

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

TRANCE INDUSTRIES, INC., AN ARIZONA CORPORATION,
Plaintiff/Appellant,

v.

NATURE MED, INC., AN ARIZONA NOT-FOR-PROFIT CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2019-0115
Filed September 29, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20160625
The Honorable Charles V. Harrington, Judge

AFFIRMED

COUNSEL

Kelly McCoy PLC, Phoenix
By Walid A. Zarifi
Counsel for Plaintiff/Appellant

Barrett & Matura P.C., Phoenix
By Jeffrey C. Matura and Melanie M. Weigand
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Vásquez and Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 Trance Industries Inc. appeals from the trial court’s dismissal of three of its claims against Nature Med Inc., arguing dismissal was procedurally and substantively improper. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In early 2014, Trance entered into an agreement with Nature Med to rent “[c]ultivator [s]pace” for growing medical marijuana and to produce a minimum harvest that the parties would then jointly sell. In 2016, Trance filed suit against Nature Med and its sole principal, Michael Schmidt, alleging breach of contract, breach of implied covenant of good faith and fair dealing, conversion, and unjust enrichment. Trance alleged that after entering into the agreement, it had discovered the electrical supply at the premises “was not sufficient to support the minimum harvest and yield requirements” set forth in the agreement. Trance’s complaint detailed that Nature Med and Schmidt had been notified about the shortfall in “electrical output” and the parties had agreed Trance would use its best efforts to grow and harvest “as much product as possible based on constrained available electrical output.” Trance further claimed that in the fall of 2014, Schmidt and Nature Med had unilaterally terminated the agreement, locked Trance out of the premises, solicited some of Trance’s employees to work with Nature Med, confiscated all of Trance’s plants, and sold the product without compensating Trance.

¶3 An answer was filed on behalf of both defendants in June of 2016, alleging Trance had known “of the actual amount of electrical output” at the premises before entering into the agreement and Schmidt had been “unhappy with Trance’s performance” under the agreement. The answer further denied that Nature Med wrongly terminated the agreement. There was no further activity in the case until March 2017, when Schmidt, represented by new counsel, and Trance filed a Joint Report in which they

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stated that Nature Med had “apparently recently undergone a change in management and new counsel has not appeared.” Another filing indicated that a dispute had arisen within Nature Med as to who was the rightful owner of the company. That dispute had been resolved, but Nature Med went on to change ownership five more times.

¶4 In June 2018, the trial court placed the case on the dismissal calendar, and Trance thereafter filed a motion to continue the matter and that Nature Med be ordered to appear so that all parties could prepare a new joint report and scheduling order. The court denied the motion and set a trial date, noting it appeared “very little has been done in this case over the 2 ½ years that it has been pending,” and “[v]irtually all, if not all, deadlines in the Scheduling Order have passed.”

¶5 Schmidt thereafter filed a motion to dismiss and motion for summary judgment “as to the entire action,” arguing Trance had not diligently prosecuted the case, nor had any disclosure been made. He additionally argued that because Trance had not timely disclosed any evidence or witnesses, summary judgment was appropriate. He asserted, “[T]o be absolutely clear, this [dismissal] should include not only Plaintiff Trance’s claims against Defendant Schmidt, but the entire claim including allegations against Defendant Nature Med.” In response, Trance argued it “believe[d]” it had prepared and sent an initial disclosure statement to defendants, and conceded “personal issues admittedly contributed to a good portion of the delay” in litigation, then addressed Schmidt’s substantive arguments for dismissal and summary judgment. In reply, Schmidt repeated his request that the court dismiss the action in its entirety or enter summary judgment against Trance “on all counts and claims.”

¶6 The trial court dismissed Trance’s complaint as to Schmidt for all but the conversion claim, finding Schmidt had signed the contract central to the dispute “in his representative capacity and not as an individual.”¹ As to Nature Med, the court also dismissed all but the conversion count, reasoning Trance’s claims rested on an oral modification of the written contract, which was not permitted under the express terms of the agreement. Trance filed a motion for partial reconsideration, arguing for the first time that dismissal of the three claims against Nature Med was “procedurally and legally deficient” because Schmidt’s counsel was not authorized to move for dismissal or summary judgment on behalf of Nature

¹In a separate ruling, the trial court denied Schmidt’s motion to dismiss and motion for summary judgment as to the conversion claim.

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Med. Schmidt responded that Trance failed to timely raise this argument and had therefore waived it. The court agreed and denied the motion for reconsideration.

¶7 In January 2019, after the deadline for the joint pretrial statement had passed, Schmidt again moved for dismissal of the entire action based on Trance’s “continued failure to comply with [c]ourt ordered deadlines and requirements.” Schmidt and Trance thereafter entered into a stipulation whereby Trance dismissed its conversion claim against Schmidt with prejudice and against Nature Med without prejudice and Schmidt withdrew his motion to dismiss. The trial court accepted the stipulation, and a final judgment was subsequently entered. Trance appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Summary Judgment in Favor of Nature Med

¶8 Trance challenges the trial court’s entry of summary judgment in favor of Nature Med, claiming it was procedurally and substantively improper. At the outset, we note that although the court’s minute entry “dismissed” the claims against Nature Med, rather than entering summary judgment in its favor, both parties on appeal treat the ruling as a summary judgment for Nature Med. We apply the same general standard of review to a trial court’s ruling on both a motion to dismiss and a motion for summary judgment, *see Conklin v. Medtronic, Inc.*, 245 Ariz. 501, ¶ 7 (2018) (de novo review of motion to dismiss); *Palmer v. Palmer*, 217 Ariz. 67, ¶ 7 (App. 2007) (de novo review of grant of summary judgment), and our resolution of this appeal would be the same regardless of either characterization. Accordingly, we view the trial court’s ruling as an entry of summary judgment in favor of Nature Med and address each of Trance’s arguments as such.

Procedure

¶9 Trance first contends the trial court’s dismissal of the three claims as to Nature Med was “legally and fundamentally erroneous” and “contrary to established law” because Nature Med was not represented and did not move for dismissal or summary judgment. Nature Med argues, as a threshold matter, that Trance did not adequately preserve this issue for appellate review because it was not raised until its motion for partial reconsideration, after the court had already dismissed the claims. *See Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15 (App. 2006) (appellate courts generally “do not consider arguments on appeal that were raised for the first time at the trial court in a motion for reconsideration”).

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Indeed, the trial court expressly found the argument waived for not having been timely raised, a finding Trance has not challenged on appeal. Accordingly, we need not address this issue further.²

Substance

¶10 Trance also argues the trial court’s ruling in Nature Med’s favor was improper on the merits. As noted above, we apply a de novo standard when reviewing a trial court’s grant of summary judgment. See *Palmer*, 217 Ariz. 67, ¶ 7. Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). Summary judgment should be granted when “the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim.” *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990); see also Ariz. R. Civ. P. 56(a).

¶11 Trance’s claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment were all based on Nature Med’s termination of the cultivator agreement. Trance alleged that termination was wrongful because the parties had orally modified the agreement, allowing Trance to produce less product than previously agreed. Schmidt and Nature Med, however, denied any modification and alleged Trance was not in material compliance, justifying the contract’s termination. Schmidt’s motion for summary judgment argued that Trance had failed to disclose any evidence relating to its claims, and in particular had failed to provide any evidence of a written modification to the agreement, as expressly required by its terms,

² Even were this procedural issue not waived, the trial court committed no error. While Rule 56(f), Ariz. R. Civ. P., explicitly permits the court to grant summary judgment independent of any motion, Trance had both notice and opportunity to respond to the motion to dismiss and motion for summary judgment. See Ariz. R. Civ. P. 56(f) (requiring “notice and a reasonable time to respond”); cf. *Johnson v. Earnhardt’s Gilbert Dodge, Inc.*, 212 Ariz. 381, ¶ 25 (2006) (trial court may enter summary judgment for non-moving party so long as opponent had adequate opportunity to respond). Trance’s cited federal case is thus easily distinguished. See *Choudhry v. Jenkins*, 559 F.2d 1085, 1088-89 (7th Cir. 1977) (reversing sua sponte summary judgment ruling because it “came with no warning, taking plaintiff completely by surprise”).

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warranting summary judgment on that ground alone. Additionally, Schmidt alleged Nature Med terminated the contract not only due to lack of production, but because one of Trance's employees "might have been misappropriating [cannabis] plants."³ The trial court's dismissal noted that Trance "has not provided to the Court any written document regarding" the alleged oral modification, nor has it "provided any argument that such terms should be enforced without a writing notwithstanding the writing requirement of . . . the Cultivator Agreement."

¶12 On appeal, Trance correctly points out that parties may orally modify contracts even when the contract precludes oral modification. See *Phoenix Orthopaedic Surgeons, Ltd. v. Peairs*, 164 Ariz. 54, 57-58 (App. 1989), *disapproved on other grounds by Valley Med. Specialists v. Farber*, 194 Ariz. 363 (1999). This argument, however, was raised in the trial court for the first time in Trance's motion for reconsideration. As earlier noted, we generally do not consider arguments on appeal that were not raised to the trial court until a motion for reconsideration. See *Evans Withycombe, Inc.*, 215 Ariz. 237, ¶ 15. Additionally, although Trance cites this general point of law, it has not explained why summary judgment was improper. Nor has Trance cited to any portion of the record containing evidence that supports reversal of the trial court's dismissals. We "generally decline to address issues that are not argued adequately." *In re J.U.*, 241 Ariz. 156, ¶ 18 (App. 2016); see Ariz. R. Civ. App. P. 13(a)(7) (requiring argument to contain "supporting reasons for each contention"); see also *Rice v. Brakel*, 233 Ariz. 140, ¶ 28 (App. 2013) (declining review of argument when appellant did not cite to relevant portions of record or address basis of the trial court's decision to grant summary judgment).

¶13 Nevertheless, addressing Trance's bare argument on appeal, we conclude Trance has not demonstrated that dismissal was improper. To defeat summary judgment on its claims, Trance was required to demonstrate a triable issue of fact regarding whether the parties had orally modified the contract. The only evidence offered was a declaration by Trance's former principal, who claimed Trance and Nature Med "were able to work out a resolution regarding the minimum harvest requirements." But Trance has failed, both on appeal and below, to point to any evidence that all the elements of a contract modification were satisfied. See *Demasse*

³Nature Med alleges the employee was consequently arrested and "[t]his discovery jeopardized [its] dispensary registration certificate from ADHS and also explained Trance's inability to produce the required quantities of medical marijuana."

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v. ITT Corp., 194 Ariz. 500, ¶ 18 (1999) (“[T]o effectively modify a contract . . . there must be: (1) an offer to modify the contract, (2) assent to or acceptance of that offer, and (3) consideration.”). And “[h]e who asserts the modification of a contract has the burden of proof.” *Yeazell v. Copins*, 98 Ariz. 109, 116 (1965). The principal’s unilateral declaration that the parties had modified the contract was simply a legal conclusion regarding the ultimate issue upon which summary judgment turned. But mere statements of ultimate facts or conclusions of law, even by affidavit, are insufficient to defeat a motion for summary judgment. *See Florez v. Sargeant*, 185 Ariz. 521, 526 (1996); *see also Feuchter v. Bazurto*, 22 Ariz. App. 427, 429 (1974) (“An affidavit filed in response to a motion for summary judgment must be affirmative and present sufficient material to show that there is a triable issue of material fact.”). Because Trance failed to demonstrate a triable issue of fact, summary judgment was proper on its claims against Nature Med. *See Orme School*, 166 Ariz. at 309 (summary judgment appropriate when “the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense”).⁴

Attorney Fees on Appeal

¶14 Both Trance and Nature Med request an award of attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01(A). As the prevailing party in this contractual dispute, we award Nature Med its reasonable costs and attorney fees upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶15 For the foregoing reasons, the trial court’s judgment is affirmed.

⁴Trance also argues in its reply brief that its claims did not solely rely on the oral modification of the contract, but also on Nature Med’s allegedly wrongful seizure and sale of product. Trance did not raise this argument in its opening brief. Arguments raised for the first time in a reply brief are deemed waived. *See Ariz. Dep’t of Rev. v. Ormond Builders, Inc.*, 216 Ariz. 379, n.7 (App. 2007); *In re Marriage of Pownall*, 197 Ariz. 577, n.5 (App. 2000).