IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STANDARD CONSTRUCTION COMPANY INC., *Plaintiff/Appellant*,

v.

STATE OF ARIZONA, et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0411
FILED 9-3-2020

Appeal from the Superior Court in Maricopa County
No. CV2018-014714
The Honorable Teresa A. Sanders, Judge

REVERSED AND REMANDED

COUNSEL

Jennings Strouss & Salmon PLC, Phoenix
By John J. Egbert, Andy J. Chambers
Counsel for Plaintiff/Appellant

Glendale City Attorney's Office, Glendale
By Michael D. Bailey, Nancy A. Mangone, Aaron C. Schleper,
Kurt W. Christianson
Counsel for Defendants/Appellees

OPINION

Chief Judge Peter B. Swann delivered the opinion of the court, in which Presiding Judge Lawrence F. Winthrop and Judge Maria Elena Cruz joined.

S W A N N, Chief Judge:

¶1 This case involves a contractor's breach of contract claim against a public entity. After exhausting the administrative remedies required by the contract, the contractor timely exercised its unilateral option under the contract to require the parties to participate in non-binding mediation. When the mediation failed, the contractor filed a notice of claim and a complaint that only complied with the deadlines prescribed by A.R.S. §§ 12-821 and -821.01 if those deadlines were measured from the date of the mediation's failure and not from the date of the final administrative decision. We hold that the notice of claim and the complaint were timely because the contractor's decision to require mediation triggered the tolling provision set forth in § 12-821.01(C). We therefore reverse the superior court's judgment dismissing the contractor's action as time-barred, and we remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 In 2014, the Arizona Department of Transportation ("ADOT") engaged Standard Construction Company, Inc., to construct a pathway for the benefit of the City of Glendale. The parties' contract prescribed the following regarding resolution of disputes arising from the project:

> The administrative process for the resolution of disputes is sequential in nature and is composed of the following steps:
>
> Step I. Review by the Resident Engineer;
>
> Step II. Review by the District Engineer;
>
> Step III. Review by the State Engineer.
>
> . . . .
>
> [Upon the conclusion of Step III, t]he contractor shall, within 15 calendar days of the receipt of the decision of the State Engineer, either accept or reject it in writing. If the contractor does not reject the State Engineer's decision within 15 calendar days, the contractor will be deemed to have accepted the decision, the dispute will be considered withdrawn from the administrative process, and there will be no further administrative remedy.

> If the contractor rejects the decision of the State Engineer, there will be no further automatic review of the dispute.
>
> (D) Contractor's Options After State Engineer Review: The decision of the State Engineer in relation to the contractor's claim shall be final unless the contractor commences arbitration or litigation as follows:
>
> > (1) Where the amount in controversy is $200,000.00 or less, the contractor's sole legal remedy shall be arbitration as prescribed in Subsection 105.22.
> >
> > (2) Where the amount in controversy is more than $200,000.00, the contractor's sole remedy shall be to initiate litigation pursuant to Section 12-821 et seq. of the Arizona Revised Statutes.
>
> (E) Mediation: If the contractor is not satisfied with the decision of the State Engineer, and prior to filing for arbitration or litigation, the contractor may request a non-binding mediation by filing a request for mediation in writing with the Engineer. The Engineer will then arrange for a mutually agreeable mediator. Such request for mediation shall be made within 30 calendar days from the date of the State Engineer's decision as provided for in this subsection.

¶3 When a dispute arose concerning payment, Standard Construction participated in the three-step administrative review process. The final result of that process was the State Engineer's June 9, 2017 decision rejecting Standard Construction's claim that it was owed approximately $1,000,000 and concluding that it actually had been overpaid by more than $200,000. Standard Construction promptly rejected the State Engineer's decision and requested mediation. The mediation concluded unsuccessfully on November 30, 2017.

¶4 Standard Construction filed a notice of claim regarding the payment dispute on May 21, 2018, and on November 29, 2018, commenced a breach of contract action against ADOT, the state, and, via intervention, the City of Glendale. The defendants moved for dismissal for failure to state a claim under Arizona Rule of Civil Procedure ("Rule") 12(b)(6), arguing that the action was time-barred because the notice of claim and complaint deadlines set forth in A.R.S. §§ 12-821 and -821.01 measured from the date of the State Engineer's decision rather than from the date of the mediation's conclusion. The superior court granted the defendants'

motion and entered a judgment of dismissal. Standard Construction appeals.

DISCUSSION

¶5 We review de novo the dismissal of an action under Rule 12(b)(6) based on a statute of limitations. *Dube v. Likins*, 216 Ariz. 406, 411, ¶ 5 (App. 2007). We assume the truth of the complaint's well-pleaded factual allegations and all reasonable inferences therefrom, *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012), and we consider public records and documents that, though provided to the superior court separately from the complaint, are central to the complaint, *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶¶ 13–14 (App. 2010). We review questions of statutory application and contract interpretation de novo. *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, 367, ¶ 12 (2017). We construe statutes to give effect to the legislature's intent, applying the plain statutory language when it is unambiguous. *Glazer v. State*, 244 Ariz. 612, 614, ¶ 9 (2018). Likewise, we construe contracts to give effect to the parties' intent, applying the plain contractual language when it is unambiguous. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App. 2009).

¶6 A plaintiff's breach of contract claim against a public entity is barred absent compliance with both A.R.S. § 12-821.01, which requires a notice of claim to be provided to the entity "within one hundred eighty days after the cause of action accrues," and § 12-821, which requires a complaint to be filed "within one year after the cause of action accrues." A.R.S. §§ 12-821, -821.01(A); *Falcon v. Maricopa Cty.*, 213 Ariz. 525, 527, ¶ 10 (2006).

¶7 Typically, for purposes of §§ 12-821 and -821.01 "a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B); *Stulce v. Salt River Project Agric. Improvement & Power Dist.*, 197 Ariz. 87, 90, ¶ 11 (App. 1999). Accrual is delayed, however, when the parties are contractually obligated to submit to non-judicial dispute resolution processes—§ 12-821.01(C) provides that "any claim that must be submitted to a binding or nonbinding dispute resolution process or an administrative claims process or review process pursuant to a . . . contractual term shall not accrue . . . until all such procedures, processes or remedies have been exhausted" and "a final decision or notice of disposition is issued in [the] alternative dispute resolution procedure, administrative claim process or review process," or until such later time as the parties may agree. This tolling provision

"recognize[s] the tension between the purposes of alternative dispute resolution procedures and the time limits of claims statutes, and . . . preserve[s] the public policies inherent in both." *Stulce*, 197 Ariz. at 92, ¶ 16 (describing case law codified in § 12-821.01(C)); *see also Andress v. City of Chandler*, 198 Ariz. 112, 114, ¶ 11 (App. 2000). Tolling ensures that the parties' opportunity to engage in the alternative dispute resolution process is meaningful, which advances our state's strong public policy of encouraging settlement. *See Grubaugh v. Blomo*, 238 Ariz. 264, 268, ¶ 14 (App. 2015).

¶8 Here, the parties' contract provided that Standard Construction could not seek judicial relief unless it first participated in a three-tiered administrative review process culminating in a decision by the State Engineer. The contract further provided that within thirty calendar days of the State Engineer's decision, and "prior to filing for . . . litigation," Standard Construction could unilaterally require the State Engineer to arrange non-binding mediation. Therefore, upon Standard Construction's demand, the claim became one "that must be submitted to a . . . nonbinding dispute resolution process" within the meaning of § 12-821.01(C). The fact that Standard Construction could have decided not to pursue mediation does not take this case, in which it *did* elect mediation, outside the scope of the statute. By its plain language, the statute applies to any claim that "must be submitted" to an alternative dispute resolution process. The statute does not restrict itself to claims that "automatically must be submitted," and as a matter of statutory construction we may not add such qualifying language. *See In re Estate of Gordon*, 207 Ariz. 401, 405, ¶ 19 (App. 2004) ("[I]f a statute's meaning is plainly apparent from its language, we simply are not authorized to add anything to it unless an absurdity would otherwise result."). We further note that to hold otherwise would be to discourage settlement, in direct contravention of the statute's public policy goals. *See supra* ¶ 7. We finally note that the concept of a litigant's choice affecting a jurisdictional filing deadline is not novel—for example, a civil litigant's decision to file certain optional post-judgment motions will extend the appeal deadline, *see* ARCAP 9(e), and a party's decision to file an optional motion for reconsideration will suspend the finality of an agency's decision, *Houser v. City of Phoenix*, 248 Ariz. 608, 610–11, 612, ¶¶ 7–8, 13 (App. 2020).

¶9 The defendants emphasize that when Standard Construction rejected the State Engineer's decision, plaintiff's counsel memorialized in an email that defense counsel had "confirmed by email that June 15 [the date on which Standard Construction received the June 9 decision] is the date that 'the clock starts' for statutory and other claim deadlines." We assign no significance to that statement. Even assuming that the email

could properly be considered on a motion to dismiss, its own text confirms that it was sent before Standard Construction demanded mediation[1] and therefore before tolling applied.

¶10 Because the tolling provision set forth in § 12-821.01(C) applied, Standard Construction's claim did not accrue until the mediation process concluded on November 30, 2017. Accordingly, Standard Construction's May 21, 2018 notice of claim was timely under § 12-821.01(A), and its November 29, 2018 complaint was timely under § 12-821. The superior court erred by dismissing the action as time-barred.

CONCLUSION

¶11 We reverse the superior court's judgment of dismissal, and we remand for further proceedings. Both Standard Construction and the defendants request attorney's fees on appeal under § 12-341.01. In our discretion, we decline to award fees, at this juncture, without prejudice to the assertion of a request for fees in the Superior Court at the conclusion of the case.

AMY M. WOOD • Clerk of the Court
FILED: AA

[1] Though the email described Standard Construction's plan to mediate, it did not constitute an immediate and unequivocal "request for mediation" as contemplated by the contract. The email merely advised that Standard Construction "intends to go forward with a mediation" and "the mediation request will be filed with the AAA later this week or early next week." The parties do not dispute that they eventually participated in mediation at Standard Construction's request.