

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2002-000004

03/31/2003

HONORABLE CATHY M. HOLT

CLERK OF THE COURT  
E. Schneider  
Deputy

FILED: 04/04/2003

TAMARAC PROPERTIES LLC

MERRICK B FIRESTONE

v.

CITY OF PHOENIX

BRADLEY D GARDNER

MINUTE ENTRY

The Court has had under advisement Defendant City of Phoenix's ("Defendant") Motion for Reconsideration. The Motion requests that the Court reconsider its minute entry ruling of August 9, 2002 denying Defendant's Motion to Dismiss. Because the parties have presented matters outside the pleadings, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment. *Pritchard v. State*, 163 Ariz. 427, 433, 788 P.2d 1178 (1990).

In the Motion to Dismiss Defendant requested dismissal of this action based upon Plaintiff Tamarac Properties, L.L.C.'s ("Plaintiff") failure to comply with A.R.S. Section 12-821.01. The statute sets forth certain prerequisites for filing an action against a public entity including a requirement that a plaintiff's claim "contain a specific amount for which the claim can be settled . . ." The Notice of Claim letter served upon Defendant on or about March 8, 2001 states:

"On September 16, 1993, the City of Phoenix and Tamarac Properties, L.L.C. entered into a contract entitled 'Downtown Area Redevelopment and Improvement Plan, Phoenix, Arizona Historic Preservation Project 802-830 North Second Avenue and 801-805 North Third Avenue Disposition and Development Agreement.' The contract provides that Tamarac Properties, L.L.C. has the right to purchase property at Lots 1, 2, 3, 4, 6, 8, 10, 12, 15 and 16 for the agreed appraisal value of \$16,000 for each lot provided that Tamarac Properties, L.L.C. would rehabilitate historic structures on lots 6, 10, 14 and 16 and develop buildings in a character consistent with the architecture on the remaining lots within a prescribed time period specified in the agreement. In addition,

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2002-000004

03/31/2003

the agreement provides that Tamarac Properties, L.L.C. would have the right to sell a conservation easement to the City of Phoenix on the historic properties.

On January 31, 2001 the City of Phoenix terminated the agreement. Tamarac Properties, L.L.C. has a breach of contract action against the City of Phoenix for terminating the contract. Tamarac Properties, L.L.C. demands that the DDA be reinstated at this time, and that the City of Phoenix not sell any of the properties in question until this matter is resolved in its entirety. This claim cannot be valued.”

By minute entry dated August 9, 2002 this Court denied Defendant’s Motion to Dismiss concluding that a demand for specific performance complies with the requirements of A.R.S. Section 12-821.01 in that it met the purpose of the notice of claim statute of permitting a public entity to investigate the merits of a claim and settle the dispute short of litigation. Defendant filed the Motion for Reconsideration and the Court ordered a Response to the Motion for Reconsideration and additional briefing to specifically address the decision of the Arizona Court of Appeals in *Crum v. Superior Court*, 186 Ariz. 351, 922 P.2d 316 (1996).

While there are no reported Arizona cases as to whether a demand for specific performance complies with the requirements of A.R.S. Section 12-821.01, upon review, this Court is persuaded by the language and purpose of the statute, the language of the notice of claim and the decision of the Arizona Court of Appeals in *Crum* that the Court erred in denying Defendant's Motion To Dismiss.

In *Crum* the Arizona Court of Appeals, in examining the purpose of A.R.S. Section 12-821.01, stated that the “purpose of the notice is to allow the public employee and his employer to investigate and assess their liability, to permit the possibility of settlement prior to litigation and to assist the public entity in financial planning and budgeting. *Crum*, 186 Ariz. at 353. Both the plaintiff and the defendant in *Crum* were Deputy Maricopa County Attorneys. The defendant sent a letter to the County Board of Supervisors, the Attorney General, and to the County Sheriff accusing the plaintiff of conducting personal business on County time and misusing County property. The plaintiff objected to defendant’s accusations and demanded in a letter that the defendant apologize for the alleged defamation or be sued. *Id.* The Court of Appeals held that the plaintiff’s demand for retraction of defendant’s statements and an apology from the defendant would not be sufficient to satisfy the specific amount requirement of A.R.S. Section 12-821.01. In reaching this decision the court stated:

“More important, while the letter clearly infers that [the plaintiff] would have been satisfied with a retraction and apology, it says nothing about “the specific amount for which the claim can be settled,” A.R.S. Section 12-821.01(A) (emphasis added), in the event a retraction and apology were not forthcoming. We can envision circumstances in which a person, faced with an action for defamation, would be totally unwilling to retract and apologize and might nevertheless be willing to buy peace in return for money. We can even more

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2002-000004

03/31/2003

readily envision an employer who would be willing to do so if the employer was unable to persuade its employee to retract and apologize. If it is ultimately concluded that [the defendant] was acting within the course and scope of his employment, the application of Section 12-821.01 will preclude the entry of judgment against him."

Like the Court in *Crum*, this Court can envision circumstances in which a defendant public entity such as the City would be totally unwilling to agree to specific performance of the contract but might nevertheless be willing to "buy peace in return for money". The Court recognizes that Plaintiff need only give a reasonable estimate of what the claim is worth to comply with the notice of claim requirements of A.R.S. § 12-821.01. *Young v. City of Scottsdale*, 193 Ariz. 110, 114, 970 P.2d 942 (App. 1998). But here Plaintiff gave no estimate at all. Instead, Plaintiff expressly stated "[T]his claim cannot be valued" and demanded specific performance of the contract. The only manner in which the Defendant could have arrived at a settlement of the controversy and thus avoid litigation was to reinstate the DDA as demanded by Plaintiff in the notice of claim. When specific performance is demanded in a notice of claim, rather than a specific amount, no financial planning or budgeting can occur, nor does the public entity have the option of "buying peace". Under these circumstances, Plaintiff failed to comply with requirement of A.R.S. Section 12-821.01, as interpreted by the court in *Young*, that the notice of claim contain a reasonable estimate of what the claim is worth.

Plaintiff further contends that this Court should not grant Defendant's Motion because the claims statute is procedural, not jurisdictional, and is subject to defenses of waiver, estoppel, and equitable tolling. Plaintiff further contends that Defendant had the information to ascertain Plaintiff's damages by looking at the Contract itself. Indeed the claims statute is procedural and is subject to defenses of waiver, estoppel and equitable tolling. *Pritchard*, 163 Ariz. at 432-433. But Plaintiff has asserted no circumstances under which these defenses could be applied to it. In essence Plaintiff asserts that Defendant, when faced with a notice of claim demanding specific performance, was somehow required to calculate the amount of Plaintiff's damages in the event Defendant was unwilling to reinstate the DDA. But nothing within the statute, or encompassed within the defenses of waiver, estoppel or equitable tolling, required Defendant to attempt to calculate damages when the notice of claim demanded specific performance, not damages. The statute makes it incumbent upon Plaintiff to set forth in the notice of claim, at minimum, a reasonable estimate of the worth of the claim. A.R.S. Section 12-821.01(A). *Young*, 193 Ariz. at 114. Accordingly,

IT IS ORDERED granting Defendant's Motion for Reconsideration.

IT IS FURTHER ORDERED granting Defendants' Motion to Dismiss.

IT IS FURTHER ORDERED denying Plaintiff's Motion to Strike Defendant's Reply in Support of its Motion for Reconsideration as moot.