UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2784

September Term, 2003

SHANGRI-LA LIMITED
PARTNERSHIP, ET AL.

V.

BEVARD FARMS CORPORATION

Davis,
Salmon,
Bishop, John J., Jr.
(Ret., Specially
Assigned),

JJ.

Opinion by Salmon, J.

Filed: March 4, 2005

13C02053794

The Circuit Court for Howard County granted summary judgment in favor of Bevard Farm Corporation ("Bevard") in the amount of $340,017.53. The judgment was against Bevard's former tenant, Shangri-La Limited Partnership ("Shangri-La"), Shangri-La's general partner, Shangri-La Enterprises, Inc., and two guarantors of the limited partnership's lease with Bevard. Two days after judgment was entered, all the defendants filed a "Motion to Revise, or Reconsider or to Alter or Amend Judgment," which the court denied on January 20, 2004. This timely appeal followed, in which two issues are presented, which we have reordered and rephrased.

Questions Presented

1. Did the circuit court err in ruling that the doctrine of collateral estoppel precluded it from addressing the issue of what version of the lease was binding?

2. Did the circuit court err in granting summary judgment, despite the fact that disputes of material fact existed as to the damage issue?

I. Background Facts

To understand why summary judgment was granted, it is useful to review the history of two prior cases between Bevard and Shangri-La. The important facts in those cases were summarized by Judge Ellen Hollander in *Shangri-La Ltd. P'ship et al. v. Bevard Farms Corp.*, No. 1512, (Md. Ct. Spec. App., unreported, filed October 22, 2003) (hereafter "*Bevard I*"). *Bevard I* involved the

same parties as those in this appeal. In *Bevard I*, Judge Hollander, for the panel, said:

> This matter is rooted in a ten-year lease agreement dated April 17, 1997 (the "Lease"), executed by the tenant, Shangri-La Limited Partnership ("Shangri-La"), appellant, and the landlord, Bevard Farm Corporation ("Bevard"), appellee. Pradip Ghosh, Ph.D., and his wife, Kumkum Ghosh, appellants, executed a Guaranty of Lease on April 17, 1997. The Lease pertains to property located at 10215 Guilford Road in the Columbia Junction Shopping Center in Howard County, and consists of approximately 6400 square feet. Appellants used the premises for a branch location of Children's Manor Montessori School, which opened on or about December 1, 1997.
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> Pursuant to § 4.1 of the Lease, Shangri-La paid an annual rent of $96,000 in the first year. During each successive year, based on a formula in the Lease, Shangri-La's annual rent was subject to an increase. Article V of the Lease is titled "Taxes," and § 5.1 defines "Real Estate Taxes." Under § 5.2 of the Lease, a triple net commercial lease, Shangri-La was obligated to pay, as "Additional Rent," "all Real Estate Taxes attributable to the Premises. . . ." The real estate taxes are central to the parties' dispute.
>
> The instant appeal arises from two separate law suits filed by Bevard in the District Court for Howard County, which were consolidated below. Bevard filed its first suit on March 9, 2000, in the District Court, seeking to recover from appellant $1184.55 in rent, consisting of unpaid real estate taxes for the tax year 1999/2000. Appellee also demanded possession of the premises, pursuant to Md. Code (1974, 1996 Repl. Vol.) § 8-401 of the Real Property Article ("R.P.") ("Case I"). Bevard filed a second suit on September 14, 2000, in the District Court ("Case II"), seeking to recover $8870.98 in rent, based on unpaid real estate taxes allegedly due and owing from appellants for the tax year 2000/2001. Appellee also sought possession of the premises. Both complaints were titled:

"Failure To Pay Rent-Landlord's Complaint For Repossession Of Rented Property Under Real Property 8 § 401."

As to Case I, on April 3, 2000, the District Court for Howard County (Axel, J.) entered judgment in favor of Bevard in the amount of $1192.14. Thereafter, on April 7, 2000, appellants filed a Notice of Appeal to the Circuit Court for Howard County, which led to the transfer of Case I to the circuit court. On October 5, 2000, after appellants requested a jury trial in Case II, that case was also transferred to the circuit court. Then, by Order of March 8, 2001, the circuit court consolidated Case I and Case II. A consolidated jury trial was held and, on July 30, 2001, the jury determined that appellants breached the Lease. The jury awarded Bevard $10,713.83 in damages.

Following the verdict, Bevard orally requested the court to award possession of the premises. Pursuant to the court's directive, on August 6, 2001, Bevard filed a Motion for Order of Possession of the Premises, pursuant to R.P. § 8-401. Then, on August 8, 2001, a "Notice of Recorded Judgment" was filed in the circuit court, reflecting entry of a judgment in the amount of $10,713.83 in favor of Bevard. Thereafter, on September 7, 2001, while Bevard's motion for possession was pending, appellants noted an appeal to this Court.

On September 24, 2001, counsel for both sides submitted legal memoranda in regard to appellee's motion for possession. By Order docketed October 15, 2001, the court granted Bevard's motion.

Subsequently, on October 22, 2001, appellants moved for judgment notwithstanding the verdict or, alternatively, for a new trial to alter, amend or revise the judgment, and to stay execution of the judgment. In the interim, on October 23, 2001, Bevard filed a Petition For Warrant of Restitution, which appellants answered on October 29, 2001. They opposed the Petition, in light of their pending revisory motion. Then, on

> February 13, 2002, the circuit court denied appellants' post-trial motions.

Slip op. at 1-4 (footnotes omitted).

In *Bevard I*, the panel dismissed the appeal, holding as to Case I, that the appellants had no right to appeal. As to Case II, no appeal was filed within thirty days after the judgment became final. Slip op. at 24, 26.

One of the questions resolved by the jury in the consolidated case discussed in *Bevard I* was: What version of the lease was binding on the parties? The jury decided that the version of the lease advocated by Bevard as being genuine was binding.

On November 27, 2002, which was about eleven months before we dismissed the appeal filed in *Bevard I*, Bevard filed its complaint in the subject case (*"Bevard II"*). The complaint filed in *Bevard II* alleged that Shangri-La breached the Lease by

> failing to pay [r]ent, and other expenses incurred in maintenance and operation of the [p]remises, as well as fees and costs incurred in enforcement of [p]laintiff's rights under the Lease.

The complaint further alleged that Shangri-La breached the Lease by voluntarily vacating the premises prior to the expiration of the term of the Lease. Because of those breaches, Bevard terminated the Lease and requested compensatory damages for the pre-termination contract damages, liquidated damages for post-termination damages, interest, and attorneys' fees.

After appellants filed their answer in *Bevard II*, Bevard filed a Motion for Summary Judgment. Movant asserted that Shangri-La

voluntarily vacated the premises and failed to pay the rent it owed to Bevard. Bevard thereafter exercised its contractual rights under the Lease to re-enter the Premises while still holding Shangri-La liable for all rent that would have been due but for the termination of the Lease. Bevard maintained that it had made reasonable efforts to relet the property after Shangri-La vacated the leased premises. Bevard asked: (1) for damages of $699,945.47, which was the amount due for rent, late charges, and interest for the remainder of the term of the Lease; (2) $24,208.29 due for reasonable costs, fees, and expenses incurred by Bevard to pursue its remedies; and (3) $21,541.72 for repairs, taxes, and maintenance fees, plus interest.

Attached to Bevard's motion for summary judgment was an affidavit by Bevard's comptroller, Edward Plitt. Plitt averred that he received correspondence from Shangri-La on January 2, 2002, saying that it had vacated the premises. Plitt also said that Bevard had not consented to Shangri-La's abandonment of the premises and that Shangri-La failed to pay rent since January 1, 2002. Plitt attached to his affidavit documents showing the rent, late charges, and interest due, as well as attorneys' fees incurred as a result of the breach. The affiant also said that Bevard "has made reasonable efforts to relet the premises since its re-entry including advertising on the property itself, marketing to the brokerage community and contacting specific tenants to determine interest."

On June 5, 2003, Bevard filed an amendment to its motion for summary judgment in which it revised downward the damages claimed based on the fact that, on January 24, 2003, it had relet the premises at a rental fee of $196,000 per month to Tiny Tekkies Learning Center, Inc. Because of the new lease, the damages prayed for were reduced to $260,152.98 for rent, late charges, and interest for the remainder of the Lease. Other expenses were revised upward, *viz*: $30,868.76 for expenses incurred in pursuing its remedies against appellants and $79,864.55 for repairs, taxes, and maintenance. The amended motion was supported by two affidavits by appellee's comptroller, which, *inter alia*, authenticated various business records of Bevard's. In addition, the comptroller swore that Bevard had "made reasonable efforts to relet the premises since its re-entry[,] including advertising on the property itself, marketing to the brokerage community and contacting specific tenants to determine interest."

Appellants filed an opposition to the amended motion for summary judgment. Appellants claimed that summary judgment was inappropriate because there were two versions of the Lease and determination of which lease was binding was a disputed issue of material fact. In addition, appellants maintained that a material factual dispute existed as to whether Shangri-La voluntarily abandoned the premises. Appellants claimed that Shangri-La was forced to vacate by acts of Bevard in bringing multiple "unfounded lawsuits" against it and by winning those lawsuits as a result of making materially false representations, introducing perjured

testimony, and submitting false documents. In their written opposition, appellants also made the following vague and elusive argument, *viz*:

> Bevard was not entitled to the requested relief because the basis for that relief "has been constructed upon a factual scenario which requires scrutiny to determine its accuracy and validity, and will require a resolution of the facts which are material to the determination of the rights of the parties. . . .

Attached to appellants' opposition was an affidavit from Pradip Ghosh, Ph.D., a guarantor of the Lease and one of the appellants herein. Dr. Ghosh averred that there were two differing versions of the Lease, presenting a factual issue as to which version was binding. He also asserted that Shangri-La did not breach the Lease or voluntarily abandon the premises; instead, it was forced out by multiple lawsuits filed by Bevard.[1]

A hearing was held on Bevard's motion for summary judgment on August 29, 2003. The motions judge questioned appellants' counsel as to whether there remained a germane issue as to whether the lease filed with plaintiff's complaint was the "binding lease" in light of the July 30, 2001, verdict in *Bevard I* where the jury concluded that the same lease as the one attached to Bevard's complaint was binding. The relevant exchange was as follows:

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[1] Dr. Ghosh also reiterated the vague defense assertion in appellants' opposition, i.e., that Bevard was

> not entitled to any relief sought because as a matter of fact all same has been constructed upon a factual scenario which requires scrutiny to determine its accuracy and validity, and will require a resolution of the facts which are material to the determination of the rights of the parties in the pending litigation.

> [THE COURT]: The lease that was filed in this case ["*Bevard II*"], to support the complaint in this case, was it or was it not the lease that the jury determined in the other case ["*Bevard I*"] to be the binding lease between the party [sic].
>
> [COUNSEL FOR APPELLANTS]: It was.
>
> THE COURT: Okay, so, there was no incorrect, for lack of a better word, lease filed in this case. It[']s precisely what the jury found to be the binding document in the other litigation.
>
> [COUNSEL FOR APPELLANTS]: That's correct.

(Emphasis added.)

At the motions hearing, appellants, for the first time, put forth the contention that there was a dispute of material fact as to whether Bevard had exerted sufficient effort to mitigate its damages by reletting the premises. Appellants' counsel argued:

> One of the issues, of course, is the leasing of the premises to a new tenant, and what appears to be an apparent reduction in the amount of . . . [Bevard's] claim by virtue of that lease but the, [sic] whether or not the landlord made reasonable efforts to re-rent the premises is an issue of fact. And what efforts were made, and that hasn't been determined yet, this motion for summary judgment apparently was filed together with, or shortly after the filing of the original[] complaint in this case, but the landlord is required by statute to make reasonable efforts to re-rent the premise and by virtue. . . .

Counsel for Bevard then interposed an objection to appellants' "failure to mitigate" argument, *viz*,

> [BEVARD'S COUNSEL]: Your honor, I'm going to have [to] object to the extent counsel deviates from the response that he filed. The Rule 2-501(b) requires the response to contain the allegations or material facts that are in

> dispute. He filed this [Opposition to the Summary Judgment Motion] on June the 25th when all this information was at his disposal. So, I would object to anything outside of the answer, the response that he filed [on June 25, 2003].
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> THE COURT: Yeah, Mr. Powell [appellants' counsel], he's correct. I mean this has to be specifically asserted and supported by affidavit or otherwise.
>
> [COUNSEL FOR APPELLANTS]: The affidavit that was filed on the premises by the defendant [sic] however does contain additional information, including issues with regard to the leasing of the premises or the releasing of the premises. And, the method of termination of the lease and whether or not by virtue of the act in prior litigation-in other words the allegation here is that the lease was terminated for breach for some reason but what has also been argued today, and is a matter of record in this [c]ourt, is that there was a writ of restitution sought and secured, and that the landlord evicted the tenant from the premises, I'm not sure of the date.
>
> The question of course is the amount of the rents claimed has already been altered. The original claim has been changed by virtue of the conduct of the plaintiff and the plaintiff seeks to say now that the amount of rent reducing the judgment is fair and reasonable, and therefore that's all the [c]ourt should consider, but the very filing by the plaintiff of the additional information subjects the claim to scrutiny as to the reasonableness of the rent. The [c]ourts find as [a] matter of law that there was a breach of the lease in order [to] grant the relief apparently but whether there was a breach of the lease entitling the defendant - I mean the plaintiff - to relief is an issue of fact.

Additional facts will be added to answer the questions presented.

II. Analysis

A. Issue 1

In granting summary judgment, the trial judge ruled that the lease attached to Bevard's complaint was binding on the parties because the issue as to which lease was valid had been determined by the jury verdict in *Bevard I*.

In *Janes v. State*, 350 Md. 284, 295 (1998), the Court said:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, [the doctrine of collateral estoppel renders that] the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

(internal quotes omitted) (quoting *Murray Int'l Freight Corp. v. Graham*, 315 Md. 543, 547, 555 A.2d 502, 504 (1989) (quoting from RESTATEMENT (SECOND) OF JUDGMENTS, § 27 (1982)).

At the time summary judgment was entered in favor of Bevard in the subject case, Judge Hollander's unreported opinion in *Bevard I* had not yet been filed. Based on the fact that the appeal in *Bevard I* had not been dismissed when summary judgment was entered, appellants contend in their brief that the judgments in *Bevard I* were not then final. Therefore, according to appellants, the jury's decision in the prior consolidated case resolving the issue of which lease was valid, should not have been given preclusive effect by the motions judge. In other words, in the view adopted by the appellants in their brief, the doctrine of collateral estoppel was inapplicable because when summary judgment was

entered, no final judgment had been entered in *Bevard I*. As a consequence, there remained a material issue of fact as to which lease was binding. In support of their argument, appellants rely on the following excerpt from *Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515, 535 (2004):

> Neither is *res judicata* applicable in this case because there is no final judgment - the case is still on appellate review - and because issue and claim preclusion require a subsequent cause of action in which those doctrines may take effect; this appeal is not a subsequent cause of action but all part of the same case. *See Murray International [Freight Corp.] v. Graham*, 315 Md. 543, 547, 555 A.2d 502, 504 (1989)(noting that *res judicata* principles preserve the conclusive effect of judgments, "except on appeal or other direct review," and quoting Restatement (Second) of Judgments § 27 (1982) that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim").

(Emphasis added.)

This argument overlooks two facts (1) in *Bevard I*, we dismissed the appeal because we had no jurisdiction as to Case I, because no appeal to the Court of Special Appeals was allowed by Statute (slip op. at 21);[2] and (2) Case II was dismissed because

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[2] Judge Hollander said, for the panel:

> As to Case I, the circuit court acted in an appellate capacity in regard to appellant[s'] appeal from a decision of the District Court. Therefore, "[o]ne level of appellate review has already been provided in this case." *State v. Monroe*, 82 Md. App. 65, 70, *cert. denied*, 320 Md. 16 (1990). And, we are unaware of any authority that "permits a second appeal as of right from the circuit court review of a final decision of the District Court." *Id.* Rather, "the sole additional avenue of review"

(continued...)

appellants failed to note an appeal within 30 days of the final judgment (slip op. at 44-45). In regard to *Bevard I*, appellants were in the same position they would have been in if they had appealed the judgments in those cases to the Supreme Court of Alaska or to any other court not having jurisdiction to entertain the appeal. The rule announced in *Spencer*, *supra*, quite obviously only applies to timely appeals that are permitted by law.

We hold that because no valid appeal was filed, the judgments in *Bevard I* were final when summary judgment was entered. Thus, the motions judge did not err in treating the lease attached to Bevard's complaint as binding based on the doctrine of collateral estoppel.

B. Issue 2

> Maryland Rule 2-501 provides that a court shall enter summary judgment on the motion of a party where "there is no genuine dispute as to any material fact and . . . the party is entitled to judgment as a matter of law." . . . Thus, the court's task is not to decide disputed facts. *Coffey v. Derby Steel Co.*, 291 Md. 241, 247, 434 A.2d 564 (1981). Rather, it is to determine whether there are disputes as to "material" facts, *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 326, 398 A.2d 887 (1978), whose resolution would somehow affect the outcome of the case. *King v. Bankerd*, 303 Md. 98, 111, 492 A.2d 608 (1985). In reviewing a trial court's grant of summary judgment, an appellate court must also determine whether the trial court's ruling was legally correct. *Baltimore Gas and Electric Co. v. Lane*, 338

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[2](...continued)
available to appellants as to Case I is by certiorari to the Court of Appeals. *Id.*

(Slip. op. at 21.)

Md. 34, 43, 656 A.2d 307 (1995); *Nationwide Mutual Insurance Co. v. Scherr*, 101 Md. App. 690, 694, 647 A.2d 1297 (1994).

General Accident Ins. Co. v. Scott, et al., 107 Md. App. 603, 611 (1996).

In the present case, appellants contend that the trial court erred in granting summary judgment because there were material facts in dispute concerning the reasonableness of Bevard's efforts to mitigate damages. Appellants contend that the motions judge erred in failing to consider (1) whether the efforts put forth by Bevard to find a new tenant were reasonable, (2) whether the overall lease with Tiny Tekkies was reasonable, (3) whether the amount of rent received from Tiny Tekkies was reasonable, (4) whether, and to what extent, there should be some apportionment for the variance in the term of the Lease between Shangri-La and appellee and the lease with Tiny Tekkies, and (5) what, if any, net benefit accrued to Bevard from the improvements made by Shangri-La or from other provisions in the Tiny Tekkies lease.[3]

None of the purportedly "material" issues of fact were mentioned in appellants' written response to appellee's revised motion for summary judgment.

Maryland Rule 2-501(b)(2003) provides:[4]

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[3] Of the five (purported) material issues of fact, only one (whether the efforts made by Bevard to find a new tenant were adequate) was even mentioned in appellants' counsel's oral argument in opposition to Bevard's summary judgment motion.

[4] Rule 2-501(b) was revised, effective July 1, 2004. The appeal in this case was filed prior to July 1, 2004. In any event, the changes made do not affect the outcome of this matter.

> (b) **Response.** The response to a motion for summary judgment shall identify with particularity the material facts that are disputed. When a motion for summary judgment is supported by an affidavit or other statement under oath, an opposing party who desires to controvert any fact contained in it may not rest solely upon allegations contained in the pleadings, but shall support the response by an affidavit or other written statement under oath.

(Emphasis added.)

Appellants opposition to Bevard's motion for summary judgment did not dispute the reasonableness of Bevard's efforts to relet the premises nor the amount of damages sought under the Lease. Appellants' counsel first raised the "reasonableness of effort" issue at the August 29, 2003, hearing on the summary judgment motion, when appellants' counsel made the argument quoted *supra* at 8-10.

Appellants admit that the issue of reasonableness of Bevard's efforts was not raised in any written response to the summary judgment motion but contend that it is perfectly acceptable to bring the matter up for the first time in oral argument at the summary judgment motion hearing. Appellants contend:

> Maryland Rule 2-501 does not limit the discretion or the scope of a trial court's review of the material facts of the case, nor does it limit the trial court's review solely to those issues raised in the affidavits submitted by the parties. More often than not, additional issues or disputes come to the attention of the litigants or the court **after** the written motions have been filed. However, the trial court and the parties are still permitted to make these arguments and raise these issues. To construe Maryland Rule 2-501 in any other manner would straight jacket the

> lower courts and infringe upon their ability to reach . . . well reasoned decisions.

Even if we were to assume, purely for the sake of argument, that new grounds for an opposition to summary judgment can be raised for the first time at the hearing on the summary judgment motion, appellants' argument would not prevail. As shown earlier, appellants' counsel made the following oral arguments at the hearing: (1) if there is a breach of a lease, Maryland law requires the landlord to mitigate damages; (2) whether Bevard made "reasonable efforts" to relet the premises was an "issue of fact" to be determined by a jury because "what efforts were made" by Bevard "hasn't been determined yet"; (3) that the filing by Bevard of an amended motion for summary judgment was supported by affidavit which set forth "additional information" as to what it did to relet the premises; (4) the fact that new information was set forth in the affidavit "subject[s] [Bevard's] claim to scrutiny as to the reasonableness of the rent" charged to the new tenant.[5]

The four points orally raised by appellants' counsel were too vague to be meaningful. *See Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 738 (1993)("[G]eneral allegations which do not show facts in detail and with precision are insufficient to prevent summary judgment.") (internal citation omitted); *Lowman v. Consol. Rail Corp.*, 68 Md. App. 64, 70 (1986) ("Bald, unsupported statements or conclusions of law are insufficient" to defeat a

[5] The affidavits filed by Bevard in support of its amended motion for summary judgment were both filed prior to appellants' initial response to the summary judgment motion.

motion for summary judgment.) (internal quotations and citation omitted).

Second, the oral argument of appellants' counsel was not supported by evidentiary facts set forth in an affidavit or other sworn statement under oath. Basically, appellants' counsel simply denied that Bevard's efforts to relet the premises constituted a reasonable effort at mitigation. Such unsupported assertions are insufficient to defeat summary judgment.

> [I]f a general denial could be relied on to prevent the granting of summary judgment, a motion for such a judgment would be an exercise in futility since it could always be successfully resisted. For these reasons, an affidavit is required, with the expectation that if it is established that no genuine dispute exists as to material facts the expense and delay caused by more extensive litigation can be avoided.

Wyand v. Patterson Agency, Inc., 266 Md. 456, 460 (1972)(emphasis added). "[O]nce the moving party has provided the court with sufficient grounds for summary judgment, the non-moving party must produce sufficient evidence to the trial court that a genuine dispute as to a material fact exists." *Arroyo v. Bd. of Educ.*, 381 Md. 646, 654 (2004)(citation omitted). "These tendered facts should be given under oath, based on the personal knowledge of an affiant." *Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 162 (2004)(citation omitted). "'Bald, unsupported statements or conclusions of law are insufficient.'" *Arroyo*, 381 Md. at 655

(quoting *Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav. Bank*, 297 Md. 691, 712 (1983)).

To controvert the facts contained in the affidavits submitted by movant, the burden shifted to appellants, the non-moving parties, to set forth facts in an affidavit or other written statement under oath demonstrating that Bevard did not make reasonable efforts to relet the property.[6] *Arroyo*, 381 Md. at 654. Appellants failed to file any such affidavit or other statement under oath. Under circumstances such as these, the motions judge did not err in granting summary judgment in favor of Bevard.[7]

JUDGMENT AFFIRMED;
COSTS TO BE PAID BY APPELLANTS.

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[6] During oral argument, appellants' counsel criticized Plitt's affidavits as being too general to support summary judgment. This argument was not raised in appellants' initial or reply briefs and will not be considered. *DiPino v. Davis*, 354 Md. 18, 56 (1999)("[I]f a point germane to the appeal is not adequately raised in a party's brief, the [appellate] court may, and ordinarily should, decline to address it."

[7] In this appeal, appellants do not contend that the motions judge abused her discretion in denying their motion to "Revise or Reconsider or to Alter or Amend Judgment."