DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BLUE SKY INTERNATIONAL, INC., an Arizona corporation dba BLUE SKY MANAGEMENT; BLUE SKY MANAGEMENT, a sole proprietorship, Plaintiffs/Appellants, v. GRAND CANYON EDUCATION, INC., formerly known as SIGNIFICANT EDUCATION, INC., Defendant/Appellee.	No. 1 CA-CV 12-0863 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2012-000064

The Honorable Robert H. Oberbillig, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

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B R O W N, Judge

¶1 Blue Sky Management ("Blue Sky") appeals the superior court's dismissal of its complaint against Grand Canyon Education, Inc. ("Grand Canyon"). For the following reasons, we vacate the dismissal order in part and remand for further proceedings.

BACKGROUND

¶2 In March 2007, Blue Sky entered a Financial Advisor Agreement ("the agreement") with Grand Canyon's predecessor, Significant Education (hereinafter referred to as Grand Canyon). Pursuant to the agreement, Blue Sky agreed to act as Grand Canyon's "financial advisor and business development consultant" and utilize Blue Sky's "relationships in the banking industry" to introduce Grand Canyon to potential lenders. In exchange for Blue Sky's services, the agreement provided that Grand Canyon would pay a $17,500 retainer fee and, in the event Grand Canyon obtained a loan from a Blue Sky "source," Grand Canyon would pay "an amount in cash equal to ½ of 1 Percent (.005) of the gross transaction amount[.]"

¶3 A few months after entering the agreement, Grand Canyon obtained a loan from Bank of America, a Blue Sky source, for $6,000,000 and paid Blue Sky the corresponding $30,000 fee. In April 2009, Grand Canyon obtained another loan from Bank of America for $25,675,000 (the 2009 loan) and paid Blue Sky the corresponding $128,375 fee.

¶4 In April 2011, Grand Canyon entered an "Amended and Restated Loan Agreement" ("amended loan agreement") with Bank of America. Pursuant to the amended loan agreement, the maturity date for the 2009 loan was extended from April 2014 to March 2016. In addition, the amended loan agreement provided Grand Canyon with a $50,000,000 revolving line of credit and "standby letters of credit" up to $10,000,000 (the "revolver loan"). As consideration for the revolver loan, Grand Canyon paid a non-refundable fee of $200,000 and also agreed to pay an "unused commitment fee" on "any difference between" the $50,000,000 line of credit and the "outstanding amounts actually advanced" in the amount of .25% per year. The maturity date for the revolver loan is March 2016.

¶5 Upon discovering that Grand Canyon had obtained the revolver loan, Blue Sky demanded a $250,000 fee, which Grand Canyon refused to pay. Blue Sky then filed a complaint alleging Grand Canyon breached the agreement.[1] Grand Canyon eventually moved to dismiss the complaint, arguing Blue Sky's claims were contrary to the express and unambiguous terms of the agreement. Following oral argument on the motion, the superior court

[1] The original complaint also listed Blue Sky International, Inc. as a plaintiff and Significant Education as a defendant. The superior court entered a separate judgment against Blue Sky International and it is not a party to this appeal.

dismissed the complaint with prejudice.[2] Blue Sky timely appealed.

DISCUSSION

¶6 Blue Sky contends the superior court erred by dismissing its complaint. Specifically, Blue Sky argues that the fee provision of the agreement extends to the revolver loan.

¶7 We review a superior court's ruling on a motion to dismiss de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-56, ¶ 7, 284 P.3d 863, 866-67 (2012). Likewise, we review de novo a superior court's determination whether a contract term is ambiguous. *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 395, ¶ 11, 87 P.3d 81, 83 (App. 2004). Because "the question whether written language is 'reasonably susceptible' to the meaning asserted is a matter of law," the dismissal of a complaint is appropriate when the written language underlying the complaint's claims "is not reasonably susceptible of the meaning asserted." *Long v. City of Glendale*, 208 Ariz. 319, 328-29, ¶¶ 31-32, 93 P.3d 519, 528-29 (App. 2004).

[2] Blue Sky's argument relates only to Count I of the second amended complaint, which alleged a breach of contract for failure to pay a fee for the revolving line of credit. Because Blue Sky has not raised any issues regarding the dismissal of Counts II (requesting payment for any "draw downs" from any Bank of America loan), III (requesting declaratory relief ordering Grand Canyon to report any undisclosed loans from any Blue Sky source), and IV (requesting a declaration that the agreement is valid and binding), we affirm the dismissal of those counts.

¶8 "When the terms of an agreement are clear and unambiguous, we give effect to the agreement as written." *Marana v. Pima County*, 230 Ariz. 142, 147, ¶ 21, 281 P.3d 1010, 1015 (App. 2012) (citation omitted). Indeed, when "the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto." *Grosvenor Holdings, L.L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009) (internal quotations omitted). "A contract is not ambiguous just because the parties to it [] disagree about its meaning." *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005).

¶9 Subsection (2)(B) of the agreement states, in relevant part:

> In the event a transaction is concluded between [Grand Canyon] and a "[Blue Sky] Source," . . . [Grand Canyon] agrees to pay [Blue Sky] an amount in cash equal to ½ of 1 Percent (.005) of the gross transaction amount for the *mortgage credit and term loans* totaling up to $110,000,000. Payment will only be made as and when AMOUNTS ARE DRAWN DOWN by [Grand Canyon].

(Emphasis added.) The superior court found the agreement unambiguous and concluded the plain language of the fee

provision applies only to two types of loans, mortgage loans and terms loans, not revolving lines of credit.[3]

¶10 As a preliminary matter, we note that neither party offered evidence in the superior court regarding the parties' intent at the time they entered the agreement. Likewise, although Blue Sky argues it could not have intended to narrow the scope of loans upon which its fee would be due because such an arrangement would undermine its financial interests, neither party has argued on appeal that parol evidence should be considered. Therefore, our review is limited to the four corners of the agreement.

¶11 The fee provision expressly applies to "mortgage credit and term loans[.]" Blue Sky argues that the phrase "mortgage credit" is meaningless and "undoubtedly a scrivener's error." Blue Sky further asserts that interpreting the qualifying phrase "mortgage credit" to apply only to loans involving a mortgage effectively reads out the word "credit." Accordingly, to give effect to all of the words of the

[3] As noted by Blue Sky, the superior court initially expressed concern about deciding this matter at the motion to dismiss stage and suggested that it may be more appropriately considered pursuant to a motion for summary judgment. The court explained, however, that its reservations related primarily to the parties' dispute as to whether Grand Canyon had "drawn down" the revolving loan. Because the court ultimately determined the agreement unambiguously did not extend to the revolving line of credit, it concluded no additional discovery was necessary on the "drawn down" issue and therefore dismissal was appropriate.

provision, Blue Sky contends that the language should be construed as stating either: (1) "mortgage, credit, and term loans" or (2) "mortgage 'credit and term loans.'"

¶12 Under either construction, the fee provision would apply to "credit" loans, which would lead to a redundancy. The word "credit" is commonly defined as "[a]n amount placed by a bank at the disposal of a client" and the word "loan" ordinarily means "[a] sum of money lent at interest." Webster's II New College Dictionary 271, 658 (3rd ed. 2005). *See W. Corr. Group, Inc. v. Tierney*, 208 Ariz. 583, 587, ¶ 17, 96 P.3d 1070, 1074 (App. 2004) (explaining we refer to established and widely used dictionaries to determine the plain and ordinary meaning of a word). Thus, if the provision were construed as applying to all "credit loans," it would necessarily apply to all loans, which is contrary to the qualifying language used to modify the word "loan." *See Bryceland v. Northey*, 160 Ariz. 213, 216, 772 P.2d 36, 39 (App. 1989) ("We will interpret a contract in a manner which gives a reasonable meaning to the manifested intent of the parties rather than an interpretation that would render the contract unreasonable."). Had the parties intended the fee provision to apply to all loans obtained through a Blue Sky source, they easily could have done so simply by omitting the qualifying phrase "mortgage credit and term." Moreover, the prefatory language of the agreement explains that Grand Canyon

entered the agreement "seeking a [sic] term/mortgage loans[.]" This stated purpose is consistent with the limiting language incorporated in the fee provision. *See Nichols v. State Farm Fire & Cas. Co.*, 175 Ariz. 354, 356, 857 P.2d 406, 408 (App. 1993) (explaining that a contract must be "read as a whole in order to give a reasonable and harmonious meaning and effect to all of its provisions" and "each part must be read and interpreted in connection with all other parts"). Therefore, we conclude the plain language of the fee provision limits its application only to mortgage loans and term loans.

¶13 Blue Sky alternatively argues that the revolver loan of credit qualifies as a mortgage loan and/or a term loan. We address each argument in turn.

¶14 As noted by Grand Canyon, the term mortgage is defined by statute to include "[e]very transfer of an interest in real property, other than in trust, or a trust deed[.]"[4] A.R.S. § 33-702. Our supreme court has interpreted A.R.S. § 33-702's definition of mortgage as "expressly exclud[ing] a deed of trust." *Levy v. Ariz. Dep't of Econ. Sec.*, 132 Ariz. 1, 4, 643 P.2d 704, 707 (1982). Here, the parties do not dispute that the revolver loan is secured by a deed of trust. Thus, applying

[4] Although Blue Sky asserts Grand Canyon erroneously informed the superior court that "mortgage credit" is a "statutorily defined term," our review of the record demonstrates that Grand Canyon's attorney clarified that the term "mortgage," not "mortgage credit," is a statutorily defined term.

A.R.S. § 33-702, the revolver loan does not, on its face, qualify as a mortgage loan under the agreement.

¶15 Turning to the term loan argument, we note that the agreement does not define "term loan" and neither party has cited an authoritative definition of the phrase.[5] Nonetheless, a term loan may be broadly defined as a "loan with a specified due date, usu[ally] of more than one year." Black's Law Dictionary 955 (8th ed. 2004); *see also* Neil H. Jacoby & Raymond J. Saulnier, *Term Lending to Business* at 9 (1942) (defining a term loan as "credit extended to a business concern" in which there is "a direct relationship between borrower and lender" and a "provision" making the loan "repayable after the passage of one year"). Applying these definitions to the agreement, based on the limited record before us, we cannot say that the phrase "term loan" would not be reasonably susceptible to a meaning

[5] Grand Canyon argues that the revolving line of credit is not a term loan because the parties to the amended loan agreement, Bank of America and Grand Canyon, used the phrase "term loan" to define the 2009 carryover loan and the word "revolver" to define the revolving line of credit. We conclude otherwise. To the extent the use of those naming conventions in the amended loan agreement reflected an intent to characterize the nature of the revolving line of credit as other than a "term loan," Grand Canyon and Bank of America cannot, through their independent negotiations, determine the scope of the phrase "term loan" as used in the agreement between Blue Sky and Grand Canyon. Therefore, in the context of evaluating Grand Canyon's motion to dismiss, the naming conventions used in the amended loan agreement are not relevant, much less dispositive, to ascertaining the meaning of "term loan" in the agreement.

that encompasses the revolver loan, which has a maturity date of more than one year and extends credit to a business.[6] *See Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148, 158-59, 854 P.2d 1134, 1144-45 (1993) ("Whether contract language is reasonably susceptible to more than one interpretation . . . is a question of law[.]"). Therefore, the superior court erred by granting Grand Canyon's motion to dismiss the complaint as to Count I. *See Long*, 208 Ariz. at 329, ¶ 32, 93 P.3d at 529 (explaining dismissal is appropriate when, as a matter of law, the contractual language upon which the complaint is premised "is not reasonably susceptible of the meaning asserted" by the plaintiff). Nothing in our decision should be construed as precluding the parties from addressing in the superior court whether the phrase "term loan" is a term of art or has a commonly-understood meaning, as indicated by industry standards or other authority.

[6] Our conclusion is supported by the parties' inclusion of a broad prefatory statement in the agreement that Blue Sky would introduce Grand Canyon to lenders "for the purpose of obtaining credit[.]"

CONCLUSION

¶16 For the foregoing reasons, we vacate the trial court's order dismissing Count I of the complaint and remand for proceedings consistent with this decision.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
ANDREW W. GOULD, Presiding Judge

_____/s/_____
DONN KESSLER, Judge