

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

AMERICAN REFRIGERATION SUPPLIES, INC.,
AN ARIZONA CORPORATION,
Plaintiff/Appellee,

v.

HIGGINBOTHAM & SONS, INC. AND
STEVE HIGGINBOTHAM, AN INDIVIDUAL,
Defendants/Appellants.

No. 2 CA-CV 2014-0035
Filed November 14, 2014

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NOT FOR PUBLICATION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); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. C20130054
The Honorable Ted B. Borek, Judge

AFFIRMED

COUNSEL

Robert S. Wolkin, Tucson
Counsel for Plaintiff/Appellee

Fidelis V. Garcia, Chandler
Counsel for Defendants/Appellants

AMERICAN REFRIGERATION v. HIGGINBOTHAM
Decision of the Court

MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Higginbotham & Sons, Inc. (“HSI”) and Steve Higginbotham (collectively “Appellants”) contend the trial court erred in granting Appellee American Refrigeration Supplies, Inc.’s (“American”) Motion for Summary Judgment. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We view the facts in the light most favorable to the party opposing the motion for summary judgment. *Keonjian v. Olcott*, 216 Ariz. 563, ¶ 2, 169 P.3d 927, 928 (App. 2007). In May 2010, Appellants entered into a written “Business Account Application and Agreement” with American for the sale of goods to HSI. Higginbotham signed the agreement as the company’s principal, and he and his wife, Amy Shaffer, signed as guarantors. Two weeks later, Shaffer formed a new business, Shaffer & Sons Heating & Cooling LLC, with another individual. Higginbotham and Shaffer filed for divorce in November 2010.

¶3 During 2012, HSI incurred a balance of \$15,878.87 on its account with American, which was not paid. American filed its complaint in January 2013, naming HSI, Higginbotham, and Shaffer as defendants. American never served Shaffer, and she was dismissed from the lawsuit in May 2013.

¶4 American later filed a motion for summary judgment, together with a separate statement of facts and a supporting affidavit pursuant to Rule 56(c), Ariz. R. Civ. P. Appellants filed a response and statement of facts, but no accompanying affidavit. The

AMERICAN REFRIGERATION v. HIGGINBOTHAM
Decision of the Court

trial court held oral argument, after which it granted summary judgment in American's favor on its breach of contract claim, and denied summary judgment on its alternative unjust enrichment claim. Judgment was entered against Appellants in the amount of \$15,879.67, together with costs and attorney fees, and they appealed.¹ We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶5 Appellants argue the trial court erred in granting summary judgment in favor of American on its breach of contract claim because "a clear factual dispute between the Parties exists." Summary judgment is appropriate only where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). A genuine dispute of fact exists "when 'a reasonable trier of fact' could find in favor of the non-moving party on the record presented." *SWC Baseline & Crimson Investors, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, ¶ 17, 265 P.3d 1070, 1078 (App. 2011), quoting *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). We review the grant of summary judgment de novo. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, ¶ 15, 165 P.3d 173, 177 (App. 2007).

¶6 When the party moving for summary judgment makes a prima facie showing that no genuine issue of material fact exists,

¹The trial court properly certified the judgment as final pursuant to Ariz. R. Civ. P. 54(b) because American could only recover on one theory of its claim. See *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304-05, 812 P.2d 1119, 1122-23 (App. 1991) ("[W]hen a claimant presents a number of legal theories, but will be permitted to recover only on one of them, his bases for recovery are mutually exclusive, or simply presented in the alternative, and he has only a single claim for relief for purposes of rule 54(b)."), quoting *Musa v. Adrian*, 130 Ariz. 311, 313, 636 P.2d 89, 91 (1981); cf. *USLife Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 354, 732 P.2d 579, 584 (App. 1986) (contract governing rights and obligations of parties precludes unjust enrichment recovery).

AMERICAN REFRIGERATION v. HIGGINBOTHAM
Decision of the Court

the burden of production shifts to the opposing party to present sufficient evidence to raise a triable issue. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶¶ 12, 26-28, 180 P.3d 977, 979-80, 984 (App. 2008). In a breach of contract action, the plaintiff must prove the existence of a contract, its breach, and resulting damages. *Chartone, Inc. v. Bernini*, 207 Ariz. 162, ¶ 30, 83 P.3d 1103, 1111 (App. 2004). Once this showing is made, the party opposing summary judgment may not rest on the pleadings, but must respond with specific facts that create a genuine issue for trial. *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 15, 17 P.3d 790, 793 (App. 2000); *see also* Ariz. R. Civ. P. 56(c).

¶7 In opposing summary judgment, a party does not establish a genuine issue for trial by merely contradicting the movant's claim. *Chanay v. Chittenden*, 115 Ariz. 32, 35, 563 P.2d 287, 290 (1977). Instead, competent evidence must be produced, by affidavits or otherwise, setting forth specific issues of fact. Ariz. R. Civ. P. 56(e). An adverse party may support its opposition by affidavit or by memorandum, but a "memorandum must reference depositions, answers to interrogatories, or admissions on file to comply with the rule." *Maxwell v. Fidelity Fin. Servs., Inc.*, 184 Ariz. 82, 86, 907 P.2d 51, 55 (1995). Unsworn and unproven assertions of facts made by counsel in a memorandum or brief are insufficient. *See Rudinsky v. Harris*, 231 Ariz. 95, ¶ 32, 290 P.3d 1218, 1225 (App. 2012) (bare assertions of counsel in memoranda not facts admissible in evidence); *Woerth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305 (App. 1990) (same); *see also Mason v. Bulleri*, 25 Ariz.App. 357, 359, 543 P.2d 478, 480 (1975) (motion for summary judgment must be supported by admissible evidence).

¶8 Here, American provided an affidavit and supporting documents establishing: (1) Higginbotham had entered into a written agreement with American on behalf of HSI and personally guaranteed HSI's obligations; (2) HSI had breached the agreement by failing to pay for goods provided to it by American; and (3) American had been damaged in the amount of \$15,878.87 from

AMERICAN REFRIGERATION v. HIGGINBOTHAM
Decision of the Court

Appellants' failure to pay.² Thus, American presented a prima facie case for breach of contract, shifting the burden to Appellants to produce evidence of a genuine dispute of material fact. *See Thruston*, 218 Ariz. 112, ¶ 12, 180 P.3d at 979-80.

¶9 Appellants provided a separate statement of facts with their response, but it failed to controvert any of American's factual averments and, instead, contained only three additional, unnumbered facts relating to Higginbotham and Shaffer's divorce and her new business. *See* Ariz. R. Civ. P. 56(c)(3). Nor did Appellants offer any affidavits; the only materials provided were a list of filings from the divorce proceedings, an informational print out from the Arizona Corporation Commission's website relating to Shaffer & Sons Heating & Cooling LLC's corporate status, and informational print outs from the Arizona Registrar of Contractors' website concerning two contracting licenses held by Shaffer & Sons Heating & Cooling LLC.

¶10 Appellants contested American's version of the facts in their response by claiming that American had failed to show proof of delivery and that summary judgment was precluded by factual disputes relating to HSI's credit limit, the source of the incurred charges, and damages. These assertions, however, were unsworn and unsupported by any competent evidence. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 5-6, 795 P.2d 827, 831-32 (App.

²American provided several documents in support of its motion, including a copy of its agreement with HSI containing Higginbotham's signature as "Owner," and his and Shaffer's signatures as guarantors. *See* Ariz. R. Evid. 803(6) (business records exception to rule against hearsay); *State v. McCurdy*, 216 Ariz. 567, ¶ 7, 169 P.3d 931, 935 (App. 2007) (whether business records sufficiently reliable to satisfy hearsay exception within sound discretion of trial court). American also provided an account ledger listing individual charges and corresponding invoice numbers, along with an affidavit from its credit manager satisfying the requirements of Ariz. R. Evid. 803(6). *See McCurdy*, 216 Ariz. 567, ¶ 9, 169 P.3d at 935-36.

AMERICAN REFRIGERATION v. HIGGINBOTHAM
Decision of the Court

1990) (party opposing summary judgment may not rely solely on unsworn assertions of fact to controvert a motion supported by sworn facts). The materials submitted with Appellants' response failed to controvert American's prima facie case for breach of contract.³ Appellants provided documents related to Shaffer's new business and her divorce from Higginbotham apparently to support their assertion that Shaffer may be liable for at least some portion of the amount owed, but their statement of facts did not address the significance of that allegation, nor did the documents support it,⁴ merely indicating the fact of Higginbotham and Shaffer's divorce and the creation of Shaffer's new business. Considering that neither of those facts was in dispute, the documents had little probative value and failed to raise any factual issue that would preclude summary judgment.

¶11 We thus conclude Appellants failed to present any competent evidence to controvert American's properly supported motion for summary judgment, *see GM Dev. Corp.*, 165 Ariz. 1, 6, 795 P.2d at 832, and we consider the facts alleged in American's affidavit

³Nor were the documents authenticated, certified, or otherwise explained; thus, "they were not 'admissible evidence' appropriately considered in the context of summary judgment." *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, n.3, 292 P.3d 195, 200 n.3 (App. 2012); *see also* Ariz. R. Civ. P. 56(e); Ariz. R. Evid. 803(8), 901, 902.

⁴Even had Appellants properly raised an issue of fact relating to Shaffer's personal liability to American as co-guarantor, it would not have controverted American's prima facie showing because American, as a creditor, may proceed against any or all of HSI's guarantors to collect the outstanding indebtedness. *See* Restatement (Third) of Suretyship & Guaranty § 52 cmts. a & b (1996) ("obligee may pursue any or all of the secondary obligors on their secondary obligations," and "[t]he relationship among the various secondary obligors . . . does not determine their duties to the obligee").

AMERICAN REFRIGERATION v. HIGGINBOTHAM
Decision of the Court

to be true. *See Tamsen v. Weber*, 166 Ariz. 364, 368, 802 P.2d 1063, 1067 (App. 1990) (uncontroverted facts supporting motion for summary judgment presumed true). Since American established through uncontroverted evidence that it was entitled to judgment on its breach of contract claim as a matter of law, the trial court properly entered summary judgment in American's favor. *See Ariz. R. Civ. P. 56(e)(4)*; *see also Schwab v. Ames Const.*, 207 Ariz. 56, ¶ 16, 83 P.3d 56, 60 (App. 2004) (trial court must grant summary judgment where uncontroverted evidence entitles movant to judgment as matter of law).

Discovery and Disclosure Issues

¶12 Appellants also argue for the first time on appeal that summary judgment was inappropriate because they "should have been afforded the opportunity" for "full discovery." However, if Appellants needed to conduct discovery to fully respond to American's motion, it was incumbent upon them to request a continuance to do so. *Ariz. R. Civ. P. 56(f)*; *see Edwards v. Bd. of Supervisors*, 224 Ariz. 221, ¶ 19, 229 P.3d 233, 235-36 (App. 2010). Because they did not seek such relief below, the issue is waived, and we do not address it further. *Id.*; *see also Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007) (argument raised for first time on appeal is waived when trial court had no opportunity to address issue on merits).

¶13 Finally, Appellants argue American violated its disclosure duties under *Ariz. R. Civ. P. 26.1(a)(4) & (9)* by "failing to disclose and provide evidence in its sole possession." Because this argument is raised for the first time in Appellants' reply brief, it too is waived on appeal. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005).

Attorney Fees and Costs

¶14 American requests an award of its attorney fees on appeal but has failed to specify a statutory basis for such an award as required by *Rule 21(a)*, *Ariz. R. Civ. App. P.* Accordingly, we deny the request. *See Grubb v. Do It Best Corp.*, 230 Ariz. 1, ¶ 17, 279

AMERICAN REFRIGERATION v. HIGGINBOTHAM
Decision of the Court

P.3d 626, 630 (App. 2012) (appellate court will not award attorney fees when party fails to articulate statutory basis for request). As the prevailing party on appeal, however, American is entitled to an award of its costs upon compliance with Rule 21. See A.R.S. § 12-341; *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, ¶ 32, 273 P.3d 668, 675 (App. 2012) (cost award to successful party mandatory).

Disposition

¶15 For the foregoing reasons, the trial court's grant of summary judgment in favor of American is affirmed.