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IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

GUARANTY BANK AND TRUST COMPANY, a Colorado state chartered banking corporation, *Plaintiff/Appellee/Cross-Appellant,*

v.

RANCHO TUSCANA, LLC, an Arizona limited liability company; DAVID L. EWELL and DIANE R. EWELL, husband and wife; STEWART GRAF and SUSAN M. GRAF, husband and wife,
Defendants/Appellants/Cross-Appellees.

No. 1 CA-CV 13-0303

Appeal from the Superior Court in Maricopa County
No. CV2010-005362
The Honorable Arthur T. Anderson, Judge

AFFIRMED IN PART, REVERSED IN PART, REMANDED
AMENDED PER ORDERS FILED 3-31-15 AND 4-23-15

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MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Donn Kessler and Judge Kent E. Cattani joined.

T H O M P S O N, Judge:

¶1 Rancho Tuscana, LLC (Rancho), David L. Ewell and his wife, Diane R. Ewell, and Steward Graf and his wife, Susan M. Graf (collectively, the Guarantors) appeal from the court's judgment in favor of Guaranty Bank and Trust Company (Guaranty). Rancho argues that the court erred in (1) ordering that the fair market value credit did not apply to the junior loan; (2) granting judgment as a matter of law to Guaranty on the fraud counterclaim; and (3) granting judgment nothwithstanding the verdict to Guaranty on the breach of the implied covenant of good faith and fair dealing counterclaim. Guaranty cross-appeals 1) the court's fair market value determination; (2) the court's denial of Guaranty's motion for judgment as a matter of law on Rancho's second counterclaim of breach of the implied covenant of good faith and fair dealing; and 3) the court's spoliation instruction against Guaranty.[1] For the following reasons, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

¶2 In January 2007, Guaranty loaned Rancho $8,500,000 (senior loan) for the infrastructure development of forty-six condominium lots in a residential subdivision owned by Rancho in Cave Creek, Arizona (Maricopa property).[2] Rancho agreed to repay the loan, including

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[1] Because we affirm the court's judgment on the fraud and implied covenant of good faith and fair dealing counterclaims, we need not address Guaranty's argument concerning the spoliation instruction.

[2] The loan documents were entered into by Merchants Funding LLC, with Guaranty as a passive participant lender pursuant to a participation agreement between Merchants and Guaranty. In November 2007, Merchants assigned Guaranty full interest in the loans at issue, and Guaranty is entitled to enforce all rights and claims of the lender. For ease

outstanding principal and accrued unpaid interest, by July 10, 2008, with an optional one-time 180 day extension of the maturity date. The loan was evidenced by a promissory note (first note), which was secured by two deeds of trust, the Maricopa deed of trust (encumbering the Maricopa property), and the Navajo deed of trust (encumbering vacant land in Pinetop, Arizona, the "Navajo property").

¶3 Guaranty then extended a new loan to Rancho for up to $10,000,000 (junior loan) to finance the construction of dwelling units, with the proceeds to be disbursed based on draw requests submitted by Rancho. Rancho agreed to repay the junior loan by October 30, 2010, and agreed that a default under the terms of the senior loan constituted a default of the junior loan. As additional security, the Guarantors executed separate unconditional guaranties for the repayment of the senior loan and the junior loan. The junior loan was also evidenced by a promissory note (second note), which was secured by a "master deed of trust" relating to the Maricopa property. Additionally, the junior loan agreement contained a cross collateral provision, which provided that:

> The Additional Obligations[3] are cross collateralized such that any and all of the collateral securing the [junior loan] are deemed to secure the [junior loan] and all of the other Additional Obligations and such that any and all of the collateral securing any of the Additional Obligations are deemed to secure the [junior loan] and the other Additional Obligations. Any of the collateral for the [junior loan] or for any of the Additional Obligations can, therefore, be utilized . . . to satisfy, in full or in part, the [junior loan], or the Additional Obligations, or any of them (including without limitation the [senior loan]), as Lender in its sole discretion deems appropriate."

¶4 In January 2009, following the contractual six month extension of the senior loan's maturity date, the parties began negotiations

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in this decision, "Guaranty" refers to both Guaranty and its predecessor in interest.

[3] The parties also modified the senior loan agreement to define "Additional Obligations" as "the amounts due under the [junior loan] . . . [and] all other debts, obligations and liabilities of every description, whether now existing or hereafter incurred, owed to [Guaranty] by [Rancho]."

for a long-term extension and modification of the senior loan. Guaranty extended the maturity date of the senior loan to June 10, 2009 and commissioned C.B. Richard Ellis (CBRE) to conduct an updated appraisal of the Maricopa and Navajo properties. The CBRE appraisal valued the Maricopa property at $7,340,000 and the Navajo property at $3,000,000. Rancho disputed the CBRE appraisals, claiming the value should be higher as evidenced by a different appraisal Rancho had obtained on the properties. After months of negotiation, the parties could not reach an agreement on the terms of the refinancing. Guaranty sent a notice of default to Rancho demanding payment of all amounts due under the first note by October 29, 2009. Although the parties continued to negotiate and Guaranty proposed alternative options to refinancing, the parties failed to finalize an agreement.[4] Guaranty thereafter delivered a second notice of default on January 19, 2010.

¶5 Guaranty initiated non-judicial foreclosure proceedings under the Maricopa deed of trust, Navajo deed of trust and master deed of trust. Although Rancho received a notice of trustee sale for each of the three deeds of trust, a trustee sale was not conducted on the master deed of trust. As of the date of the trustee sale on the first note, the amount due on the senior loan, which included principal and interest, was $7,111,034.09 (first indebtedness), and the amount due on the junior loan was $3,086,885.25 (second indebtedness). Guaranty purchased the Maricopa property at the trustee sale for a bid of $5,490,000 and the Navajo property for $2,160,000.

¶6 Guaranty filed a complaint against Rancho and the Guarantors for breach of the notes and guaranties. At Rancho's request, the court held an evidentiary hearing pursuant to Arizona Revised Statutes (A.R.S.) § 33-814(A) (2010) to determine the fair market value of the Maricopa property. During the hearing, Rancho and Guaranty each introduced appraisal reports and testimony from certified real estate appraisers. The superior court learned that the Maricopa property consisted of forty-six lots with a completed infrastructure that included

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[4] Rancho also declined alternative options proposed by Guaranty, including: 1) a $2,000,000 discount on the amount Rancho owed on the loans if Rancho was able to obtain alternative refinancing; 2) a $3,000,000 discount on the amount Rancho owed on the loans with a deed in lieu of foreclosure on the Navajo property; or 3) a deed in lieu of foreclosure on the Maricopa property and Navajo property and a release of the Guarantors' obligations under the guaranties.

streets, sidewalks, and a community swimming pool. Four of those lots had completed dwelling units. The court found that the fair market value of the Maricopa property was $10,794,000 as asserted by the appraiser for Rancho, and not $4,100,000 as the appraiser for Guaranty had claimed. The court thereafter entered an order crediting the fair market value determination from both properties, in the amount of $12,954,000, to only the first indebtedness.[5] The court denied Rancho's motion for reconsideration of this order, and granted summary judgment to Guaranty on its breach of contract claim on the second note.

¶7 Prior to the fair market value hearing, Rancho filed a counterclaim against Guaranty for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and fraud. Guaranty filed a motion for summary judgment on the counterclaims of breach of contract, breach of fiduciary duty, and fraud. The court thereafter granted Guaranty summary judgment on the breach of fiduciary duty counterclaim, but denied summary judgment on the breach of contract and fraud counterclaims.

¶8 A jury trial commenced October 15, 2012. At the close of Appellant's case in chief, Guaranty moved for judgment as a matter of law on the remaining counterclaims. The court denied Guaranty's motion on the breach of contract counterclaim, but granted judgment as a matter of law in favor of Guaranty on the fraud counterclaim after finding that Rancho presented no evidence to substantiate the claim. The court also denied Guaranty's motion for judgment as a matter of law on the breach of the implied covenant of good faith and fair dealing counterclaim. However, the court clarified that the implied covenant only existed throughout the operative time of the contract, which expired upon Guaranty's October 29, 2009 deadline imposed in the first notice of default (first implied covenant counterclaim). Accordingly, the court limited the first implied covenant counterclaim to breaches of the implied covenant that occurred prior to October 29, 2009.

¶9 During the trial, Rancho argued that a part of its counterclaim for breach of the implied covenant good faith and fair dealing pertained to its reasonable expectation that the Maricopa and Navajo properties provided sufficient collateral for both the first and second notes, and that a benefit of the junior loan agreement and "additional obligation" provision

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5 Rancho did not dispute the $2,160,000 credit bid on the Navajo property.

in the modified senior loan agreement was that Guaranty would apply the fair market value credit of the secured properties to both the first and second note. Rancho asserted that this second bad faith claim could not be realized until after Guaranty elected to apply the fair market value credit to only the first note and sue on the second note. The court allowed Rancho to amend its counterclaim to create a separate second counterclaim for breach of the implied covenant of good faith and fair dealing (second implied covenant counterclaim) that specifically pertained to Guaranty's election to sue on the second note. The court delayed closing arguments and jury deliberation on the second bad faith counterclaim until after the verdicts on Rancho's breach of contract and first implied covenant counterclaim.

¶10 The jury returned a verdict in favor of Guaranty on the breach of contract counterclaim; found in favor of Rancho on the first implied covenant claim and awarded Rancho $6,200,000 in damages; and could not reach a verdict on the second bad faith counterclaim.

¶11 The court thereafter granted Guaranty's motion for judgment notwithstanding the verdict on the first implied covenant counterclaim and vacated the $6,200,000 verdict. The court found that because the original loan documents did not obligate Guaranty to negotiate or modify the loan after the maturity date, a modification and extension of the senior loan was not a benefit of the initial senior loan agreement. Thus, Rancho's later developed expectation of a long-term extension to the senior loan was not protected by the implied covenant of good faith and fair dealing. However, the court denied Guaranty's motion for judgment as a matter of law on the second bad faith counterclaim,[6] finding that sufficient evidence existed to submit that claim to the jury.

¶12 Rancho timely appealed the judgment, and Guaranty timely cross-appealed the judgment. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A) (2013).

DISCUSSION

Rancho's Issues on Appeal

I. Application of the Fair Market Value Credit

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[6] The court declared a mistrial on the second bad faith counterclaim, vacated trial on this claim, and placed it on the court's inactive calendar pending conclusion of this appeal.

¶13 Rancho argues that the court erred in ruling that the fair market value determination of the Maricopa and Navajo properties did not apply to the second indebtedness. Rancho contends that pursuant to the cross collateral provision in the junior loan, the second indebtedness was secured as an "additional obligation" of the first note. We review a grant of summary judgment and issues of contractual interpretation de novo. *See Tenet Healthsystem TGH, Inc. v. Silver*, 203 Ariz. 217, 219, ¶ 5, 52 P.3d 786, 788 (App. 2002); *Republic Ins. Co. v. Feidler*, 178 Ariz. 528, 531, 875 P.2d 187, 190 (App. 1993).

¶14 "On review of summary judgment, we view the facts and evidence in a light most favorable to the party against whom summary judgment was granted and draw all reasonable inferences in favor of that party." *AROK Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 293, 848 P.2d 870, 872 (App. 1993). Summary judgment should be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). It should not be granted if reasonable people could differ with the conclusion. *Id.* at 309, 802 P.2d at 1008. Further, "if a material issue concerns the state of mind or intent of one of the parties, summary judgment normally is not appropriate." *Mid–Century Ins. Co. v. Duzykowski*, 131 Ariz. 428, 429, 641 P.2d 1272, 1273 (1982). Because we conclude there are genuine issues of material fact pertaining to the agreement of the parties, the trial court erred in awarding summary judgment to Guaranty on its breach of contract claim.[7]

¶15 The cross collateral provision of the junior loan agreement provided that "the collateral securing the [junior loan] are deemed to secure the [junior loan] and all of the other Additional Obligations and . . . all of the collateral securing any of the Additional Obligations are deemed to secure the [junior loan] and the other Additional Obligations . . . as Lender in its sole discretion deems appropriate." "Additional Obligations" was further defined in the first modification to the senior loan, as: "the amounts due under the [junior loan] . . . [and] all other debts, obligations and liabilities of every description, whether now existing or hereafter incurred, owed to [Guaranty] by [Rancho]."

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[7] Although Rancho suggests the trial court erred "as a matter of law," the facts underlying this claim are disputed, meaning it cannot be resolved as a pure question of law.

¶16 Our purpose in interpreting a contract is to determine and enforce the intent of the parties. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). "Decisions on the making, meaning and enforcement of contracts should hinge on the manifest intent of the parties . . . ." *Schade v. Diethrich*, 158 Ariz. 1, 8 n.8, 760 P.2d 1050, 1057 n.8 (1988). To determine intent, we look first to the plain meaning of the words in the context of the agreement as a whole. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). When a provision is susceptible to only one reasonable interpretation, we will apply it according to its terms. *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 66-67, ¶ 16, 263 P.3d 69, 74–75 (App. 2011). However, where, as here, the parties' intention cannot be determined within the four corners of the agreement, there is an ambiguity. *Univ. Realty & Dev. Co. v. Omid-Gaf, Inc.*, 19 Ariz. App. 488, 491, 508 P.2d 747, 750 (1973).

¶17 During the trial, the Guarantors testified that the cross collateral provision expressed their intention that the Maricopa and Navajo properties would provide sufficient collateral for both the first and second notes. The Guarantors further testified that they were informed by Guaranty that the value of both properties exceeded the value of the total indebtedness due under both notes, and that in the event of a default, Guaranty would apply the fair market value credit of the secured properties to both the first and second note. Additionally, Rancho argued to the trial court that in Guaranty's verified complaint it confirmed the parties' intention to apply the fair market value credit of the secured properties to both notes. In the complaint, Guaranty defined the first and second indebtedness collectively as the "Indebtedness"; it stated that it was in the process of initiating trustee's sales proceedings on the Navajo and Maricopa properties; and it acknowledged that "[u]pon completion of the trustee's sales, any net proceeds of such trustee's sales will be credited as appropriate against the Indebtedness due under the Loans."

¶18 In disputing Rancho's interpretation of the junior loan agreement, Guaranty asserts that the cross collateral provision expressly granted Guaranty the right to utilize the secured property to satisfy the first or second indebtedness, in full or in part, "in its sole discretion [as it] deems appropriate." Although Guaranty concedes that the junior loan agreement provided for the cross-collateralization of the security for any additional obligations between Rancho and Guaranty, it argues that neither the junior loan agreement nor the second note specifically referenced the Maricopa deed of trust or the Navajo deed of trust. Thus, Guaranty asserts that it had the right under the loan documents to credit the fair market value

determination of the Maricopa and Navajo property to only the first indebtedness, and to sue Rancho for breach of the second note.

¶19 Viewing the facts in the light most favorable to Rancho, a fact finder could conclude that based on the language of the loan documents together with the extrinsic evidence, the parties intended that the junior loan agreement and modification to the senior loan agreement obligated Guaranty to credit the fair market value determination of the Maricopa and Navajo properties to both the first and second indebtedness.[8] *See Anaconda Co. v. Chapman-Dyer Steel Mfg. Co.*, 117 Ariz. 254, 255, 571 P.2d 1050, 1051 (App. 1977) (stating that where evidence existed both ways, whether the terms of the written contract applied retroactively was a question of fact); *see also Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385–86, ¶¶ 17–23, 132 P.3d 825, 829–30 (2006) (conflicting language in service contract together with parol evidence in form of plaintiff's affidavit regarding his understanding of contract, precluded entry of summary judgment); *Burkons v. Ticor Title Ins. Co. of Cal.,* 168 Ariz. 345, 349–51, 813 P.2d 710, 714–16 (1991) (holding that ambiguous financing documents and letter of intent created genuine issues of material fact on whether parties intended that a loan would be used to finance construction and whether the plaintiff had agreed to unconditionally subordinate his lien to the lien of the buyer's lender). Accordingly, the trial court erred in concluding there was no material factual dispute with respect to Guaranty's breach of contract claim.[9] *See Santiago v. Phx. Newspapers, Inc.*, 164 Ariz. 505, 508, 794 P.2d 138, 141 (1990) ("The court may grant summary judgment only if no dispute exists as to any material facts, if only one inference can be drawn from those facts, and if the moving party is entitled to judgment as a matter of law.");

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[8] We reject Guaranty's argument that Rancho waived this issue by not objecting to the trustee sale prior to the sale's completion. Claims of relief, defenses, and objections that are independent from an objection to the trustee's sale are not waived by A.R.S. § 33–811(C) (2014). *Morgan AZ Fin., L.L.C. v. Gotses*, 235 Ariz. 21, 24, ¶ 9, 326 P.3d 288, 291 (App. 2014) (stating that under A.R.S. § 33–811(C), the trustor does not waive defenses against a post-sale deficiency claim by lender)*; Sitton v. Deutsche Bank Nat'l Trust Co.*, 233 Ariz. 215, 218, ¶ 13, 311 P.3d 237, 240 (App. 2013) ("Section 33–811(C) contemplates the waiver of 'defenses and objections to the sale' only . . . .").

[9] Because of our resolution of this issue, we do not address Rancho's argument that A.R.S. § 33-814(A) required the court to reduce the amount owed on the second indebtedness by the fair market value of the secured property at the time of the trustee sale.

Schenks v. Earnhardt Ford Sales Co., 9 Ariz. App. 555, 557, 454 P.2d 873, 875 (1969) ("It is for the trier of fact, be that jury or judge, to resolve . . . disputed fact question[s] . . . and it was reversible error for the trial court to grant the motion for summary judgment.").

¶20 Guaranty argues that pursuant to *Southwest Savings & Loan Ass'n v. Ludi*, 122 Ariz. 226, 594 P.2d 92 (1979), Rancho's obligation under the junior loan was a separate obligation from the senior loan, and thus, Guaranty, by law, properly sued for breach of the second note. In *Ludi*, the holder of two promissory notes secured by mortgages on the same property foreclosed on the senior loan and then sued to collect on the junior loan. *Id*. at 227, 594 P.2d at 93. Our Supreme Court explained that a claim arising from the junior loan, although secured by the same property as the senior loan, was not a deficiency of the foreclosed senior loan; and thus, a separate action was appropriate. *Id.* at 228, 594 P.2d at 94; *see also Mid Kansas Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 130, 804 P.2d 1310, 1318 (1991) (noting that the foreclosure of a senior mortgage will not extinguish the debt secured by the junior mortgage).

¶21 However, neither case relied on by Guaranty involved an agreement by the lender and debtor to have the secured property be credited towards both the junior and senior loan. Because an issue of fact exists as to whether Guaranty and Rancho agreed to apply the fair market value of the Maricopa and Navajo property to the debt owed under the junior loan, the court erred in granting summary judgment to Guaranty on its breach of contract claim on the second note.

II. Judgment as a Matter of Law on Fraud Counterclaim

¶22 Rancho also argues that the court erred in granting Guaranty's motion for judgment as a matter of law on the fraud counterclaim because there was sufficient evidence in support of the claim. We review the grant of a motion for judgment as a matter of law de novo and consider the evidence in the light most favorable to the non-moving party. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996). "A trial court should direct a verdict or enter judgment notwithstanding the verdict only if there has been no evidence that would justify a reasonable person returning a verdict for the opposing party." *Duncan v. St. Joseph's Hosp. & Med. Ctr.,* 183 Ariz. 349, 353, 903 P.2d 1107, 1111 (App. 1995). We must therefore determine whether Rancho's evidence on the elements of fraud was sufficient to warrant submission to a jury.

¶23 A fraud claim requires proof that the defendant made "a false and material representation, with knowledge of its falsity or ignorance of its truth, with intent that the hearer would act upon the representation in a reasonably contemplated manner," and that the plaintiff, "ignorant of the falsity of the representation, rightfully relied upon the representation and was thereby damaged." *Dawson v. Withycombe*, 216 Ariz. 84, 96, ¶ 26, 163 P.3d 1034, 1046 (App. 2007) (emphasis omitted) (citation omitted). Rancho asserts that "[a]t least three frauds were practiced on Rancho and all involved the heavily manipulated CBRE appraisals."[10] Guaranty argues that Rancho's fraud claim fails as a matter of law because Rancho presented no evidence that the CBRE appraisal was false, that Guaranty knew the appraisal was false, that Rancho relied on the appraisal or had a right to rely on the appraisal, and that Rancho was damaged by its reliance on the appraisal.

¶24 To the extent that the CBRE's appraisal constituted a representation by Guaranty, that representation was an opinion. "Expressions of opinion are not material facts sufficient to support a claim of fraud." *Caruthers v. Underhill*, 230 Ariz. 513, 522, ¶ 32, 287 P.3d 807, 816 (App. 2012) (citing *Frazier v. Sw. Sav. & Loan Ass'n*, 134 Ariz. 12, 15, 653 P.2d 362, 365 (App. 1982) (holding that representations as to the value of land are expressions of opinion that will not support a claim for fraud)); *see also Page Inv. Co. v. Staley*, 105 Ariz. 562, 564, 468 P.2d 589, 591 (1970); *Fifty Assocs. v. Prudential Ins. Co. of Am.*, 450 F.2d 1007, 1010-11 (9th Cir. 1971) (holding that the assessment of land value was an "educated guess" and not a representation of fact). The policy behind this rule is that "value is largely a matter of judgment and estimation" about which people may differ. 37 Am.Jur.2d Fraud and Deceit § 170 (2015). Here, the CBRE appraisal explicitly stated that it was based on the "personal, impartial and unbiased professional analyses, opinions, and conclusions" of the appraiser. Accordingly, Guaranty's use of the CBRE appraisal during the senior loan extension negotiation did not constitute a material misrepresentation.

¶25 Moreover, Rancho presented no evidence that Guaranty's 2009 appraisal proximately caused the compensatory damages it sought in its counter-complaint. *See Smith v. Don Sanderson Ford, Inc.*, 7 Ariz. App.

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[10] Rancho claimed Guaranty and CBRE manipulated the appraisal with regard to 1) representing that Guaranty must use bulk valuation of the finished dwellings, 2) inflated discount rates applied to valuations of the forty-two lots, and 3) the cost of a golf course membership.

390, 392, 439 P.2d 837, 839 (1968) (a showing of actual damages is essential to a case of fraud). There is no evidence that Rancho pledged the additional collateral requested by Guaranty in exchange for a long-term extension of the senior loan, consented to the final extension terms proposed by Guaranty; or was unable to obtain alternative financing because of Guaranty's appraisal.[11] Thus, the superior court did not err by granting Guaranty's motion for judgment as a matter of law on Rancho's claim of fraud.

III. Judgment Notwithstanding the Verdict on First Implied Covenant Counterclaim

¶26 Rancho next contends that the court improperly granted judgment notwithstanding the verdict on its claim for breach of the implied covenant of good faith.[12] Arizona "law implies a covenant of good faith and fair dealing in every contract." *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (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 Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund,* 201 Ariz. 474, 490, ¶ 59, 38 P.3d 12, 28 (2002). However, an implied covenant of good faith and fair dealing cannot directly contradict an express term of the contract. *Bike Fashion Corp*. 202 Ariz. at 424, ¶ 14, 46 P.3d at 435. Thus, "the relevant

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[11] Although the guarantors testified that they believed looking for alternative financing would be futile, this evidence was insufficient to prove that Rancho was, in fact, unable to obtain financing from a different lender as a result of Guaranty's 2009 appraisal and suffered damages as a result of their reliance on the appraisal.

[12] The test for granting judgment notwithstanding the verdict is the same as that for granting a judgment as a matter of law: "Both should be granted only if the facts presented in support of a claim have so little probative value that reasonable people could not find for the claimant." *Shoen v. Shoen,* 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997) (citation omitted).

inquiry always will focus on the contract itself, to determine what the parties did agree to." *Rawlings*, 151 Ariz. at 154, 726 P.2d at 570.

¶27 In its counter-complaint, Rancho alleged that Guaranty breached the implied covenant of good faith and fair dealing by 1) failing to extend the senior loan and continue financing through the completion of the development of the Maricopa property, 2) altering the proposed terms of modified agreements, and 3) relying on fraudulent appraisals during the refinancing negotiation. However, both the senior loan and junior loan agreements explicitly provided that Guaranty was not contractually obligated to modify or extend the senior loan after the initial 180 day loan extension.[13] *See Sw. Sav. & Loan Ass'n v. SunAmp Sys., Inc.*, 172 Ariz. 553, 558, 838 P.2d 1314, 1319 (App. 1992) (stating that acts in compliance with the terms of the contract cannot, without more, be equated with bad faith because "[i]f contracting parties cannot profitably use their contractual powers without fear that a jury will second-guess them under a vague standard of good faith, the law will impair the predictability that an orderly commerce requires"). Guaranty exercised its contractual discretion to not renew or extend the senior loan after the date of maturity, it was commercially reasonable to use that power, and Rancho had no justifiable expectation that Guaranty would refrain from exercising that discretion. *See id.*, 172 Ariz. at 558-59, 838 P.2d at 1319-20 (good faith performance doctrine permits "the exercise of discretion for any purpose-including ordinary business purposes-reasonably within the contemplation of the parties"). Thus, Rancho failed to show how it was denied the benefit and entitlement of its contractual agreement with Guaranty.[14]

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[13] Section 5.1 of the senior loan agreement states: "Borrower hereby jointly and severally represents and warrants to Lender as follows: . . . (c) [Guaranty] has not promised or committed that it will loan any additional sums of money to [Rancho], or that [Guaranty] will renew or extend the Loan at its maturity, other than as set forth in section 2.5 [the optional one-time six month loan extension]." The junior loan agreement contained a nearly identical provision.

[14] Rancho focuses much of its argument on whether the court erred in limiting the first implied covenant claim to October 29, 2009, the date of default of the senior loan as set forth in Guaranty's first notice of default, rather than the date of the second notice of default in January 2010. Even if, as Rancho asserts, the junior loan did not terminate on October 29, 2009,

¶28 We likewise reject Rancho's additional argument that Guaranty breached its duty to act in good faith during the negotiation of the senior loan extension by relying on the CBRE appraisal and altering proposed loan modification terms. While Arizona law recognizes an implied covenant of good faith and fair dealing in the performance of every contract, *Wells Fargo*, 201 Ariz. at 490, ¶ 59, 38 P.3d at 28, we find no authority to support Rancho's assertion that there is a corresponding duty to negotiate in good faith as well. *See Silving v. Wells Fargo Bank, NA*, 800 F.Supp.2d 1055, 1071 (D. Ariz. July 7, 2011) (stating that the covenant of good faith does not typically extend to negotiations); *See also* Restatement (Second) of Contracts § 205 cmt. c (1981) ("This Section . . . does not deal with good faith in the formation of a contract."). Although Rancho acknowledges that the implied covenant of good faith and fair dealing typically does not extend to negotiations, Rancho contends that an exception should be made in this instance.[15] Based on our review of the record, we do not believe an exception is warranted in this case. Consequently, the court did not err in granting judgment notwithstanding the verdict on Rancho's counterclaim for breach of the implied covenant of good faith and fair dealing.

Guaranty's Issues on Cross-Appeal

I. Trial Court's Fair Market Determination

¶29 On cross-appeal, Guaranty argues that the court made several evidentiary errors in determining the Maricopa property's fair market value. "'In determining a property's fair market value, a trial court may adopt portions of the evidence from different witnesses,' and this Court will

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Rancho had no justifiable expectation under the terms of the junior loan that Guaranty would extend or renew the loan.

[15] In support of this assertion, Rancho cites to Mark E. Budnitz & Helen Davis Chaitman, *The Law of Lender Liability*, at 4-30 (2012), for the proposition that a court will find a breach of the implied covenant of good faith when a borrower is lulled into a false sense of security by the lender during negotiations, or when a lender suddenly reverses a course of dealing. Even if we presumed this assertion to be true, the record does not support a finding of breach of the implied covenant of good faith. While the evidence clearly showed that Guaranty agreed to enter negotiations with Rancho for a potential modification and extension of the senior loan, we find no evidence that Guaranty relinquished its rights under the senior loan agreement or promised to modify the loan documents.

sustain 'a result anywhere between the highest and lowest estimate which may be arrived at by using the various factors appearing in the testimony in any combination which is reasonable.'" *CSA 13-101 Loop, LLC, v. Loop 101, LLC*, 233 Ariz. 355, 362-63, ¶ 25, 312 P.3d 1121, 1128-29 (App. 2013) (quoting *State Tax Comm'n. v. United Verde Extension Mining Co.*, 39 Ariz. 136, 140, 4 P.2d 395, 396 (1931)). On appeal, we will not disturb the court's ruling that is based on conflicting testimony by reweighing the evidence. *Id*. at ¶ 25 (citation omitted).

¶30 At the hearing, Donald Duncan, the appraiser for Rancho, testified that in June 2010, he inspected the interiors of four units on the Maricopa property and found that all aspects of the units were of "the highest quality that you can find to put into these types of luxury houses." Duncan further testified that he used a direct sales approach on the lots with units, using comparable sales of units in the Desert Mountain planned community, and then combined this analysis with a land extraction analysis on the remaining forty-two lots, to get a property market value of $10,794,000.

¶31 Michael Turner, the appraiser for Guaranty, previously valued the Maricopa property in September 2006 for $9,740,000. At the evidentiary hearing, Turner testified that he again appraised the property in 2010, but did not conduct an interior inspection of the property. Turner stated that he used both a sales approach and a discounted cash flow analysis, and reconciled the values under each approach to get a property market value of $4,100,000. Turner further testified that he disagreed with the use of comparable sales from Desert Mountain, and instead, compared sales of dwelling units from a number of different subdivisions. The court found Duncan's "appraisal more convincing" and thus determined that the fair market value of the Maricopa property was $10,794,000.

¶32 None of Guaranty's alleged evidentiary errors calls into question the validity of the trial court's ruling. Guaranty challenges the court's findings that "Turner did not adequately explain his use of Desert Mountain comparisons in his 2006 appraisal . . . but not in his current appraisal," and did not explain why the 2010 appraisal had a lower appraised value than the 2006 appraisal. Guaranty argues that Turner did not rely on the Desert Mountain comparisons in 2006, however, during the evidentiary hearing Turner admitted that he used the Desert Mountain comparisons in his 2006 appraisal "as a part of the process" in his determination of a value range for the Maricopa property. We also reject Guaranty's argument that the court failed to consider the different market conditions between 2006 and 2010. Both appraisers testified that their

appraisals took into account the change in market conditions between 2006 and 2010, and the court expressly acknowledged the changed market conditions during the hearing, stating "obviously there's been a drop in the market." Moreover, we find no error in the court's recognition that "prepaid building permit and impact fees were not included in either appraisal." Contrary to Guaranty's assertion, it does not appear that the court used the added value of prepaid permits and fees to discredit Turner's appraisal.

¶33 In addition, Guaranty contends that the court committed prejudicial error by admitting Turner's 2006 appraisal of the Maricopa Property into evidence. "[A]bsent a clear abuse of discretion" by the trial court, we will not "second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997) (citation omitted). Although Turner's 2006 appraisal would be inadmissible if offered as independent evidence of the value of the Maricopa property in 2010, it was admissible to impeach or otherwise discredit Turner's testimony. *See State ex rel. Morrison v. Jay Six Cattle Co.*, 88 Ariz. 97, 106, 353 P.2d 185, 191 (1960). Rancho sought to admit Turner's 2006 appraisal to challenge his selected methodology, the comparable sales used, and his method of calculating value in his 2010 appraisal; and the court specifically admitted the 2006 appraisal for this purpose. Accordingly, we find no error.

¶34 Guaranty's remaining criticism goes merely to the weight the court should have given to the appraiser's testimony and the court's determination of credibility. We will not second-guess the court's determination or re-weigh the evidence; and we presume that the court considered all of the evidence presented. *Fuentes v. Fuentes*, 209 Ariz. 51, 55-56, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (citation omitted); *Magna Inv. & Dev. Corp. v. Pima Cnty.*, 128 Ariz. 291, 294, 625 P.2d 354, 357 (App. 1981). Substantial evidence supports the trial court's fair market value determination and we cannot conclude that the court's adoption of Duncan's calculation was unreasonable. Consequently, we will not disturb the court's fair market value determination.

II. Rancho's Second Implied Covenant Counterclaim

¶35 Lastly, Guaranty contends the trial court erred in denying its motions for judgment as a matter of law on Rancho's second counterclaim for breach of the implied covenant of good faith and fair dealing. Rulings denying a motion for judgment as a matter of law and a new trial will be affirmed if any substantial evidence could lead reasonable persons to find

the ultimate facts to support a verdict. *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 29, ¶ 6, 270 P.3d 852, 856 (App. 2011) (citation omitted); Ariz. R. Civ. P. 50. We will uphold the ruling unless "the facts produced in support of the claim or defense 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 or defense." *A Tumbling–T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, 524, ¶ 14, 217 P.3d 1220, 1229 (App. 2009) (quoting *Orme Sch.,* 166 Ariz. at 309, 802 P.2d at 1008).

¶36 Guaranty first argues that the court abused its discretion by granting Rancho's request to add this counterclaim after the trial had commenced. It is within the sound discretion of the court whether to grant leave to amend the pleadings, and the court will allow amendments liberally. *Hall v. Romero*, 141 Ariz. 120, 124, 685 P.2d 757, 761, (App. 1984); *see MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996) (A motion to amend should be granted "unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment."). Based on our review of the record, we find no abuse of discretion.

¶37 Guaranty also asserts that its decision to apply the fair market value of the secured collateral to the first note, and thereafter sue Rancho for breach contract on the second note, was in accordance with the anti-deficiency statutes and the loan documents. Notwithstanding that Guaranty acted within its contractual and statutory rights, Rancho complained that Guaranty's actions put it in an unnecessarily disadvantageous position. We agree with the court that the record contains evidence that Rancho reasonably expected that the Maricopa property and Navajo property provided sufficient collateral for both the first and second notes pursuant to the junior loan agreement and the modified senior loan agreement, and that it was denied a benefit of its bargain when Guaranty elected to apply the fair market value of the secured properties to only the first note. *See Wells Fargo Bank*, 201 Ariz. at 492 ¶ 66, 38 P.3d at 30 (finding genuine issues of material fact as to whether bank acted in bad faith by wrongfully exercising contractual power for a reason inconsistent with borrower's justified expectations); *Sw. Sav. & Loan*, 172 Ariz. at 558, 838 P.2d at 1319 ("Instances inevitably arise where one party exercises discretion retained or unforeclosed under a contract in such a way as to deny the other a reasonably expected benefit of the bargain."). Because Rancho sufficiently established that a disputed issue of material fact existed, the court did not err in denying Guaranty's motion for judgment as a matter of law.

CONCLUSION

¶38 For the foregoing reasons, we reverse the portion of the judgment in favor of Guaranty on the claim of breach of contract on the second note, vacate the trial court's order dated December 27, 2011 crediting the fair market value against the first indebtedness, and remand for proceedings consistent with this decision. We affirm all other issues.

Ruth A. Willingham · Clerk of the Court
FILED: jt