IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

WINDSHIP 21 LLC, et al., *Plaintiffs/Appellees,*

v.

APPSWARE HOLDINGS, INC., *Defendant/Appellant.*

No. 1 CA-CV 16-0747
FILED 11-21-2017

Appeal from the Superior Court in Maricopa County
Nos. CV 2015-011499
CV 2015-011500
(Consolidated)
The Honorable Roger E. Brodman, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Margaret H. Downie (retired) joined.

C A M P B E L L, Judge:

¶1 Defendant Appsware Holdings, Inc. ("Appsware") challenges the grant of summary judgment in favor of plaintiffs Windship 21, LLC and Triremes 24, LLC (collectively "Windship") finding Appsware breached promissory notes and associated loan agreements. For the following reasons, the judgment is affirmed.

FACTS AND PROCEDURAL BACKGROUND

¶2 In early 2008, Windship loaned Appsware $761,400 pursuant to the terms of a written loan agreement and associated promissory note. The loan agreement provided for repayment of the loan on or before the two-year anniversary of the loan, January 9, 2010. In late 2009, Appsware borrowed $1,000,000 from Triremes. The associated loan documents stated that the loan would be repaid at "the earliest of November 11, 2011, or a Capital Transaction, or an Event of Default."

¶3 In June 2011, the parties signed separate amendments for both loans, extending both due dates to "the earliest of November 30, 2014, or a Capital Transaction, or an Event of Default."[1]

¶4 When Appsware failed to repay the loans on the due date, Windship and Triremes filed suit against Appsware, claiming breaches of promissory notes and associated loan agreements. In its answer, Appsware proffered several defenses, including fraud in the inducement and equitable estoppel.[2] The parties agreed to join the cases, and the superior

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[1]According to testimony, though neither party can find the written amendment for the 2008 loan, this extension was executed in writing and contained the November 2014 due date.

[2]Appsware's additional defenses were not argued in its opening brief and will not be considered on appeal. *See* ARCAP Rule 13(a)(7).

court granted plaintiffs' motion for summary judgment after oral argument.

DISCUSSION

¶5 Appsware argues the superior court erred in granting Windship's motion for summary judgment. *See* Ariz. R. Civ. P. 56(c)(3)(B). Specifically, Appsware contends there was a genuine issue of material fact regarding its defenses of fraud in the inducement and estoppel. Further, the superior court erred in applying the parol evidence rule to exclude evidence supporting these defenses.

¶6 Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Summary judgment "should be granted if 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." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). We determine de novo whether any genuine issue of material fact exists and whether the trial court erred in application of the law. *Logerquist v. Danforth*, 188 Ariz. 16, 18 (App. 1996). We construe the evidence and reasonable inferences in the light most favorable to the non-moving party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 482, ¶ 13 (2002). We will uphold the trial court's ruling if it is correct for any reason. *Logerquist*, 188 Ariz. at 18.

I. Fraud in the Inducement

¶7 Appsware does not deny it owes a debt to Windship. Instead, it contends the debt is not yet due because during negotiation of the loans, Windship orally promised Appsware the loans would not be due until a "liquid[ation] event." However, Appsware acknowledges the 2008 and 2009 loan agreements state each loan is due at the two-year anniversary of the respective agreements. Further, the subsequent amendments to each loan explicitly state the loans are due on "the earliest of November 30, 2014, or a Capital Transaction, or an Event of Default."[3] Nonetheless, Appsware

[3] While the parties could not locate a copy of the written amendment to the 2008 loan documents, Windship proved the existence and content of that written amendment through the testimony of Appsware. *See* Ariz. R.

claims these were merely "window dressing" terms included to satisfy Windship's investors and were never meant to be enforced. Appsware argues the superior court should have allowed it to present parol evidence demonstrating it was "lure[d]" into entering the loan agreements based on promises that there would be no specific due date.

¶8 While parol evidence is admissible to show fraud, "evidence of statements which are squarely against the terms of the written agreement are inadmissible under the parol evidence rule." *Spudnuts Inc. v. Lane*, 131 Ariz. 424, 426-27 (App. 1982); *see also Sun Lodge, Inc. v. Ramada Dev. Co.*, 124 Ariz. 540, 542 (App. 1979); *Arnold v. Cesare*, 137 Ariz. 48, 51-52 (App. 1983) ("such evidence is not admissible . . . to cause the express terms of the agreement to be read just the opposite"). Further, "the parol evidence rule prohibits extrinsic evidence to vary or contradict, but not to interpret, the agreement." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152 (1993).

¶9 Here, the terms of the contract are clear and in no need of interpretation. Appsware does not argue there was fraud or alternative oral understandings when it executed the amendments, which established an absolute due date of November 30, 2014. Instead Appsware maintains the amendments prove the due dates of the loan agreements were fluid. In fact, the amendments demonstrate the opposite: if it was understood that the loans were not due until a liquidation event, there would be no need for an amendment containing a due date certain.

¶10 Appsware's argument that it was "lure[d]" into the agreements by verbal promises does not compel a contrary conclusion. Though parol evidence may sometimes be considered if there is an abuse of the bargaining process, there is no evidence of such abuse here. In *Pinnacle Peak Developers,* this court upheld the trial court's exclusion of parol evidence on summary judgment in part because the parties had experience in business transactions and both parties were represented by counsel. *Pinnacle Peak Developers v. TRW Inv. Corp.*, 129 Ariz. 385, 392-93 (App. 1980). Here, the lay representative of Appsware holds an MBA from Harvard, was the CEO of a company that had $20-30 million in annual sales, and negotiated more than 100 contracts. The record clearly indicates Appsware's representatives were experienced in business transactions, sophisticated actors in negotiation and formation of contracts. Their claims of abuse are not founded in fact. Appsware was aware of the risk, participated in the establishment of a due date and, for whatever reason,

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Evid. 1007 (proponents may prove the content of a writing by the testimony of the opposing party).

executed the contract with the explicit due date included. Accordingly, they are bound by the terms of the contract.

¶11 The superior court did not err in precluding evidence of fraud that would contradict a material term of the contract based on the parol evidence rule.

II. Estoppel

¶12 Appsware argues the superior court erred in applying the parol evidence rule precluding introduction of the oral agreement for purposes of proving estoppel. However, as above, "[t]here can be no implied contract where there is an express contract between the parties in reference to the same subject matter." *Chanay v. Chittenden*, 115 Ariz. 32, 35 (1977) (citing cases) (rejecting argument that oral promises estopped enforcement of a written contract).

¶13 Contrary to Appsware's argument, even if parol evidence of the verbal information had been allowed to support the estoppel theory, summary judgment would have been appropriate because Appsware could not raise the necessary factual basis to support the elements of estoppel. To prove promissory estoppel, Appsware must show that Windship made a promise and should have reasonably foreseen Appsware would rely on that promise, and that Appsware actually relied on the promise to its detriment. *Higginbottom v. State*, 203 Ariz. 139, 144, ¶ 18 (App. 2002). Appsware can only recover under promissory estoppel if its reliance was justifiable. *Id.* "Reliance is justified when it is reasonable, but it is not justified when knowledge to the contrary exists." *Id.* (quoting *Carondelet Health Servs. v. Ariz. Health Care Cost Containment Sys. Admin.*, 187 Ariz. 467, 470 (App. 1996)). Here, the terms of the loan agreement and loan amendments explicitly included terms in direct conflict with Appsware's claim that the loans were due only upon the occurrence of a "liquidity event." Thus, Appsware's reliance was not justifiable. Appsware failed to provide facts that establish a genuine dispute or otherwise preclude summary judgment in favor of Windship. Accordingly, the superior court correctly granted Windship's motion for summary judgment. *See* Ariz. R. Civ. P. 56(c)(3)(B).

III. Attorney Fees and Costs

¶14 Windship seeks an award of attorney fees and costs on appeal pursuant to the loan agreement, which provides that "Borrower agrees to pay all costs of collection, including, without limitation, reasonable attorneys' fees, whether or not suit is filed, and all costs of suit and preparations for suit (whether at trial or appellate level) in the event any

payment of principal, interest or other amount is not paid when due . . . ." Because Windship is the prevailing party, it is granted reasonable attorney fees incurred on appeal, along with taxable costs on appeal, contingent upon Windship's compliance with ARCAP 21.

CONCLUSION

¶15 The judgment is affirmed.

AMY M. WOOD • Clerk of the Court
FILED: AA