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

CHRISTINE BUSH, a single woman and as successor of Tuscany Village LLC, a former Arizona LLC, Plaintiff/Appellant, v. DESERT SCHOOLS FEDERAL CREDIT UNION, a federally insured credit union, Defendant/Appellee.	1 CA-CV 12-0157 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-017255

The Honorable Eileen S. Willett, Judge

AFFIRMED

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P O R T L E Y, Judge

¶1 Christine Bush ("Bush") appeals the summary judgment ruling that dismissed her claims for negligence, breach of contract and breach of the covenant of good faith and fair dealing against Desert Schools Federal Credit Union ("DSFCU"). For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Bush created Tuscany Village, LLC ("Tuscany Village") in April 2009, as a member-managed limited liability company. She listed herself as the manager and her then-boyfriend, Jon Michael Nolan ("Nolan"), was listed as a member. Tuscany Village is a home healthcare business operating under the name "A Touch of Desert Class."

¶3 Bush and Nolan went to a DSFCU branch in June 2009 to open business checking and savings accounts. Bush gave DSFCU a copy of Tuscany Village's Articles of Organization, listed her title as "owner/mgr" of the business on the credit union's "Business Account Master Application," and signed it. She reportedly told the DSFCU officer that she wanted to ensure that Nolan could only sign checks if she was unavailable. She and Nolan then signed DSFCU's "Certification of Identity and Authority" ("Certification").

¶4 Nolan turned out be a bad boyfriend. He went to a different DSFCU branch in June 2010, had Bush's name removed from both the savings and checking accounts, and subsequently withdrew the $107,000.00 balance from the checking account. After discovering Nolan's defalcation, Bush sued DSFCU for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence. DSFCU successfully moved for summary judgment, and Bush filed this appeal.[1]

DISCUSSION

¶5 Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. ("Rule") 56(c); *see also Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (explaining that summary judgment is proper "if 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"). We review a trial court's entry of summary judgment de novo, "viewing the evidence and reasonable inferences in the light

[1] Although the trial court also dismissed her negligence claim, Bush does not challenge that ruling.

most favorable to the party opposing the motion," *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003), and determine "whether any genuine issues of material fact exist." *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

I. Breach of Contract

¶6 DSFCU argued that it was entitled to summary judgment because Nolan and Bush were both members of the business, both were listed as principals on the account, both had individual signatory authority, and both signed the Certification. Bush responded that there were genuine issues of material fact that precluded summary judgment. Specifically, she claimed that DSFCU had to explain why it allowed Nolan to remove her from the accounts without any notification and without requiring both to agree to the change. The trial court disagreed, and concluded that:

> The language of the Contract is clear and unambiguous. Parol evidence is not admissible or necessary to interpret the plain meaning of the Contract's terms. The Contract gave the Credit Union authority to act as it did. Mr. Nolan was a principal on the account with authority to act on behalf of Tuscany Village, LLC. His removal of Plaintiff from the account and his withdrawal of funds, whether Plaintiff remained on the account or not, were within his authority per the Contract.

¶7 Bush now contends that the court erred because paragraph five of the Certification only permits joint action and paragraph twelve requires DSFCU to freeze or close the accounts in the event of a business dispute. We review issues of contract interpretation de novo. *Andrews*, 205 Ariz. at 240, ¶ 12, 69 P.3d at 11. "A contract should be read in light of the parties' intentions as reflected by their language and in view of all the circumstances."[2] *Smith v. Melson, Inc.*, 135 Ariz. 119, 121, 659 P.2d 1264, 1266 (1983). We employ standard rules of interpretation to determine the parties' intent. For example, "we read words in the context in which they are used, and [consider] the purposes sought . . . by the agreement." *State v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, 120, ¶ 13, 75 P.3d 1075, 1078 (App. 2003) (internal quotation marks omitted). And, we "apply a standard of reasonableness to contract language." *Id.* at ¶ 12 (internal quotation marks omitted). Additionally, "[w]e construe a contract in its entirety and in such a way that every part is given effect." *Id.* (internal quotation marks omitted). Thus, we interpret a clause in a

[2] "[A]lthough the primary objective of contract law is to discern and effect the contracting parties' intent, any such inquiry is difficult when . . . the parties engaged in no significant negotiations, but rather merely executed form agreements. . ." *Miller v. Hehlen*, 209 Ariz. 462, 466 n.3, ¶ 13, 104 P.3d 193, 197 n.3 (App. 2005).

contract in context and "with[] reference to its use in the entire contract." *Id.* at 122, ¶¶ 23-24, 75 P.3d at 1080.

¶8 If we employ the rules of interpretation and find that the terms in the contract "can reasonably be construed to have more than one meaning,"[3] then ambiguity exists. *Id.* at 120, ¶ 12, 75 P.3d at 1078 (internal quotation marks omitted). If, however, "the intention of the parties is clear" from the document, then there is no ambiguity, *Smith*, 135 Ariz. at 121, 659 P.2d at 1266, and we will "give effect to the contract as written." *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, ¶ 12, 138 P.3d 1210, 1213 (App. 2006).

¶9 Here, the key document is the two-page Certification. The key provisions are in paragraphs two and three. The provision in paragraph two provides that each LLC member "alone [is] authorized and empowered on behalf of the Business to . . . create deposit accounts and transact other banking business with Credit Union." The paragraph three provision provides that DSFCU "is authorized and directed to pay or otherwise honor or apply without inquiry and without regard to the application of the proceeds thereof . . . including those drawn to the

[3] "Only when the meaning of the contract remains uncertain after application of the primary standards of interpretation . . . may the court apply the rule of construction that ambiguity of language is to be construed against the drafter of the contract." *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 258, 681 P.2d 390, 410 (App. 1983).

individual order of any of the undersigned." The Certification, moreover, does not contain a provision that requires DSFCU to contact a business or the other principals if one principal modifies the account in any fashion, including removing a signatory. The Certification does not explicitly require a principal to prove his or her authority to modify the account. The Certification has no provision suggesting that if an account is modified the credit union will presumes there is a business dispute of some sort which would require the account to be frozen.

¶10 Bush contends that the trial court erroneously relied on paragraphs five and twelve of the Certification as authority for DSFCU's conduct. Paragraph five states:

> In addition to the foregoing authority, the undersigned (and any other persons designated by them in writing) are authorized on behalf of the Business to apply for and receive letters of credit and from time to time to increase the amount, extend the date of expiration or amend the terms of any outstanding letters of credit, to execute and deliver all necessary and proper documents in connection with any transaction with Credit Union; to execute and deliver indemnity agreements, acceptance agreements, guarantees for missing documents or other guarantees, acceptances, trust receipts and other forms of security agreements; to order payments against receipt of shipping and other documents; to purchase savings certificates, bond and all other types of intangible personal property from Credit Union; to execute and deliver to Credit Union *night depository agreements*, *to*

> *designate from time to time the individuals (agents) empowered to act on behalf of the Business in connection therewith and to revoke suck [sic] designations*; to execute and deliver to Credit Union safe deposit box agreements, to designate from time to time the persons empowered to have access to such box and to revoke such designations; and to enter into any and all types of transactions with Credit Union that Credit Union is now or hereafter authorized to transact in its normal course of business; and to contact with Credit Union for the rendition of any services now or hereafter offered by Credit Union.

(Emphasis added.)

¶11 The trial court agreed with DSFCU that the provision in paragraph five allowing one principal to revoke designations made pursuant to night deposit agreements authorizes one principal to remove another principal from the account. The provision, however, only applies to night deposit agreements. Therefore, the provision does not support the court's ruling.

¶12 Paragraph twelve similarly does not help Bush. The paragraph provides that

> [t]he business agrees that in the even[t] a question or dispute arises concerning the authority of one or more individuals to transact business on behalf of the Business, Credit Union shall have the option either (1) to rely on the most recent declaration, certification, or notice furnished to Credit Union by an individual purporting to have authority for the Business, or (2) to freeze accounts, close accounts to posting, refuse to honor items, place stop payment order[s] on items and otherwise refuse to allow any transaction or to do any further business

> with respect to the Business or any of its accounts until such question or dispute is resolved to the satisfaction of Credit Union.

¶13 The paragraph, however, also notes that "[a]ll transactions by any employee or other representative of the Business . . . are hereby approved and ratified." The quoted portion of the paragraph allows DSFCU in the event of a business dispute the option to either rely on an individual purporting to have authority to act, or to freeze or close the accounts. Bush, however, did not notify DSFCU of any dispute before Nolan had her name removed from the account and withdrew the funds. As a result, DSFCU was under no obligation to anticipate a potential dispute by the fact that Nolan had Bush's name removed from the account.

¶14 It is clear that the provisions in paragraphs two and three allowed DSFCU to permit Nolan to change the accounts and withdraw funds from the checking account. Similarly, the Business Account Master Application also authorized Nolan to unilaterally remove Bush. It states: "I/we agree that Credit Union may honor the signature of any one of the undersigned persons in the transfer or payment of funds or the transaction of any business relating to this account." Consequently, the Certification is not ambiguous, and the trial court did not err

by determining that DSFCU had not breached the banking agreement.

II. Applicability of the Reasonable Expectations Doctrine

¶15 Bush also argues that the "reasonable expectations" rule adopted in *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*, 140 Ariz. 383, 682 P.2d 388 (1984), required the trial court to examine parol evidence to deduce the true meaning of the Certification because it was not negotiated but merely standard boilerplate language. We disagree.

¶16 Although the "reasonable expectations" doctrine generally applies to standardized contracts used by businesses conducting large volumes of transactions, *id.* at 393, 682 P.2d at 398, it only applies where customers are "neither expect[ed] nor desire[d] . . . 'to understand or even to read the standard terms.'" *Id.* at 391, 682 P.2d at 396 (quoting Restatement 2d of Contracts § 211 cmt (b)). The examples provided by our supreme court include those drafted by airlines or car rental agencies who do not "expect their customers to line up, demand copies of the various instruments which set forth the 'contract' and require explanations of the various terms." *Id.* at 394 n.9, 682 P.2d at 399 n.9. Furthermore, our supreme court stated that the rule still

> charges the customer with knowledge that the contract . . . is or contains a form applied to a vast number of transactions and

> includes terms which are unknown (or even unknowable); it binds the customers to such terms. However, the rule . . . holds the drafter to good faith and terms which are conscionable; it requires drafting of provisions which can be understood if the customer does attempt to check on his rights.

Id. at 393-94, 682 P.2d at 398-99.

¶17 Here, the Certification is not one that DSFCU did not expect Bush or Nolan to read. It is a two-page document containing twelve paragraphs that govern the relationship between DSFCU and Tuscany Village. Bush never testified that she was prevented from reading the two-page document or from asking questions about the Certification. Moreover, as the owner of the business, she signed the Certification after acknowledging that she had read the document. Because the Certification is not a *Darner* consumer contract that was book-length and could not be understood, *see id.* at 386, 682 P.2d at 391, the "reasonable expectations" doctrine does not apply to the Certification. Accordingly, the court did not err by declining to consider parol evidence to interpret the Certification.

III. Implied Covenant of Good Faith and Fair Dealing

¶18 Bush also contends that the court improperly granted summary judgment on her claim for breach of the implied covenant of good faith and fair dealing. She argues that the court

failed to recognize that DSFCU breached the implied covenant when it allowed Nolan to remove her from the account without her approval and when it did not provide her with any recourse to remedy the matter.

¶19 Initially, we must determine whether Bush's claim for breach of the implied covenant was a tort or contract claim. *See Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985) (superseded by statute on other grounds) (stating that "[i]n certain circumstances, breach of contract, including breach of the covenant of good faith and fair dealing, may provide the basis for a tort claim"); *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 491, ¶ 61, 38 P.3d 12, 29 (2002) ("There is a difference . . . in the proof required, depending on whether the claim sounds in tort or in contract."). Although the court discussed causation in its summary judgment ruling, Bush never argued "why the traditional contract damage rule would not provide adequate compensation under the facts of this case." *Burkons v. Ticor Title Ins. Co.*, 168 Ariz. 345, 355, 813 P.2d 710, 720 (1991). Although her Amended Complaint asserted that the claim for breach of the implied covenant of good faith and fair dealing "arises out of contract," it is "devoid of any indication that [she] is seeking tort damages for breach of the implied covenant," *Firstar Metro.*

Bank & Trust v. F.D.I.C., 964 F. Supp. 1353, 1358 (D. Ariz. 1997), because she failed to allege or demonstrate a special relationship with DSFCU. *Wells Fargo*, 201 Ariz. at 491, ¶ 60, 38 P.3d at 29. As a result, we only address whether DSFCU breached the contractual implied covenant.

¶20 The implied covenant can be breached even when a party "performs its express covenants under the . . . contract." *Rawlings v. Apodaca*, 151 Ariz. 149, 157, 726 P.2d 565, 573 (1986). A party breaches the implied covenant when it exercises its "express discretion in a way inconsistent with a party's reasonable expectations," "act[s] in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain," *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 424, ¶ 14, 46 P.3d 431, 435 (App. 2002), or "do[es] anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement." *Wells Fargo*, 201 Ariz. at 490, ¶ 59, 38 P.3d at 28. Consequently, even though the trial court found that the implied covenant must fail because there was no breach of contract, we must focus on the contract and determine whether DSCFU breached the implied covenant, *Rawlings*, 151 Ariz. at 154, 726 P.2d at 570, because "the express terms are presumed to be the best indicator of the parties' reasonable expectations." *Bike Fashion*, 202 Ariz. at 424, ¶ 17, 46 P.3d at 435.

¶21 As we found in reviewing the contract, the express terms of the Certification allowed DSFCU to recognize the actions of either member. *See supra* ¶ 13. We also examine the evidence presented with the motion to determine whether a "jury might reasonably have found that" DSFCU's refusal to exercise its power to close or freeze the accounts was beyond the risk assumed by Bush in the Certification "or [was] for a reason inconsistent with [Bush]'s justified expectations." *Sw. Sav. & Loan Ass'n v. SunAmp Sys., Inc.*, 172 Ariz. 553, 559, 838 P.2d 1314, 1320 (App. 1992) (internal quotation marks omitted); *see also Bike Fashion*, 202 Ariz. at 424, ¶ 14, 46 P.3d at 435. A party "exercise[s] its contractual power for a reason beyond the risks that [the other party] assumed" if it lacks a valid reason when exercising its discretion. *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 604-05, ¶¶ 40-41, 233 P.3d 1169, 1183-84 (App. 2010). And, a party acts contrary to another party's justified expectations if it acts "out of spite, ill will, or any other non-business purpose." *Id.* at 604, ¶ 39, 233 P.3d at 1183 (quoting *SunAmp*, 172 Ariz. at 559, 838 P.2d at 1319).

¶22 Bush argues that she reasonably expected DSFCU to honor her designation as owner/manager of Tuscany Village and notify her if her name was removed from the account or otherwise freeze or close the account if suspicions as to ownership arose.

DSFCU, however, did not act in a manner inconsistent to the Certification or with Bush's justified expectations. DSFCU did not act "out of spite, ill will, or any other non-business purpose." *Id.* (quoting *SunAmp*, 172 Ariz. at 559, 838 P.2d at 1319). Indeed, DSFCU explained that instead of investigating every instance where a principal seeks to remove another principal, it "places the onus of policing business activities with the individuals designated to conduct business on the accounts."

¶23 Accordingly, because the facts produced by Bush to support her claim that DSFCU breached the implied covenant "have so little probative value . . . that reasonable people could not agree with the conclusion advanced by [her]," *Orme School*, 166 Ariz. at 309, 802 P.2d at 1008, the trial court did not err in granting summary judgment on Bush's claim for breach of the implied covenant.[4]

ATTORNEY'S FEES

¶24 DSFCU requests its attorney's fees and costs on appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01 (West 2013) ("In any contested action arising out of a

[4] Bush argues that summary judgment was improper because she listed Nolan as a non-party at fault and only a jury could resolve the relative fault of the parties. We will not address the argument because she does not challenge the entry of summary judgment on her negligence claim, and comparative fault is not applicable to her breach of contract claims.

contract . . . the court may award the successful party reasonable attorneys' fees.), A.R.S. § 12-341 (West 2013) ("The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law."), and Arizona Rule of Civil Appellate Procedure ("ARCAP") 21. Because DSFCU is the successful party on appeal, we will award it reasonable attorneys' fees and costs on appeal upon compliance with ARCAP 21.

CONCLUSION

¶25 For the foregoing reasons, we affirm the entry of summary judgment dismissing Bush's claims against DSFCU.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
PHILIP HALL, Judge