "[d]uring extensive communications . . . Hodgen held himself out to be the person within the claims services group that was responsible for the administration of SRP's claims." CAU argues that it "relied on the conduct and representations made by SRP and Mr. Hodgen that he was the proper individual *to receive claim information* for SRP and had *authority to act on behalf* of SRP." (Emphasis added.) But there is no factual support in the record for these assertions or that they pertain specifically to Hodgen's ability to process a "notice of claim," as opposed to any claim that is processed through SRP's claims department.[4]

[4] We note that CAU did not provide an affidavit from counsel to substantiate its pleadings.

¶16 The evidence in the record does not suggest that Hodgen held himself out in a misleading way.[5] The few documents in the record show that counsel for CAU and Hodgen exchanged emails within days after the fire, in September 2009, and then again in December 2009. There is no mention of a "notice of claim" in the emails. The identifying information under Hodgen's name says "SRP Claims Services" and then lists his contact information. The emails do not show that Hodgen represented himself as having any particular authority to accept a "notice of claim."

¶17 Moreover, the record shows that in December 2009, *before* the time to file a notice of claim had expired, Hodgen specifically informed counsel for CAU that he did not have the authority to accept service of a suit for SRP and that CAU should serve the corporate secretary. CAU's contention that such statement pertained only to service of process of a lawsuit is immaterial because the provisions for service of a lawsuit under the Arizona Rules of Civil Procedure are specifically incorporated in A.R.S. § 12-821.01(A). Therefore, Hodgen's email, in which he also provided the name of the corporate secretary, should have alerted counsel that the December letter

[5] There is no evidence in the record to support CAU's claim that in other "extensive communications" Hodgen allegedly held himself out to be someone who could properly accept service of a notice of claim.

was not a properly served "notice of claim" for purposes of our notice of claim statute and rules of procedure.

¶18 CAU also relies on *Young v. City of Scottsdale*, 193 Ariz. 110, 114, ¶ 15, 970 P.2d 942, 946 (App. 1998), *disapproved on other grounds by Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 297, ¶ 12, 152 P.3d 490, 494 (2007), and *Jones*, 218 Ariz. at 379, ¶ 24, 187 P.3d at 104, to argue that "waiver may occur when a party fails to assert a deficiency in the notice of claim until after . . . *investigating the claim prior to litigation.*" CAU argues that because Hodgen continued to communicate about the claim, investigate the claim, and ultimately reject the claim, SRP's conduct was inconsistent with any intention to challenge the sufficiency of the service of the notice of claim.

¶19 CAU's reliance on *Young* and *Jones* is misplaced. In *Young*, the plaintiff improperly served his notice of claim by sending a letter to the city attorney after the notice of claim period had expired. 193 Ariz. at 111, ¶ 3, 970 P.2d at 943. But because the matter was referred to an independent claims adjuster retained by the City to investigate the claim, and the claim was denied without an objection to service, the City waived by its conduct any complaint about the improper service of process. *Id.* at 114, ¶ 15, 970 P.2d at 946. In contrast, here the only communication with SRP was with an employee of a

risk management section of the large public entity. By CAU's argument, every communication by a risk management employee in response to a claim, other than to say it was an improper service of a notice of claim, would amount to waiver. This would penalize public employees for taking any appropriate action on a claim in an effort to resolve it. *See Brown v. Portland Sch. Dist. No. 1,* 628 P.2d 1183, 1187 (Or. 1981) ("[P]ublic officials may well process and investigate alleged claims without intending to waive their objection to improper notice of such claims.").

¶20 In addition, such a position conflicts with the stated public policy of having the policymakers within a public entity be made aware of the claim so they could investigate it and settle it or include the possible exposure and financial costs of litigation in budgets. *Backus v. State*, 220 Ariz. 101, 104, ¶ 10, 203 P.3d 449, 502 (2009); *Falcon ex rel. Sandoval v. Maricopa Cnty.*, 213 Ariz. 525, 527, ¶ 9, 144 P.3d 1254, 1256 (2006). The import of the statute and service requirements is to ensure the entity "as a whole" receives notice so it can be said that the entity itself considered the claim. *Id.* at 529, ¶ 25, 144 P.3d at 1258.

¶21 Though we agree with CAU that *Jones* does not foreclose the possibility of waiver by conduct before the notice of claims period expires, *Jones* does not assist CAU. In *Jones*, the county

failed to properly raise its affirmative defense based on noncompliance with the notice of claim statute. 218 Ariz. at 380, ¶ 27, 187 P.3d at 105. We held that the County's conduct of engaging in depositions and discovery and actively litigating the case for almost one year after the complaint was filed amounted to a waiver of its affirmative defense to the notice of claim. *Id.* at 380-81, ¶¶ 27, 30, 187 P.3d at 105-06. The failure of the County to even assert the affirmative defense of failure to comply with the notice of claims statute along with litigating the complaint itself was indicia of an intent to waive the defense. *Id.* at 380, ¶ 27, 187 P.3d at 105; *see also Havasupai Tribe of Havasupai Reservation v. Ariz. Bd. of Regents,* 220 Ariz. 214, 224, ¶ 33, 204 P.3d 1063, 1073 (App. 2008) (stating "[w]aiver is the voluntary intentional relinquishment of a known right or conduct that would warrant an inference of such intentional relinquishment").

¶22 There is no evidence SRP or Hodgen led CAU to believe Hodgen was authorized to accept service of a notice of claim under A.R.S. § 12-821.01. Nor is there any evidence that the December 1 letter was even a notice of claim. The absence of any evidence that the notice of claim was properly served or that SRP took action on what it believed to be a "notice of claim" without challenging the defective service, precludes a finding of waiver.

¶23 Lastly, and particularly in light of the reasons discussed throughout our decision, we reject CAU's argument that if the notice was deficient, SRP "should have said so then." Nothing in the notice of claim statute requires a potential defendant, (particularly a defendant not properly served and unaware that it may be "processing" a "notice of claim" as a routine claim), to inform a prospective plaintiff's counsel about compliance with Arizona law.

CONCLUSION

¶24 There are no issues of genuine material fact precluding summary judgment. As a matter of law, CAU's notice of claim was improperly served under Arizona law, and to the extent SRP "processed" the claim through its claims department, under the facts here, SRP did not waive its affirmative defense under the notice of claim statute. We affirm the trial court's entry of summary judgment for SRP.

__/S/_____
DONN KESSLER, Judge

CONCURRING:

__/S/_____
MARGARET H. DOWNIE, Presiding Judge

__/S/_____
PETER B. SWANN, Judge