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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

PETE SPAN, a single man, *Plaintiff/Appellant*,

v.

MARICOPA COUNTY TREASURER, a political subdivision of the State of AZ; COUNTY OF MARICOPA, AZ, a political subdivision of AZ; DAVID SCHWEIKERT, personally and in his official capacity as Treasurer; CHARLES HOSKINS, personally and in his official capacity as Treasurer; DAVID BROWNING, personally and in his official capacity as Tax Office Manager, *Defendants/Appellees*.

No. 1 CA-CV 12-0771
FILED 3-25-2014

Appeal from the Superior Court in Maricopa County
No. CV2008-007180
The Honorable Katherine M. Cooper, Judge

REVERSED AND REMANDED

COUNSEL

Stoops, Denious, Wilson & Murray, P.L.C., Phoenix
By Thomas A. Stoops
Counsel for Plaintiff/Appellant

Maricopa County Attorney's Office, Phoenix
By Bruce P. White and Steven B. Palmer
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Donn Kessler delivered the decision of the Court, in which Judge Patricia K. Norris and Judge Maurice Portley joined.

K E S S L E R, Presiding Judge:

¶1 Pete Span appeals the superior court’s grant of summary judgment in favor of Maricopa County holding that a tax lien purchased in 1995 on Span’s property did not expire in 2005.¹ We hold that the original 1995 tax lien expired in 2005. Accordingly, we reverse and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 Span is the deeded owner of the subject property. Span failed to pay property taxes in 1993 and a tax lien was sold at auction in 1995. The County Treasurer issued the buyer (the “CP holder”) Certificate of Purchase number 93002715 (the “CP”). The CP holder later paid the delinquent taxes for 1994, 1995, and 1996, and those payments were added to the CP. In 2007, the CP holder initiated a foreclosure proceeding, which it dismissed when Span paid the County \$102,989.94 (“redemption amount”) under protest to obtain a redemption certificate.

¹ In his opening brief, Span does not address the superior court’s dismissal of the claims against David Schweikert and David Browning for untimely service under Arizona Rule of Civil Procedure 4(i). The defendants also moved for summary judgment as to the Maricopa County Treasurer, Charles Hoskins, for Span’s alleged failure to serve Hoskins and his office with a notice of claim as required by Arizona Revised Statutes (“A.R.S.”) section 12-821.01 (Supp. 2013). The court granted the County’s motion for summary judgment, thus implicitly dismissing for lack of a notice of claim. Span does not address that issue in his opening brief. We therefore find the issues related to dismissal of the office of the Maricopa County Treasurer, Hoskins, Schweikert, and Browning waived. See *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 17, 91 P.3d 1019, 1023 (App. 2004) (“Generally, we will consider an issue not raised in an appellant’s opening brief as abandoned or conceded.”).

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¶3 Span filed a *pro se* complaint against the County contending that the CP holder's lien had expired and the County violated his statutory and constitutional rights by requiring him to pay money on an expired lien to avoid foreclosure. In addition to damages, Span sought return of the money he paid under protest to redeem the lien.² On appeal, Span conceded the only claim in this action was one for declaratory relief as to whether the lien was still valid and recoupment of the payment he made under protest.

¶4 The County and Span filed motions for summary judgment. As it relates to this appeal, the County argued that the CP had not expired under Arizona Revised Statutes ("A.R.S.") section 42-18208 (2006) (ten-year statute of repose) because the purchase of later delinquent taxes kept the CP active and tolled the statute from running. Span argued that the lien had expired under A.R.S. § 42-18208 because the statute does not explicitly provide for tolling based upon the purchase of subsequent taxes.

¶5 The superior court granted the County's motion for summary judgment and denied Span's motion. The court held that "A.R.S. § 42-18208 when read in conjunction with A.R.S. § 42-18121 [(Supp. 2013)] and other applicable property tax and tax lien foreclosure statutes in Title 42 provides no statutory procedure for a certificate of purchase containing endorsed subtaxes newer than ten years to expire." The court denied Span's motion for new trial and Span timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 (2003), -2101(A)(1), (A)(5)(a) (Supp. 2013).³

DISCUSSION

¶6 On appeal, Span argues that the superior court erred in granting summary judgment in favor of the County by finding that the statute of repose set forth in A.R.S. § 42-18208(A) is rendered inapplicable by the CP holder's payment of subsequent property taxes. The County

² Span also challenged the County's calculation of interest and fees owed on the lien independently of whether the lien had expired. Except to the extent the lien might have expired, Span does not argue on appeal the calculation of fees or interest was invalid, thus waiving that issue. *Robert Schalkenbach Found.*, 208 Ariz. at 180, ¶ 17, 91 P.3d at 1023.

³ We cite to the current versions of statutes when no changes material to this decision have since occurred.

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argues that the court correctly held that the payment of subsequent taxes or “subtaxes” tolled the running of the statute, and, in any event, the County’s failure to give the CP holder notice of the CP’s alleged 2005 expiration also extended the validity of the lien because such notice is a prerequisite for the lien to expire.⁴

¶7 We review the grant of a motion for summary judgment *de novo*. *Vig v. Nix Project II P’ship*, 221 Ariz. 393, 396, ¶ 10, 212 P.3d 85, 88 (App. 2009). “We must view the evidence in the light most favorable to the party opposing the motion for summary judgment and draw all inferences fairly arising from the evidence in favor of the opposing party.” *Johnson v. Svidergol*, 157 Ariz. 333, 335, 757 P.2d 609, 611 (App. 1988).

We review issues of statutory construction *de novo* with the goal of giving effect to legislative intent. . . . “[W]e look to the plain language as the most reliable indicator of meaning.” However, we will not construe a statute literally when such a construction would lead to an absurd result, would conflict with clear legislative intent, or would be contrary to the rest of the statutory scheme.

Koss Corp. v. American Express Co., 233 Ariz. 74, 79, ¶ 12, 309 P.3d 898, 903 (App. 2013) (citations omitted). “[A]lthough we give deference to an agency’s interpretation of a statute or regulation it is charged with enforcing, it is ultimately the responsibility of the judiciary to interpret the meaning and applicability of statutory and constitutional provisions.” *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 119 n.16, ¶ 57, 290 P.3d 1226, 1242 n.16 (App. 2012) (citations omitted).

⁴ The County also argues on appeal that Span’s *pro se* complaint was not one for declaratory relief and was not the correct procedural device for challenging the validity of the lien. The County did not make that argument below and thus we deem it waived. *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007) (“Generally, arguments raised for the first time on appeal are untimely and deemed waived.”). The parties and the superior court all proceeded to argue and resolve the merits of whether the lien at issue had expired and this is the only issue before us.

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I. EXPIRATION OF TAX LIENS UNDER A.R.S. § 12-18208

¶8 The only question before us is when does a property tax lien expire under A.R.S. § 42-18208(A). For the reasons that follow, we hold that such a lien expires ten years after its purchase regardless of whether a buyer later pays subsequent taxes on the same property. The effect of A.R.S. § 42-18208 on subsequent taxes paid for by the CP holder is not before us except to the extent that it does not toll the ten-year expiration on the original CP.

¶9 When a property owner is delinquent on taxes, the County secures payment by selling a tax lien at auction. See A.R.S. §§ 42-18101(A) (2006), -18112 (2006), -18114 (Supp. 2013); see also *Suzico Inc. v. Maricopa County*, 187 Ariz. 269, 271-72, 928 P.2d 693, 695-96 (App. 1996) (noting that tax liens are inchoate as of January 1 and perfected by operation of law). “The purchaser of a tax lien receives a certificate of purchase, known as a tax lien certificate, which . . . serves as evidence entitling the holder to a deed if certain statutory conditions are met.” *Daystar Invs., L.L.C. v. Maricopa Cnty. Treasurer*, 207 Ariz. 569, 570, ¶ 3, 88 P.3d 1181, 1182 (App. 2004). The certificate holder has the option of paying any subsequent delinquent taxes outside of the auction process:

[I]f a person who holds a certificate of purchase desires to pay subsequent taxes, accrued interest and related fees due on the property, the person shall exhibit the certificate or receipt of registered certificate to the county treasurer. The treasurer shall enter the amount of the payment on the certificate and on the record of tax lien sales. The amount of subsequent taxes bears interest at the rate stated in the certificate of purchase from the first day of the month following the purchase of the subsequent tax lien.

A.R.S. § 42-18121(A). The payment for such additional liens is added to the original certificate of purchase. A.R.S. § 42-18121(A) (“The treasurer shall enter the amount of the payment [of such additional purchases] on the certificate . . .”).

¶10 Prior to 2002, “there [was] no time limit for a tax lien holder to redeem the certificate of purchase or foreclose on the property.” Ariz. S. Fact Sheet, 2002 Reg. Sess. S.B. 1041 (May 14, 2002).

At any time beginning three years after the sale of a tax lien, if the lien is not redeemed, the purchaser or the purchaser’s heirs or assigns, or the state if it is the assignee, may bring an

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action in superior court in the county in which the real property is located to foreclose the right to redeem.

A.R.S. § 42-18201 (2001). This resulted in an upsurge of old tax liens on county treasurer tax rolls and issues with income tax filings. *Ariz. S. Fact Sheet, 2002 Reg. Sess. S.B. 1041* (“This has resulted in a number of old tax liens compounding on the county treasurers’ tax rolls. In addition, while the certificates of purchase are outstanding, the holder of the tax lien is unable to provide documentation to support a business loss deduction on federal and state income tax filings.”).

¶11 Consequently, in 2002, the Arizona Legislature amended A.R.S. § 42-18201 to include a ten-year statutory lifetime for tax liens purchased at auction pursuant to A.R.S. § 42-18114 from and after the date of the act. *See Ariz. S. Fact Sheet, 2002 Reg. Sess. S.B. 1041; County Treasurers, 2002 Ariz. Legis. Serv. Ch. 193 (S.B. 1041); see also A.R.S. § 42-18114* (“A real property tax lien shall be sold pursuant to this article to the person who pays the whole amount of delinquent taxes, interest, penalties and charges due on the property, and who in addition offers to accept the lowest rate of interest on the amount so paid to redeem the property from the sale . . .”).

¶12 In 2003, the Legislature extended the ten-year expiration date to liens purchased prior to 2002 by enacting A.R.S. § 42-18208. *Ariz. S. Fact Sheet, 2003 Reg. Sess. S.B. 1069 (Feb. 10, 2003)*. In 2005, the statute was amended to apply only to liens purchased at auction pursuant to A.R.S. § 42-18114. *See Ariz. H.B. Summary, 2005 Reg. Sess. H.B. 2252 (Jan. 20, 2005)* (“HB 2252 proposes several changes to county treasurer’s procedure and policies specifically, the bill allows tax liens that are assigned to the state to not have an expiration date of ten years . . .”). Section 42-18208 now provides:

If a tax lien that was purchased pursuant to § 42-18114 on or before August 31, 2002 is not redeemed and the purchaser or the purchaser’s heirs or assigns fail to commence an action to foreclose the right of redemption on or before ten years from the date that the lien was purchased, the certificate of

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purchase or registered certificate expires and the lien is void.^[5]

¶13 This ten-year limitations period is reiterated in A.R.S. § 42-18127 (Supp. 2013), which was also enacted in 2002:

If the tax lien is not redeemed and the purchaser or the purchaser's heirs or assigns fail to commence an action to foreclose the right of redemption as provided by this chapter within ten years after the last day of the month in which the lien was acquired pursuant to § 42-18114, the certificate of purchase or registered certificate expires and the lien is void.

2002 Ariz. Legis. Serv. Ch. 193 (S.B. 1041).

¶14 It is clear from the plain language and history of A.R.S. § 42-18127, -18201, and -18208 that the Legislature intended certificates of purchase to expire after ten years unless the purchaser begins a foreclosure action on the right of redemption before that time. Thus, any lien purchased through auction expires ten years from the date of

⁵ We note that the Legislature has addressed the retroactivity of new statutes of limitations in A.R.S. § 12-505 (2003) (effect of statute changing limitation). Even if A.R.S. § 12-505 applied to statutes of repose, it would not be applicable in this case. “Subsection A provides that claims under which the time to file had already passed under the old statute remain barred. Subsection B provides that the new statute generally applies to all other claims, but an express qualification to the general rule is set forth in subsection C. If a claim would have been timely filed under the old law but not the new, under subsection C the plaintiff has one year from the effective date of the new law to file suit.” *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 554, ¶ 42, 105 P.3d 1163, 1173 (2005). When applied to A.R.S. § 42-18208, if the new statute of repose barred a claim, the claimant would have one year after the effective date of the new statute to bring suit. Because A.R.S. § 42-18208 became effective in 2003, under subsection C, any CP holder of a tax lien purchased prior to 1993 would have until 2004 to start a foreclosure action to collect on the lien. Here, because the CP had not expired as of the date of the statute’s effective date, the new expiration date simply applies under subsection B.

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purchase absent a timely foreclosure action. The statute does not provide that paying subsequent taxes tolls or extends this ten-year period.⁶

¶15 Here, the CP holder purchased the original lien in 1995 and paid the property's subtaxes for three additional years. The CP holder did not commence a foreclosure action until 2007, and dismissed it when Span, under protest, paid the amount the County claimed was due under the lien. By 2005, the original lien evidenced by the CP had expired.

II. NOTICE

¶16 To support its claim that the CP was still valid, the County also claims that the notice provision required by A.R.S. § 42-18208(B) is a prerequisite to expiration. It argues that "[b]ecause the notice mandated by A.R.S. § 42-18208(B) was not sent, the certificate did not expire."

¶17 The statute's notice provision provides that the County is required to notify purchasers of the upcoming expiration of their lien. *See* A.R.S. § 42-18208(B). The statute requires this notice to be given at least six months prior to the expiration date, *id.*, which is ten years after the date the lien was purchased. A.R.S. § 42-18208(A). However, nothing in the statute indicates that the expiration date hinges on completion of the notice requirement.⁷ Although we give great weight to an agency's interpretation of the statute, the court ultimately determines the meaning

⁶ We recognize that none of these statutes of repose mention the payment of subsequent taxes not purchased at auction. As previously mentioned, we do not discuss any potential effect of A.R.S. § 42-18208 on subsequent taxes because that issue is not before us.

⁷ The relevant section states the following:

At least six months before the certificate of purchase or registered certificate expires, the county treasurer shall: (1) Notify each purchaser by certified mail of the pending expiration[,] (2) Post the names of purchasers who hold liens that are subject to pending expiration . . . [and] (3) Publish the names of purchasers who hold liens that are subject to pending expiration at least one time in a newspaper of general circulation in the county.

A.R.S. § 42-18208(B).

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of the statutory language. *Mathis*, 231 Ariz. at 119 n.16, ¶ 57, 290 P.3d at 1242 n.16. Nothing in A.R.S. § 42-18208(B) provides that a county's failure to give notice extends the lien and the right to foreclose on redemption. Indeed, by the County's argument, if a county failed to ever give such notices, the liens would never expire.⁸

III. ATTORNEYS' FEES AND COSTS

¶18 In his opening brief, Span requests an award of attorneys' fees on appeal by construing his complaint as one seeking a declaratory judgment on the validity of a rule. See A.R.S. § 41-1034 (2013) (permitting an action for declaratory relief challenging the validity of a rule). Not only does that section not provide for an award of attorneys' fees, but it applies only to challenges to an agency's rules, and the County is not an agency for the purposes of that statute. A.R.S. § 41-1001(1), (18) (2013) (defining rule as an agency statement of general applicability that interprets or prescribes law or policy, and explaining that an agency "does not include a political subdivision of this state or any of the administrative units of a political subdivision"). Although in his reply brief Span also asks for fees pursuant to A.R.S. § 12-348(B)(1) (Supp. 2013) (providing for an award of reasonable attorneys' fees to a prevailing party in an action against a county challenging the assessment or collection of taxes), we will not consider that request because it was only made in the reply brief. *Robert Schalkenbach Found.*, 208 Ariz. at 180, ¶ 17, 91 P.3d at 1023.

⁸ Span contends that the County never made this argument in the superior court. That is incorrect. The County argued below that giving notice of the expiration date to a lienholder was a prerequisite to the expiration of the lien.

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CONCLUSION

¶19 For the foregoing reasons, we reverse and remand for further proceedings consistent with this decision. We deny Span's request for attorneys' fees on appeal, but we will award him his costs on appeal upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.



Ruth A. Willingham · Clerk of the Court
FILED: MJT