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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAMES BEEDE, Plaintiff/Appellant, v. CITY OF TUCSON, a municipal corporation of the State of Arizona, Defendant/Appellee.	2 CA-CV 2010-0182 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20095599

Honorable Carmine Cornelio, Judge

AFFIRMED

Watters & Watters, P.C.
By Andrea E. Watters
Tucson
Attorney for Plaintiff/Appellant

Michael G. Rankin, Tucson City Attorney
By Julianne Hughes
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E S P I N O S A, Judge.

¶1 In this wrongful termination action, plaintiff/appellant James Beede appeals from the trial court's grant of summary judgment in favor of defendant/appellee City of

Tucson (City) and its denial of his motion to amend his complaint.[1] For the reasons set forth below, we affirm.

Factual Background and Procedural History

¶2 "On appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered and draw all justifiable inferences in [his] favor." *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). "'However, we consider as true those facts alleged by [the moving party]'s affidavits that [the nonmoving party] did not controvert.'" *Id., quoting Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, ¶ 3, 123 P.3d 186, 188 (App. 2005) (alterations in *Modular*). The facts here are largely undisputed but require being set out in some detail.

¶3 Beede began working for the Tucson Police Department (TPD) in 1983 and was promoted to detective in 1996. In 2003, he was assigned to the Crimes Against Persons Division's (CAPD) Sex Offender Registration and Tracking Unit (SORT). In 2005, Sergeant Anthony Sabori began supervising Beede. In 2006, Sabori asked Beede what his testimony would be in an Internal Affairs investigation concerning a female officer's complaints against Sabori. When Beede said he was "going to tell the truth," Sabori "seemed angry." Beede received positive evaluations from Sabori for several

[1]The trial court also granted defendant Anthony Sabori's motion for summary judgment because Beede failed to serve Sabori with a notice of claim and the Tucson Police Department's summary judgment motion because "it is an agency of the Defendant City of Tucson and not a separate entity for purposes of suit." Beede does not appeal these portions of the court's ruling.

years, but Sabori also noted in those evaluations that Beede was not carrying a significant caseload. In Beede's August 2008 evaluation, Sabori wrote, "I have been disappointed by the number of Internet predator cases that you have done" and "I would like you to put more emphasis on doing more Internet traveler cases," with the goal of one or two cases a month.[2] Beede contended this goal was unreasonable but said he would try to meet it. That same month, Sabori and Lieutenant Kathy Rau met with Beede to discuss their concerns about his performance.

¶4 Beede initiated no new Internet-traveler cases from August through November 2008, but instead continued to work on an ongoing, evidence-intensive, Internet-traveler case as well as another extensive investigation. In November 2008, after observing Beede posing as a minor online, Assistant Chief Roberto Villaseñor and Captain John Stamatopoulos noted there were numerous targets for investigation and expressed confidence Beede would be able to conduct one to two Internet-traveler cases a month. Although Stamatopoulos had proposed transferring Beede out of SORT in October 2008, Villaseñor decided not to do so at that time, explaining to Beede, "I need to stress that I think that it is not unreasonable for you to do at least two travelers a month" and "[t]he only reason that I am not allowing the transfer is because I do not feel that we did an appropriate job in documenting our dissatisfaction with your level of

[2]"Internet traveler" cases refer to investigations targeting persons who use the Internet to recruit minors for illegal sexual relationships. Law enforcement personnel pose as underage minors and enter into online communications with predators with the ultimate goal of arranging a meeting for sex, at which time the predator is arrested.

productivity." Villaseñor also told Beede his performance would be reevaluated in three months, at which time he might be transferred "if [his] performance [wa]s not meeting the standards" set by Stamatopoulos.

¶5 In December 2008, Lieutenant Robert Wilson was assigned to CAPD. Because he was aware his predecessor, Rau, had reviewed Beede's work history, Wilson also conducted a review of Beede's work and found he had conducted only four Internet-traveler cases over the previous twenty-eight months. He also determined Beede's investigations in other types of cases, including child pornography, had been deficient.

¶6 As a result, Wilson reviewed and approved a Special Performance Review and Work Improvement Plan (the Plan) that was given to Beede in December 2008 and was to be effective through March 18, 2009, at which time a decision would be made as to whether Beede had met its requirements. The Plan explained that although Beede had been told in August to investigate one or two Internet-traveler cases a month, he had not done so and had conducted inadequate investigations in other cases. The Plan directed Beede to conduct at least two Internet-traveler cases a month and to investigate his other cases thoroughly. Beede submitted two separate rebuttals to the Plan in which he challenged the criticisms of his performance.

¶7 Wilson met with Sabori over the next few months to discuss Beede's progress under the improvement plan. Wilson also observed Beede as he investigated potential Internet predators. After watching Beede pose as a minor online, Wilson was

concerned Beede was purposely avoiding aggressive targets who were interested in setting up meetings.

¶8 Because Beede was on a work-improvement plan, he was not eligible for outside or secondary employment through the department. Although Beede previously had earned extra income by working at the Tucson Gem Show, Sabori informed him he was not allowed to do so in 2009 under the Plan. Beede alleged Sabori had "falsified" the Plan because one copy showed Beede was still eligible for special duty and another version showed he was not, and requested an Internal Affairs investigation into the differences between the two copies. An investigation was conducted, which concluded the allegations against Sabori were unfounded and determined Beede had "somehow received an incomplete Performance Evaluation that had not been signed by his chain of command" and "[t]he actual Performance Evaluation signed by the chain of command reflects that Detective Beede is not authorized to work Special Duty."[3]

¶9 In early March 2009, Beede's counsel sent a letter to the City of Tucson's Legal Department and TPD's Acting Chief of Police, in which she asserted "[f]rom . . . late 2005 through the present Det[ective] Beede has been subjected to constant threats, harassment and retaliation at the hands of his present supervisor, S[ergeant] Tony Sabori." The letter outlined a number of incidents and complaints Beede had with Sabori

[3]The investigation also noted Sabori had consulted with Stamatopoulos and Wilson, both of whom had informed him Beede's special duty privileges should be suspended.

and requested that Sabori be transferred and Beede compensated for lost overtime, lost earnings from the Gem Show, emotional distress, and attorney fees.[4]

¶10 Also in March 2009, Wilson and Stamatopoulos reviewed and discussed Beede's progress under the Plan and determined he was not performing at an acceptable level. Stamatopoulos, after consulting with Villaseñor, transferred Beede to "CAPD/Night Detectives" effective March 22, 2009. In an e-mail to Villaseñor, Stamatopoulos explained the transfer had been intended to give Beede the opportunity to improve his work performance through an assignment with a more manageable caseload.[5]

¶11 Beede submitted a notice of retirement on April 29, 2009, with an effective date of May 30, 2009. In his letter, Beede stated his "working conditions have become so intolerable that I feel compelled to retire." He explained he had "been singled out by my direct supervisor" and "was the subject of ongoing threats of being transferred, retaliation, harassment and denied an opportunity to earn wages." He further alleged "[m]y supervisor issued falsified job performance evaluations and set unattainable work goals for me in an effort to ensure that I would fail at my job" and "S[ergeant] Sabori was

[4]TPD conducted an investigation into Beede's allegations of hostile work environment, discrimination, and harassment. As a part of the investigation, Wilson met with Beede and asked for details about his complaints and reviewed his two written rebuttals to the Plan. Stamatopoulos and Wilson ultimately determined there was no factual basis for Beede's allegations and that they were not based on "sexual orientation, religion, race, color, age, handicap, or sex."

[5]In an affidavit accompanying Defendants' motion for summary judgment, Stamatopoulos explained that Sabori, because he was a sergeant, did not have the authority to transfer any member of the department. Sabori affirmed in his own affidavit that he was not a party to Stamatopoulos's decision to transfer Beede.

allowed to orchestrate my transfer to another department where I have been assigned to work nights and weekends," which he characterized as a "demoralizing and a harassing move."

¶12 Also during early 2009, Wilson had opened an Internal Affairs investigation into a potential breach of the SORT computer system. Although Beede had initially denied making a specific entry into the system, he later admitted making the entry after evidence revealed in the investigation disclosed it had been made on his computer and related notes were in his handwriting. As a result, Wilson and Stamatopoulos concluded Beede had violated several of the department's General Orders and Villaseñor determined Beede should be suspended for twenty hours. This discipline, however, was not imposed due to Beede's imminent retirement. When Beede asked if he could grieve the suspension, he was told he could not because he was retiring.

¶13 In July 2009, Beede filed a complaint against the City, TPD, Sabori, and several fictitious defendants, alleging claims of wrongful discharge, violation of his due process rights, and negligent supervision and retention. The defendants moved for summary judgment in April 2010, including with their motion a number of affidavits and documents. Beede opposed the motion, relying primarily on his unsigned affidavit.[6]

¶14 In May 2010, only two months before the scheduled trial date and after the dispositive motion deadline had passed, Beede moved to amend his complaint, seeking to

[6]Beede later filed a signed version with the trial court. Although the court noted it was not filed with permission, it did not strike it.

add the Tucson Police Officer's Association (TPOA) as a party and to assert additional claims against the City for defamation per se, libel, and slander; invasion of privacy and false light; and retaliation. The proposed amendments were based on allegations that several months earlier, in February 2010, TPOA had published false statements about him in its newsletter, including that he had resigned in lieu of termination. Beede subsequently filed a separate motion to reschedule the trial date based on his counsel's personal schedule conflict. Although the City did not oppose a short continuance of the trial date in order to accommodate Beede's counsel, it did oppose his motion to amend his complaint, arguing the amendment would "interject[] new theories, facts, and parties[,] none of which [we]re part of or connected to the original complaint" and would prejudice the City.

¶15 The trial court granted Beede's motion to reschedule the trial but denied his motion to amend his complaint, explaining "this matter has been pending for some time and . . . most (if not all) of the disclosure, discovery, and deadlines have passed" and "the addition of a new party, and these new facts would cause significant delay" and "substantial prejudice" to defendants.

¶16 Several weeks later, the trial court granted the City's motion for summary judgment on two alternative bases. First, it held the notice of claim had not been filed timely and properly with the City pursuant to A.R.S. § 12-821.01 and the City had not waived this affirmative defense. Second, because the first resolution "disposes of the case on a technical rather than merit-based ruling . . . [and] the City could have been

more candid and less opaque in its language raising the affirmative defense," the court reached the merits of Beede's claims and determined that "even viewing the facts and reasonable inferences in the light most favorable to the non-moving party, as this Court must, the facts presented fail in that no reasonable jury could find in favor of the Plaintiff." We have jurisdiction over Beede's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

Motion for Summary Judgment

¶17 The entry of summary judgment is appropriate "if the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). "When a moving party meets its initial burden of production by showing that the non-moving party does not have enough evidence to carry its ultimate burden of proof at trial," the non-moving party must "present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 26, 180 P.3d 977, 984 (App. 2008). "In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material

fact exist and whether the trial court properly applied the law." *Tierra Ranchos Homeowners Ass'n v. Kichukov*, 216 Ariz. 195, ¶ 15, 165 P.3d 173, 177 (App. 2007).[7]

Wrongful Discharge

¶18 Beede alleges he was wrongfully discharged "in violation of public policy in that he refused to be improperly influenced in an EEO investigation" and "that as a public employee, [he] had a right to continued employment." *See* A.R.S. § 23-1501(3) (setting forth circumstances under which employee may bring claim against employer for termination of employment). Beede's wrongful termination claim is predicated on his allegation that he was constructively discharged as defined in A.R.S. § 23-1502, which requires either "[e]vidence of objectively difficult or unpleasant working conditions to the extent that a reasonable employee would feel compelled to resign," or "[e]vidence of outrageous conduct by the employer or a managing agent of the employer . . . if the conduct would cause a reasonable employee to feel compelled to resign." § 23-1502(A).[8]

¶19 In granting summary judgment on this claim, the trial court concluded Beede had failed to present admissible evidence sufficient to establish constructive discharge, explaining Beede "has not produced facts sufficient for a reasonable jury to

[7]Because we affirm the trial court's grant of summary judgment on the basis that all of Beede's claims fail as a matter of law, we do not reach the court's alternative basis for its decision, which concerned whether Beede's notice of claim had been properly filed with the City and whether the City had waived its objections by proceeding with discovery. *See Little v. State*, 225 Ariz. 466, n.7, 240 P.3d 861, 866 n.7 (App. 2010).

[8]Under the first provision, an employee also must notify the employer in writing of the working conditions underlying the claim and give at least fifteen days' notice of the employee's intent to resign. § 23-1502(A)(1), (B).

conclude that his working conditions were so intolerable that a reasonable person would have been compelled to resign (an objective test) nor does the record show evidence of 'outrageous conduct.'" It pointed out that, although "there were personality differences between Beede and Sabori and differences of opinion on how Beede's job should be done," the undisputed facts demonstrated "these goals were not imposed by Sabori but rather the command structure of TPD." In addition, because Beede had been transferred away from Sabori at the time of his alleged constructive discharge, Beede had failed to "establish facts that would allow a reasonable jury to conclude that his new working conditions were so intolerable such that a reasonable person would be forced to resign."

¶20 After reviewing the record, we agree with the trial court that, construing the facts in Beede's favor, *see Modular*, 221 Ariz. 515, ¶ 2, 212 P.3d at 855, he has failed to present evidence that his work environment was sufficiently difficult or unpleasant, or that his employer acted outrageously, so as to constitute a constructive discharge. *See* § 23-1502. In his opposition to the City's motion for summary judgment, Beede alleged his constructive discharge was a result of "years of harassment," "bogus threats of termination," "unreasonable job duties," the attempt to transfer him in November 2008, and Sabori's "false personnel evaluation" and "false Internal Affairs investigation." These allegations, however, are based on Sabori's conduct, and it is undisputed that, at the time of Beede's retirement, he was no longer working under Sabori or even in the same department. Moreover, the undisputed evidence demonstrates the decision to transfer Beede was made by persons other than Sabori in an effort to allow Beede to

become more productive. Most importantly, although Beede may have felt his new assignment was less desirable and did not make the best use of his experience, he did not allege any facts demonstrating that his new work environment was so "objectively difficult or unpleasant . . . to the extent that a reasonable employee would feel compelled to resign," or that his employer had acted "outrageous[ly]." § 23-1502(A). Accordingly, the court correctly granted summary judgment on Beede's constructive discharge claim.[9]

Due Process Claim

¶21 Beede's second claim alleged the City had violated his due process rights in that, as a public employee, he was "denied a right to be heard about the harassment and retaliation he suffered at the hands of Defendant Sabori," and that "adverse actions taken against him served no legitimate government purpose in depriving [him] of his

[9]Although Beede repeatedly contends Sabori manipulated events against him, including the imposition of impossible work expectations that led to his eventual transfer, he has failed to meet his burden to refute the City's evidence that supervisors other than Sabori personally evaluated whether the work expectations imposed on Beede were reasonable, determined whether Beede was meeting these goals, and ultimately made the decision to transfer him. Moreover, to the extent Beede attempted to demonstrate those expectations were unreasonable, he did so by offering only hearsay and speculation. For example, in his affidavit in opposition to summary judgment, Beede asserted that "SSA Andrews [wa]s satisfied with my production and state[d] that I do excellent investigations and follow all the [Federal Bureau of Investigation (FBI)] guidelines," "I have personally conferred with the FBI agents who will support me in stating that 1-2 traveler cases is impossible by their guidelines," and "I contacted the Phoenix [Internet Crimes Against Children U]nit . . . [and t]hey stated that their full time detective who works mostly traveler cases could not and has not done 1-2 traveler cases a month." These hearsay allegations fail to meet the requirements of Rule 56. *See* Ariz. R. Civ. P. 56(e) ("[O]pposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence."); *Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 82, 847 P.2d 117, 127 (App. 1992) (affidavit based on inadmissible hearsay insufficient under Rule 56).

constitutionally protected interests." In his opposition to the City's motion for summary judgment, Beede more specifically alleged he had been "denied due process when S[ergeant] Sabori attempted to have him transferred back in October 2008," had never been "given a hearing of any kind on the protest he filed in opposition to the Special Evaluation that S[ergeant] Sabori attacked him with," and had been "denied due process when he received a disciplinary notice just days before his retirement . . . . and was told that because he was retiring . . . he would not be able to file a grievance." The trial court noted that, apart from summarily citing 42 U.S.C. § 1983 and his constitutional due process rights, Beede's opposition memorandum cited no authority in support of this claim, nor had he presented any facts or evidence demonstrating he was a member of a protected class as required for an equal protection claim.

¶22 Section 1983 prohibits the deprivation of any constitutional rights, privileges, or immunities under color of state law. 42 U.S.C. § 1983. Beede has failed to identify the nature of the constitutional rights he contends the City violated or otherwise present any authority supporting this claim. As such, we could consider it waived. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.").[10]

[10]As noted above, the trial court construed this claim as an equal protection claim, and, as the City points out, Beede "does not dispute that this was the correct issue or assert that the Court's conclusion regarding this issue was in error."

¶23 Even were we to consider the few incidents Beede does allege and assume they implicate a due process right, they nevertheless are insufficient to survive the City's motion for summary judgment. Regarding the attempt to transfer him in November 2008, it is undisputed he was not transferred at that time. The same is true for the discipline notice: it is undisputed Beede was never disciplined in view of his imminent retirement, and Beede fails to present any reason why TPD should have allowed an appeal in light of the fact the discipline was never imposed. Finally, Beede cites no authority, nor are we aware of any, supporting his allegation that he was entitled to a hearing in response to the Plan. Moreover, the record demonstrates TPD conducted an investigation into Beede's complaints about the Plan, which investigation included meeting with Beede and reviewing his two written responses to the Plan, and concluded his allegations were unfounded. "'If the party with the burden of proof on the claim . . . cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted.'" *Nat'l Bank*, 218 Ariz. 112, ¶ 21, 180 P.3d at 982, *quoting Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). Accordingly, we conclude the trial court correctly granted summary judgment on Beede's due process claim.[11]

[11]On appeal, Beede also contends he was denied due process by not receiving a pretermination hearing after his notice of constructive discharge. Because this argument was not presented to the trial court, it is waived. *See Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 90, 796 P.2d 881, 892 (1990) ("On appeal from summary judgment, we will not consider new factual theories raised in an attempt to secure reversal of the trial court's determinations of law."). In any event, as set forth above, we have concluded Beede has

Negligent Supervision

¶24 Beede further argues the trial court erred in granting the City's motion for summary judgment on his claim for negligent supervision.[12] The court determined there were "[n]o facts . . . to support a claim that the City (TPD) failed to supervise Sabori in his management duties of Beede"; instead "the record shows that TPD management was frequently and intimately involved in the supervision of Beede, including evaluation, performance goal-setting, and decision-making as to [his] duties and assignments." The court further pointed out that Beede's "responsive memorandum to Defendant's motion for summary judgment on negligent supervision cites no law [or] specific facts and consists of two sentences."[13]

¶25 On appeal, Beede provides an almost verbatim recitation of the same two conclusory sentences the trial court criticized: "the City of Tucson failed to supervise S[ergeant] Sabori in that they failed to address his pattern of retaliating against certain employees, including Plaintiff," and "[h]ad the City of Tucson implemented better

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failed to meet his burden of establishing he was constructively discharged. *See* § 23-1502(A).

[12]Although this claim is entitled, "Negligent Supervision and Retention," in Beede's complaint, he only addressed negligent supervision in his opposition to the City's motion for summary judgment. The trial court's ruling likewise was limited to negligent supervision.

[13]Citing *Mosakowski v. PSS World Medical, Inc.*, 329 F. Supp. 2d 1112 (D. Ariz. 2003), the trial court also explained that, "[e]ven if Plaintiff had come forth with genuine material facts to establish his claim of negligent supervision, Arizona's workers compensation statutes preclude[] such a negligence claim." Because we resolve this issue on an alternative basis, we need not reach this issue.

supervision then they would have known that the Plaintiff was being denied due process rights, being harassed and retaliated against and, presumably, they would have taken action to help Plaintiff."

¶26 We agree with the trial court that Beede has failed to meet his burden of coming forward with evidence creating a genuine issue of fact as to this claim. *See Nat'l Bank*, 218 Ariz. 112, ¶ 21, 180 P.3d at 982. "For an employer to be held liable for the negligent hiring, retention, or supervision of an employee, a court must first find that the employee committed a tort." *Kuehn v. Stanley*, 208 Ariz. 124, ¶ 21, 91 P.3d 346, 352 (App. 2004). Beede does not allege, let alone present any admissible evidence, that Sabori or anyone else committed a tort. For this reason alone, summary judgment was proper. *See id.* ¶ 22. Moreover, as the court pointed out, despite Beede's allegation that Sabori needed "better supervision," the record clearly demonstrates all significant personnel actions concerning Beede, including his evaluations, performance goals, and ultimate transfer, involved TPD management. The court therefore did not err when it granted summary judgment on Beede's negligent supervision claim.

Motion to Amend Complaint

¶27 Beede also argues the trial court abused its discretion in denying his motion to amend his complaint. "Leave to amend is discretionary but should be 'freely given when justice requires.'" *Elm Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 25, 246 P.3d 938, 943 (App. 2010), *quoting* Ariz. R. Civ. P. 15(a). Amendments generally are permitted "unless the court finds undue delay in the request, bad faith, undue prejudice,

or futility in the amendment." *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996). We review the denial of a motion to amend a complaint for an abuse of discretion. *Elm Ret. Ctr.*, 226 Ariz. 287, ¶ 25, 246 P.3d at 943.

¶28 As set forth above, Beede sought to amend his complaint two months before trial to add TPOA as a party and to assert additional claims against the City, all based on allegations that, several months earlier, TPOA had published false statements about him in its newsletter. Beede argues that because the City did not object to moving the trial date due to Beede's counsel's personal obligations, "there simply is not any evidence of undue prejudice to Defendant[]s by allowing the amendment of the Complaint."

¶29 Beede's argument assumes that the City's agreement to make a minor adjustment to the trial date in order to accommodate his counsel's schedule meant it would not be prejudiced by an eleventh-hour addition of new theories and parties. The argument is without merit. As the trial court found, the addition of new causes of action and a new party would cause "significant delay" and "substantial prejudice" to the City, explaining "most (if not all) of the disclosure, discovery, and deadlines have passed" and the "parties, facts, and theories . . . were not part of the same transaction or occurrence as were originally pled, disclosed, and discovered upon." Granting Beede's request would have required the reopening of discovery and the establishment of new deadlines for dispositive motions, which would have prejudiced the City. *See Spitz v. Bache & Co.*, 122 Ariz. 530, 531, 596 P.2d 365, 366 (1979) ("[P]rejudice is 'the inconvenience and

delay suffered when the amendment raises new issues or inserts new parties into the litigation.'"), *quoting Romo v. Reyes*, 26 Ariz. App. 374, 376, 548 P.2d 1186, 1188 (1976).

¶30 Although Beede argues that allowing amendment would have prevented the litigation of a separate case and thus "save money and time," this theory is unavailing where the parties already had concluded discovery and the City had filed a dispositive motion. *See Gulf Homes, Inc. v. Goubeaux*, 136 Ariz. 33, 38, 664 P.2d 183, 188 (1983) ("Our courts have properly refused to permit amendments to pleadings where the party moved to amend . . . when further discovery was precluded."); *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 418, 837 P.2d 1143, 1153 (App. 1991) (affirming denial of motion to amend; "Allowing . . . an amendment adding an entirely new theory of liability at [a] late date would have required additional research and discovery, resulting in substantial delays."). On this record, we cannot conclude the trial court abused its discretion in denying Beede's motion to amend his complaint.

Attorney Fees

¶31 The City requests an award of its attorney fees under Rule 25, Ariz. R. Civ. App. P., arguing Beede's opening brief contains misstatements and misrepresentations of the record. Under this rule, this court may impose "reasonable penalties or damages," including attorney fees, when an appeal "is frivolous or taken solely for the purpose of delay . . . or where any party has been guilty of an unreasonable infraction of these rules." *Id*. Although Beede has not prevailed, we do not find sanctions under this rule warranted

here. *See Molever v. Roush*, 152 Ariz. 367, 375, 732 P.2d 1105, 1113 (App. 1986) (Rule 25 sanctions imposed only with "great reservation"). We therefore deny the City's request for fees. The City is entitled to costs on appeal subject to compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶32 For the reasons stated, the trial court's grant of summary judgment in favor of the City and its denial of Beede's motion to amend his complaint are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge