DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CHRIS SINDLINGER, a married man, Plaintiff/Appellant, v. CO-SALES COMPANY, an Arizona corporation, Defendant/Appellee.	No. 1 CA-CV 10-0022 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-091394

The Honorable Joseph C. Kreamer, Judge

AFFIRMED

Law Offices of Kevin Koelbel, P.C. Chandler
By Kevin Koelbel
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S W A N N, Judge

¶1 Chris Sindlinger appeals the trial court's dismissal of his complaint against Co-Sales Company ("Co-Sales"). Because we agree that the statute of limitations expired before Sindlinger filed his complaint, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Sindlinger and Co-Sales entered into a one-page agreement ("the agreement") that stated, in pertinent part:

> This Employment Contract is entered into as of 1st day of July 2001, between Christopher D. Sindlinger and CO-SALES COMPANY, an Arizona Corporation.
>
> CO-SALES COMPANY agrees to continue your salary and insurance benefits for a five- (5) year period of time, beginning July 1, 2001 through June 30, 2006. Applicable state and federal taxes shall be withheld.
>
> 1. Starting wage salary per year will be $84,000 to be paid at $7000.00 per month. (Pay periods are the 15th and last day of each month).
> 2. Position of Director of Confection/ Specialty Department.
> 3. Car allowance of $675.00 per month plus a gas card for company use. Cell phone business related charges will be covered.
> 4. $35,000 Life Insurance policy/ Disability Insurance Policy. Health and dental insurance provided for you as an employee at the cost of $15.00 month. We will reimburse you at the rate of $252.00 per month for dependent coverage.
> 5. Vacation will be four (4) weeks per year, effective upon hire.
> 6. Purchase of Sindlinger & Associates current existing accounts at July 1,

> 2001. CO-SALES COMPANY will agree to pay eight (8) percent, maximum, of annual commissions received for a five- (5) year period of time. July[]1, 2001 through June 30, 2006. Payment of these commissions will commence at the sixth year and continue for a period of five (5) years to 2010. These payments will be based on a payout of twenty (20) percent of the accumulated commission to date. Each of the five payments will be paid on a yearly basis. The maximum total payout amount will not exceed $100,000.00[.]
>
> Employee shall devote his full working time and attention to the conduct of business for the Corporation. During this Contract, Employee shall not, without the written consent of the Corporation, directly or indirectly, render services to or for any person or firm for the compensation, or engage in any practice that competes with the interest of the Corporation.

¶3 In April 2002, Co-Sales "demoted" Sindlinger. On September 29, 2003, Co-Sales attempted to modify the agreement by cutting his annual salary in half and restructuring the commission schedule. Sindlinger rejected the amendments, but Co-Sales refused to pay Sindlinger more than half of his salary beginning in October 2003. In April 2005, Co-Sales thrice proposed changes to the agreement; Sindlinger rejected those proposals. When the agreement terminated in 2006, Sindlinger continued to work for Co-Sales as an at-will employee.

¶4 On June 29, 2007, Sindlinger filed a complaint against Co-Sales alleging that Co-Sales purchased Sindlinger & Associates from him on July 1, 2001, and that the July 1 agreement served as consideration for the sale. The complaint made claims for breach of contract ("count 1"), breach of the covenant of good faith and fair dealing ("count 2"), failure to pay wages ("count 3"), fraud ("count 4"), and intentional misrepresentation ("count 5").

¶5 Co-Sales moved to dismiss the complaint pursuant to Ariz. R. Civ. P. ("Rule") 12(b)(6), alleging, *inter alia,* that the July 1 agreement was an "employment contract" and that each count was barred by certain statutes of limitation. In response, Sindlinger alleged that the agreement was actually a "purchase contract" and that his claims were therefore not subject to the shorter limitations periods.

¶6 After full briefing and oral argument, the trial court issued a two-page minute entry that (1) concluded the agreement was an employment contract, (2) dismissed counts 2, 4 and 5 as barred by their applicable statutes of limitation,[1] (3) limited counts 1 and 3 to payments due one year before the complaint was

[1] The trial court also found that count 2 was also barred by the economic loss doctrine. Because Sindlinger does not challenge that ruling on appeal, we decline to address it. *See* ARCAP 13(a)(6); *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

filed, and (4) allowed breach of contract claims for payments due under paragraph 6 of the agreement.

¶7 Singlinder filed a motion for reconsideration regarding the court's determination that the agreement constituted an employment contract, and the court ordered a response. Before briefing was completed, Sindlinger filed a second motion for reconsideration advancing an alternative argument in the event the court affirmed its decision that the agreement was an employment contract. The court denied Sindlinger's first motion, but never ruled on the second.

¶8 In August 2009, the parties stipulated to a judgment of dismissal with prejudice of Sindlinger's remaining claims. The trial court entered judgment and Sindlinger timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

¶9 Sindlinger contends that his claims were timely, and challenges the trial court's dismissal of his claims as a matter of law pursuant to Rule 12(b)(6). Our review is de novo. *Dube v. Linkins*, 216 Ariz. 406, 411, ¶ 5, 167 P.3d 93, 98 (App. 2007).

I. COUNTS 1 AND 2

A. Rule 12(b)(6) Standard

¶10 Sindlinger first asserts the trial court erred by not assuming as true all allegations in the complaint, specifically

that the agreement served as consideration for the sale of Sindlinger & Associates.[2]

¶11 When considering whether to dismiss a complaint pursuant to Rule 12(b)(6), "well-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989). A trial court may consider the facts in the complaint together with the terms of a contract central to the plaintiff's claim. *See Long v. City of Glendale,* 208 Ariz. 319, 329, ¶ 32, 93 P.3d 519, 529 (App. 2004) ("[I]n appropriate circumstances, the court can accept as true the allegations in the complaint and still determine that the written language is not reasonably susceptible of the meaning asserted. Dismissal of any claims depending solely upon such an interpretation is appropriate because the proponent would not be entitled to relief under any interpretation of the facts susceptible of proof.") (internal quotations omitted). The court is not required to rely on plaintiff's description of the contract

[2] As he did below, Sindlinger asserts there is a six-year statute of limitations on a written contract and cites to A.R.S. § 12-546 to support that assertion. Section 12-546, however, provides a four-year statute of limitations in an action for specific performance of a contract for the conveyance of real property. The trial court summarized this issue as relating to an "employment contract" subject to a one-year statute, or "some other form of contract subject to the six-year statute of limitations."

terms, but "may look to the agreement itself." *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 196 (2d Cir. 2005), *cited in Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, 513, 168 P.3d 917, 921 (App. 2007).

¶12 As the trial court noted in its March 2008 minute entry, the agreement did not specify that some of Sindlinger's salary was actually consideration for the sale of a business. As the trial court observed, the contract was "specifically called an 'employment contract' by the parties in the body of the contract. [Sindlinger] called the contract an 'employment contract' on the first page of his complaint," and "when taken as a whole, the contract is concentrated on defining the terms of [Sindlinger's] employment." *See Hadley v. Sw. Props., Inc.*, 116 Ariz. 503, 506, 570 P.2d 190, 193 (1977) ("Where the language of the contract is clear and unambiguous, it must be given effect as it is written."); *see also C & T Land & Dev. Co. v. Bushnell*, 106 Ariz. 21, 22, 470 P.2d 102, 103 (1970) ("[I]nterpretation of an agreement is a question of law for the court.") Indeed, the only indication that the agreement was anything other than an employment contract was the allegation to that effect in Sindlinger's complaint. A party, however, cannot create ambiguity in an agreement simply by alleging a disagreement with its plain meaning. *In re Estate of*

Lamparella, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005).

¶13 As he did in his motion to reconsider below, Sindlinger now contends that selected statements from a July 2007 "settlement" letter written by Co-Sales prove the character of the agreement. Generally, this court does not use evidence attached to a motion for reconsideration as a basis for overturning the trial court's decision to grant a motion to dismiss.[3] *Cella Barr Assocs., Inc. v. Cohen*, 177 Ariz. 480, 487 n.1, 868 P.2d 1063, 1070 n.1 (App. 1994); *cf. GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (allowing this court to consider on appeal only those records before the trial court at the time it considered a motion for summary judgment). When we do, it is because facts or arguments presented were not available at the time judgment was entered. *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 241 n.5, ¶ 16, 159 P.3d 547, 551 n.5 (App. 2006). Here, the settlement letter was available before Sindlinger filed his response to the motion to dismiss. Had he wished to

[3] Although Sindlinger's notice of appeal challenges "all adverse interim orders" made by the trial court, his opening brief does not discuss the court's denial of his motions for reconsideration, which we would review for an abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6, 33 P.3d 506, 509 (App. 2001). Issues not clearly raised and argued in an appellate brief are waived. *Schabel*, 186 Ariz. at 167, 920 P.2d at 47.

transform the motion to dismiss into one for summary judgment by introducing the letter, he had ample opportunity to do so before the court decided the motion.

¶14 Even if we were to consider the letter on appeal, we would not conclude that its contents undermine the trial court's view of the fundamental nature of the agreement.[4] For example, the letter never mentions any facts related to the purchase of Sindlinger & Associates -- instead, it references the "Employment of Chris Sindlinger," states in the opening paragraph that undersigned counsel represents Co-Sales "in regards to all employment issues" related to Sindlinger, and discusses the terms of the employment contract and the "circumstances surrounding Mr. Sindlinger's employment history with Co-Sales."

¶15 On this record, we find no error in the trial court's determination as a matter of law that the contract was one for employment.

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[4] We assume, without deciding, that the letter would have been admissible for these purposes. The letter is headed "RULE 408 PRIVILEGED FOR SETTLEMENT PURPOSES ONLY" and Co-Sales argued below that it was inadmissible. *See* Ariz. R. Evid. 408 (preventing the admission of compromise or settlement negotiations that show defendant's liability or the invalidity of the plaintiff's claim, but not excluding evidence "otherwise discoverable merely because it is presented in the course of compromise negotiations"); *State ex rel. Miller v. Superior Court (Hilliard)*, 189 Ariz. 228, 232, 941 P.2d 240, 244 (App. 1997) (finding "conduct and statements made in the pursuit of a settlement" are also precluded).

B. Co-Sales Was Not Equitably Estopped From Raising the Statute of Limitations as a Defense.

¶16 On appeal, Sindlinger contends that Co-Sales was estopped from raising the statute of limitations because it acknowledged the validity of the original agreement and its obligation to pay.

¶17 "When an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the action out of the operation of the law, unless the acknowledgment is in writing and signed by the party to be charged thereby." A.R.S. § 12-508. The acknowledgment "must sufficiently identify the obligation referred to, though it need not specify the exact amount or nature of the debt; it must contain a promise, express or implied, to pay the indebtedness; and it must contain, directly or impliedly, an expression by the debtor of the 'justness' of the debt." *Freeman v. Wilson*, 107 Ariz. 271, 275-76, 485 P.2d 1161, 1165-66 (1971).

¶18 Sindlinger first raised this argument in his motion to reconsider, which prevents us from considering it now. *Cella Barr*, 177 Ariz. at 487 n.1, 868 P.2d at 1070 n.1. Even if we were to consider this argument, it would fail because Sindlinger does not present any writing containing the necessary elements. He points, instead, to Co-Sales' promise to honor the agreement

as one example of its "acknowledgement" of the debt, but that promise was made *before* October 2003, when Co-Sales issued reduced paychecks. Sindlinger also points to Co-Sales' proposed changes and renegotiations as its "acknowledgement of the validity of the original contract and its obligation to pay." But oral acknowledgements -- and even partial payments -- are not sufficient under A.R.S. § 12-508 to toll the statute of limitations. *See Steinfeld v. Marteny*, 40 Ariz. 116, 123, 10 P.2d 367, 370 (1932). The only "writing" Sindlinger references is the July 2007 settlement letter written and signed by Co-Sales' counsel and sent after Sindlinger filed suit.

¶19 Because of the timing of the settlement letter, Sindlinger's reliance on *Certainteed Corp. v. United Pac. Ins. Co.*, 158 Ariz. 273, 762 P.2d 560 (App. 1988), is misplaced. The defendant in *Certainteed* submitted letters *before* litigation was filed, including one from legal counsel, that promised to pay an outstanding debt. *Id.* at 274-76, 762 P.2d at 561-63. The court held that estoppel will exist if conduct induces another to "forego litigation, by leading him to reason and believe a settlement or adjustment of his claim will be effected without the necessity of bringing suit." *Id.* at 277, 762 P.2d at 564.

II. COUNT 3 (WAGE CLAIM)

¶20 Sindlinger next asserts that his claim for treble damages under A.R.S. § 23-355[5] for failure to pay wages was timely because he filed his claim within one year of his termination. He correctly conceded below that a one-year statute of limitations applied to his claim. *See Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.,* 218 Ariz. 293, 299, ¶ 22, 183 P.3d 544, 550 (App. 2008). Sindlinger now relies on A.R.S. § 23-351(C)[6] to advance an argument that his wage claim accrued when the five-year contract ended, rather than when Co-Sales reduced his wages in October 2003.

¶21 In general, "a cause of action ... accrues immediately upon the happening of the breach, even though the actual damage resulting therefrom may not occur until afterward." *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 76, ¶ 13, 985 P.2d 556, 561 (App. 1998). We see nothing in the plain language of A.R.S. §§ 23-351(C) and -355 to suggest that the legislature intended that a different rule should apply to wage claims. Here, assuming the truth of the allegations in the complaint, Co-Sales violated

[5] Section 23-355 provides: "[I]f an employer, in violation of this chapter, fails to pay wages due any employee, the employee may recover in a civil action against an employer or former employer an amount that is treble the amount of the unpaid wages."

[6] Section 23-351(C) provides: "Each employer shall, on each of the regular paydays, pay to the employees . . . all wages due the employees up to such date . . . ."

A.R.S. § 23-351(C) beginning in October 2003 when it gave Sindlinger a reduced paycheck. And Sindlinger was aware of this violation every fifteenth and last day of the month when he continued to receive reduced paychecks. *See Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995) (finding that a cause of action generally accrues when the plaintiff knows, or through the exercise of due diligence should know, the facts underlying the cause of action).

¶22 Sindlinger provides no legal authority that supports an interpretation of A.R.S. § 23-351 or -355 that would provide for a different accrual date. His sole citation is to *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 488, ¶ 25, 143 P.3d 1023, 1029 (2006), in support of an assertion that the "wage statute is triggered by the termination of the employment." That case is not on point and mentions the wage statutes in passing only for the proposition that the state is obligated "to make certain payments to separating employees." *Id.* Indeed, Arizona law has long been to the contrary. *See Yuma County v. Hodges*, 20 Ariz. 142, 145, 177 P. 270, 271 (1919) (in suit to recover balance of salaries due to county officials, the statute of limitations "bars a recovery of back salary due and payable a year or more prior to the commencement of the

action"); *see also Graham County v. Smith*, 20 Ariz. 145, 146, 177 P. 271, 272 (1919).

III. COUNT 4 (FRAUD)

¶23 Sindlinger admits that the statute of limitations for fraud is three years, but asserts that Co-Sales' repeated offers to renegotiate the terms of the original agreement tolled the statute of limitations on this claim.

¶24 "The statute of limitations in a fraud case begins to run when the plaintiff by reasonable diligence could have learned of the fraud, whether or not he actually learned of it." *Coronado Dev. Corp. v. Superior Court (Winkler)*, 139 Ariz. 350, 352, 678 P.2d 535, 537 (App. 1983). "All that is required is that [the plaintiff] should have known such facts that would have prompted a reasonable person to investigate and discover the fraud." *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 264, 266, 678 P.2d 449, 451 (App. 1983), *approved in part, vacated in part by* 139 Ariz. 242, 678 P.2d 427 (1984).

¶25 Count 4 alleged that Co-Sales "knew" that its representation to pay the agreed amounts "was false," and that Sindlinger had "no reason" to believe that Co-Sales would not abide by the agreement. The complaint, however, demonstrates otherwise. Sindlinger alleged that Co-Sales "demoted" him in April 2002, tried to "compel" him to quit, attempted to modify the agreement in September 2003 by cutting his salary in half,

and reduced his pay in October 2003. Even assuming *arguendo* that these actions constituted evidence of a false representation at the inception of the agreement, any one of these allegations was sufficient to alert Sindlinger that Co-Sales would not abide by the terms of the agreement. Additional notice occurred each time Co-Sales issued reduced paychecks over Sindlinger's "consistent[]" protests. Accordingly, the allegations in the complaint themselves demonstrate that the fraud claim is time-barred.

¶26 Sindlinger relies on *Sobel v. Jones*, 96 Ariz. 297, 394 P.2d 415 (1964), to support his contention that Co-Sales' 2003 and 2005 attempts to renegotiate the agreement tolled the statute of limitations. *Sobel,* however, is readily distinguishable from the situation at bar. The plaintiff in *Sobel* was the defendant's employee who was never paid for his work. *Id.* at 299, 394 P.2d at 416. When plaintiff asked the defendant to "settle with him," his requests were "put off" by the defendant who "told plaintiff 'not to worry'; said that business was bad and he was short of money but that he would 'take care of' plaintiff." *Id.* Here, Sindlinger was paid for his services, albeit at a reduced rate -- there is no allegation that he was misled as to Co-Sales' intentions during that period. Although the complaint alleges that Co-Sales "assured" Sindlinger it would honor the agreement, those promises occurred

more than a year *before* Co-Sales reduced Sindlinger's pay. The complaint does not allege that Co-Sales ever told Sindlinger it would "take care" of him or remedy its breach. To the contrary, the complaint alleges that Co-Sales ignored Sindlinger's protests on "each check" and continued to withhold salary.

¶27 Sindlinger admits that he decided to "fully perform his part of the contract" instead of filing suit, but contends that he "was permitted to seek all of the damages caused by Co-Sales' fraud" when the contract ended. In *Rhoads v. Harvey Publ'ns, Inc.*, 145 Ariz. 142, 147, 700 P.2d 840, 845 (App. 1984), this court determined that the statute of limitations for fraud began to run when an independent contractor knew, or through due diligence should have known, of any fraud -- not when he ceased working for the employer.

¶28 Sindlinger's final argument is that because the wage payments were also for the purchase of the business, each decreased payment created an "arrearage" to which he, as the "creditor," could "apply the payment" where he chose. We reject this argument for the same reasons that we affirm the trial court's characterization of the contract as one for employment, not for purchase.

IV. COUNT 5 (MISREPRESENTATION)

¶29 We conclude that the misrepresentation claim is barred for the same reasons as the fraud claim. On appeal, Sindlinger

cites to A.R.S. § 12-543 (the three-year statute of limitations), and to *Aaron v. Fromkin*, 195 Ariz. 224, 229, 994 P.2d 1039, 1044 (App. 2000), to support his assertion that damages are a necessary element. Otherwise, his argument is without citation to legal authority. Appellate courts do not consider arguments posited without authority. *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007). Because Sindlinger fails to develop his argument, we decline to address it now. *See* ARCAP 13(a)(6) (appellate briefs must present significant arguments, set forth positions on issues raised, and include citations to relevant authorities, statutes and portions of the record); *Ace Auto. Prods. Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987) ("It is not incumbent upon the court to develop an argument for a party."); *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (failure to present an argument in this manner usually constitutes abandonment and a waiver of that issue). Additionally, because Sindlinger failed to provide a transcript of the oral argument on this issue, we may presume that the record supports the trial court's ruling. *See* ARCAP 11(b); *Johnson v. Elson,* 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025.

CONCLUSION

¶30 For the reasons stated above, we affirm the trial court's dismissal of Sindlinger's complaint.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge