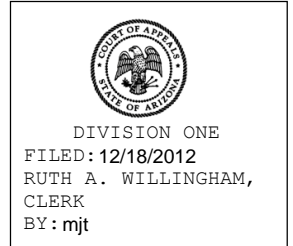


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



BROADBAND DYNAMICS, L.L.C., an ) 1 CA-CV 11-0757  
Arizona limited liability )  
company, ) DEPARTMENT E  
)  
Plaintiff/Counterdefendant/ )  
Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules  
) of Civil Appellate  
) Procedure)  
GLOBAL CREDIT NETWORK, L.L.C., a )  
Maryland limited liability )  
company, )  
)  
Defendant/Counterclaimant/ )  
Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-039402

The Honorable Eileen S. Willett, Judge

**REVERSED AND REMANDED**

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**T H O M P S O N**, Judge

¶1 Appellant Global Credit Network (Global) appeals the superior court's grant of Appellee Broadband Dynamics' (Broadband) motion for summary judgment. For the following reasons, we reverse and remand.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Global and Broadband entered into a commercial contract for telecommunications services to be provided by Broadband for a period of two years to Global's business location in Maryland. The contract contains a liquidated damages provision and incorporates by reference a Maryland Tariff issued by Broadband. The liquidated damages provision requires Global to pay its minimum customer obligation in the event of premature termination. The minimum customer obligation, according to the terms of the contract, is the revenue commitment plus the usage commitment, multiplied by the number of months remaining in the contract. The Maryland Tariff governs Broadband's services that originate and terminate in Maryland to residential and business customers. It limits the amount Broadband can charge upon termination. The Tariff provides in pertinent part:

#### **2.4.2 Cancellation of Service**

2.4.2.1 Where the applicant cancels an order for service prior to the start of the installation or special construction of facilities, no charge shall apply, except to the extent the Company incurs a service

order or similar charge from a supplying carrier, if any, prior to the construction.

2.4.2.2 Where the installation of facilities, other than those provided by special construction, has been started prior to cancellation, the lower of the following charges applies;

2.4.2.2.A The total costs of installing and removing such facilities; or

2.4.2.2.B The monthly charges for the entire initial contract period of the service ordered by the customer as provided in this tariff plus the full amount of any applicable installation and termination charges.

¶13 Although Broadband was able to provide all services outlined in the contract, Global informed Broadband that it could not go forward with the contract and would not allow Broadband to connect service. Broadband filed a complaint alleging that Global breached the contract and owed fees in the amount of \$79,646.57 based on the liquidated damages provision. The parties filed cross motions for summary judgment. Global's motion argued, among other things, that the liquidated damages provision in the contract was limited by the Maryland Tariff. In its response, Broadband argued that the liquidated damages provision should apply because the parties expressly agreed to those terms in the contract, stating: "It is not at all clear that the parties intended the reference to the Maryland tariff

to displace their bargained-for term concerning termination liability.”

¶14 The superior court entered summary judgment in favor of Broadband, finding that the parties “entered a fully integrated written contract, clear on its face by its express language, which merged any and all prior or contemporaneous agreements.” Global filed a motion for reconsideration, arguing that the contract “expressly integrated” the Maryland Tariff and that it should apply. The court denied Global’s motion for reconsideration, and ordered that Broadband recover \$79,646.57 plus \$43,410.51 in attorneys’ fees.

¶15 Global timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (Supp. 2011).

#### **STANDARD OF REVIEW**

¶16 We review the superior court’s entry of summary judgment de novo, viewing all evidence and reasonable inferences in the light most favorable to Global as the party opposing summary judgment. *Hourani v. Benson Hosp.*, 211 Ariz. 427, 432, ¶ 13, 122 P.3d 6, 11 (App. 2005). “A motion for summary judgment should only be granted if ‘there is no genuine issue as to any material fact and . . . the moving party is entitled to

judgment as a matter of law.'" *Id.* (quoting Ariz. R. Civ. P. 56(c)).

#### **DISCUSSION**

¶7 Global contends that an issue of material fact remains because it is ambiguous whether the Maryland Tariff or the liquidated damages provision controls where there has been little or no performance of the contract. We agree. Broadband drafted and issued the Maryland Tariff in 2004. The contract between Broadband and Global states that "[t]his agreement and any state or federal tariffs filed by Broadband, constitute the entire agreement between Customer and Broadband." In the trial court, Broadband acknowledged that the intent of the parties was "not at all clear" concerning the Maryland Tariff and the liquidated damages provision. It is undisputed that the Tariff is part of the contract. On appeal, Broadband admits in its answering brief that the contract and the Maryland Tariff are "in conflict."

¶8 Broadband cites the Restatement of Contracts and urges us to apply the principle that if two provisions conflict and cannot be reconciled the court must apply the provision specifically negotiated by the parties, and that therefore the liquidated damages provision must be applied as an express term of the contract. We find this argument unpersuasive for several reasons. First, the Restatement section cited by Broadband

actually states "separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated." Restatement (Second) of Contracts § 203(d). The liquidated damages provision was not a "separately negotiated or added term," but in fact appears to be simply a "standardized term" in Broadband service agreements. Second, Broadband ignores § 203(a) of the Restatement, which states, "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." Restatement (Second) of Contracts § 203(a). We construe contracts as a whole and look to the entire instrument for the intention of the parties in order to give effect to every word in the agreement. *Hamberlin v. Townsend*, 76 Ariz. 191, 196, 261 P.2d 1003, 1006 (1953) (quoting 17 C.J.S., Contract, § 297). Conflicting clauses must be reconciled rather than nullified, considering the entire instrument and the surrounding circumstances of the agreement to reach a reasonable interpretation. *Id.* (quoting 17 C.J.S., Contracts, § 309). To perform this undertaking, each clause must be considered and none ignored, to bring harmony to the writing if possible. *Id.* at 197, 261 P.2d at 1007. Under Broadband's construction of the contract, the provision incorporating the Maryland Tariff has been ignored and essentially given no effect. The superior

court made no determination concerning the applicability of the Maryland Tariff, but treated the contract as if the provision was not included.

¶19 Third, "[t]he intent of the parties to an ambiguous contract is a question of fact which cannot properly be resolved on motion for summary judgment." *Hamada v. Valley Nat. Bank*, 27 Ariz. App. 433, 436, 555 P.2d 1121, 1124 (1976). Any ambiguity in a contract "is subject to a factual determination concerning the intent of the parties and is to be resolved conclusively by the trier of fact." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 260, 681 P.2d 390, 412 (App. 1983). Broadband acknowledges that the liquidated damages provision and the Maryland Tariff conflict. Global suggests, inter alia, that the Tariff is a limitation on the liquidated damages provision. The contract is ambiguous, and summary judgment was improper. Further, an ambiguity may ultimately be "construed against the drafter of the contract." *Id.* at 258, 681 P.2d at 410. "This is particularly true when a party is attempting to impose an obligation on another where otherwise such an obligation would not exist." *Id.* at 260, 681 P.2d at 412. We agree with Broadband that this principle is subsidiary to the other rules of construction and interpretation. *Id.* at 258, 681 P.2d at 410.

¶10 Broadband also asserts that Global did not produce any evidence that it was aware of the Maryland Tariff or that it relied on it when it entered into the contract. "In a written contract, a reference to another writing, if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, is to be taken as a part of it just as though its contents had been repeated in the contract." *Id.* at 259, 681 P.2d at 411 (quoting *Short v. Van Dyke*, 50 Minn. 286, 289, 52 N.W. 643, 644 (1892)). If the contract did in fact incorporate the Maryland Tariff, then the terms are as applicable as if they had been written in the contract itself.

¶11 Global also argues that the liquidated damages clause is unenforceable because it is a penalty. We do not pass upon the validity of this defense or any others Global has raised.



**CONCLUSION**

¶12 Based on the foregoing, we reverse and remand the judgment of the trial court. Because neither party has prevailed on its respective claim, we deny both parties' requests for an award of attorney fees on appeal. See *Kaman Aerospace v. Ariz. Bd. of Regents*, 217 Ariz. 148, 158, ¶¶ 37-38, 171 P.3d 599, 609 (App. 2007).

/s/  
\_\_\_\_\_  
JON W. THOMPSON, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
DIANE M. JOHNSEN,  
Acting Presiding Judge

/s/  
\_\_\_\_\_  
KENTON D. JONES, Judge<sup>1</sup>

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<sup>1</sup> Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Kenton D. Jones, Judge of the Arizona Superior Court, to sit in this matter.