

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

VAN E. FLURY, *Plaintiff/Appellant*,

v.

GATEWAY CHEVROLET, INC., *Defendant/Appellee*.

No. 1 CA-CV 16-0218
FILED 7-6-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-011366
The Honorable J. Richard Gama, Judge

AFFIRMED

COUNSEL

Van E. Flury, Laveen
Plaintiff/Appellant

Robert D. Barlow, Attorney at Law, Phoenix
By Robert D. Barlow, Jr.
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in
which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

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C A T T A N I, Judge:

¶1 Van Flury appeals from the superior court's ruling granting summary judgment in favor of Gateway Chevrolet, Inc., on his claim alleging tortious interference with a business relationship. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In late April 2014, Flury purchased a used car from Gateway through Adesa Phoenix Auto Auctions. Flury paid Adesa the \$1,100 purchase price, plus Adesa's fee, and took the car. Gateway later requested Adesa cancel the sale and secure return of the car, ostensibly because Gateway was unable to provide clear title. Flury initially refused, maintaining that the sales contract was irrevocable for any reason.

¶3 In early June, however, Flury reached an agreement with Adesa to return the car in exchange for a full refund plus an additional \$1,000, and Flury allowed Adesa to retrieve the car. When Flury went to collect the money, an Adesa representative told Flury that Gateway had requested the car be returned without additional payment. Flury refused to waive the additional \$1,000, and Adesa returned Flury's original payment and gave him a check from Adesa for \$1,000; the check stub, however, specified a condition that "customer must reimburse us \$1000 before coming back into the sale." Flury nevertheless accepted the \$1,000 payment, and Adesa barred him from participating in future auctions for a period of approximately 100 days.

¶4 Flury sued Gateway for allegedly tortiously interfering with his business relationship with Adesa by seeking to cancel the sales contract, and he sought damages for his lost profits due to being barred from the auction. Gateway moved for summary judgment; Flury opposed and requested oral argument on the motion. The superior court declined Flury's request for oral argument as unnecessary and ruled in favor of Gateway, finding that Flury had failed to produce evidence to support all elements of his claim and that his agreement to return the car in exchange for additional compensation discharged the underlying contractual obligations.

¶5 Flury moved for reconsideration not on the merits of the ruling, but rather asserting that given his timely request for oral argument, the court was required to hold argument before granting summary judgment. *See* Ariz. R. Civ. P. 56(c)(1). The superior court summarily

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denied reconsideration. Flury filed a petition for special action asserting the same grounds for relief, and this court declined jurisdiction. *Flury v. Gama*, 1 CA-SA 15-0158 (Ariz. App. June 16, 2015).

¶6 Flury then appealed. We have jurisdiction under Arizona Revised Statutes (“A.R.S.”) § 12-2101(A)(1).¹

DISCUSSION

¶7 We review the superior court’s grant of summary judgment de novo, viewing the facts in the light most favorable to the party against whom judgment was entered. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 14 (App. 2012). We similarly consider de novo Flury’s constitutional due process claim. *See In re Estate of Snure*, 234 Ariz. 203, 204, ¶ 5 (App. 2014).

¶8 Flury argues the superior court committed reversible error by granting Gateway summary judgment without first holding oral argument on the motion per his timely request. As he correctly notes, the procedural rule governing oral argument requests on summary judgment motions is mandatory: unless the motion is uncontested or denied, “[o]n timely request by any party, the court *must* set oral argument.” Ariz. R. Civ. P. 56(c)(1) (emphasis added); *see also* Ariz. R. Civ. P. 7.1(d) (granting the superior court discretion to proceed without argument on other motions even if requested, but expressly “[s]ubject to Rule 56(c)(1)”; Ariz. Local R. Prac. Super. Ct. (Maricopa) 3.2(d) (affording the court discretion to “order, allow, or deny oral argument on any motion *consistent with the Arizona Rules of Civil Procedure*”) (emphasis added).

¶9 Flury is not entitled to relief, however, because the superior court’s technical error in failing to hold oral argument was harmless. Although Flury argues the error denied him due process, he has shown no such violation. Due process encompasses the right to notice and an opportunity to be heard at a reasonable time and in a reasonable manner. *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 355, ¶ 17 (App. 2006) (as amended); *see also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). And here, Flury received notice of Gateway’s summary judgment motion and had an opportunity to – and did in fact – respond in writing. He offers no explanation of how or why this opportunity was insufficient to present his argument against summary judgment, the

¹ Absent material revisions after the relevant date, we cite a statute’s current version.

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material facts, and any evidentiary underpinnings. *See* Ariz. R. Civ. P. 56(c)(2)-(3), (5)-(6).

¶10 Moreover, although Flury argues to the contrary, the record reflects that the technical error in failing to hold oral argument was not prejudicial to him, and thus does not provide grounds for relief. *See* Ariz. Const. art. 6, § 27 (“No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.”). Summary judgment is proper if there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). A defendant may establish entitlement to summary judgment on a plaintiff’s claim by “point[ing] out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the claim.” *Orme Sch.*, 166 Ariz. at 310. “The well-accepted logic of the argument is that because plaintiff cannot establish a prima facie case worthy of submission to a jury, defendant is necessarily entitled to judgment as a matter of law.” *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292, ¶ 18 (App. 2010). A party opposing summary judgment “may not rely merely on allegations . . . of its own pleading,” but rather “must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial.” Ariz. R. Civ. P. 56(e).

¶11 To prove tortious interference with a contractual relationship, a plaintiff must show a contractual relationship or business expectancy between the plaintiff and a third party, the defendant’s knowledge of that relationship or expectancy, the defendant’s intentional interference (with improper motive or by improper means) causing breach or loss of the relationship or expectancy, and the plaintiff’s damages resulting from the disruption. *Neonatology Assoc., Ltd. v. Phx. Perinatal Assocs. Inc.*, 216 Ariz. 185, 187, ¶ 7 (App. 2007).

¶12 Flury’s complaint arguably stated two forms of relationship with Adesa with which Gateway allegedly interfered: the April 2014 sale contract itself and Flury’s ongoing participation in Adesa auctions. Regarding the individual sale contract, the undisputed facts reflect that Flury voluntarily agreed to resolve the dispute by canceling the contract and returning the car in exchange for a full refund plus additional compensation of \$1,000, and thereby voluntarily discharged the underlying contractual obligation and eliminated the first element of the tort. *See Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 510, ¶ 24 (App. 2011) (as amended 2012). Moreover, even if Gateway interfered with this contract when it existed, there is no evidence that Flury suffered resulting damages.

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Instead, the undisputed facts show only that Flury earned \$1,000 profit from the alleged interference, not that he suffered any loss (or that he otherwise would have realized greater profit) on that individual contract.

¶13 Flury argues that oral argument would have allowed him to explain to the court that the sale contract was irrevocable by the seller for any reason, so he was under no obligation to return the car and cancel the contract. But the superior court's ruling implicitly recognized this position, and in any event the presence or absence of a pre-existing obligation to return the car is inapposite in light of Flury's decision to resolve the matter by returning the car in exchange for additional compensation.

¶14 Regarding Gateway's alleged interference with Flury's ongoing participation in Adesa auctions, the undisputed facts show an absence of evidence to support several elements of the offense. First, there was no evidence that Gateway knew of this ongoing business relationship. The facts showed only that Gateway potentially knew of the single sale contract from April 2014. Next, there was no evidence that Gateway's request to cancel the sale induced the temporary termination of Flury's ongoing business relationship with Adesa, much less that it did so intentionally. To the extent there is evidence on this issue at all, it suggests that Adesa (not Gateway) sought reimbursement of the extra \$1,000 payment and sought to incentivize repayment by conditioning Flury's participation in future auctions on reimbursement. And there was no evidence at all of Flury's damages. Although he presented evidence that he was excluded from the auction for approximately 100 days, he failed to offer any evidence of potential purchase or sale opportunities lost, or any other discrete harm.

¶15 Flury argues that oral argument would have given him an opportunity to explain to the court that his damages included not just the loss of the April 2014 purchase, but also the temporary termination of his participation in future auctions. But the superior court's ruling recognized that fact, and as explained above, the claim nevertheless fails.

¶16 Accordingly, and notwithstanding the superior court's error in failing to set oral argument, summary judgment was proper.

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CONCLUSION

¶17 The judgment is affirmed.



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