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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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Milivoje Djordjevich and Milomirka  
Djordjevich, husband and wife,

No. CV-08-0288-PHX-DGC

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Plaintiffs,

**ORDER**

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vs.

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Dexia Real Estate Capital Markets, a  
Delaware Corporation; Artesia Mortgage  
Capital Corporation, a foreign entity,

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Defendants.

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Plaintiffs Milivoje Djordjevich and Milomirka Djordjevich have filed a motion for partial summary judgment on their claim for breach of contract. Dkt. #23. Defendants Dexia Real Estate Capital Markets and Artesia Mortgage Capital Corporation have filed a response and cross-motion for partial summary judgment on the same claim. Dkt. #28. The motions have been fully briefed. Dkt. ##29, 31. For reasons stated below, the Court will grant Plaintiffs' motion for partial summary judgment with respect to liability and deny the motion with respect to damages. The Court will deny Defendants' cross-motion for partial summary judgment.<sup>1</sup>

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<sup>1</sup> The request for oral argument is denied because the parties have thoroughly briefed the law and evidence and oral argument will not aid the Court's decision. *See Mahon v. Credit Bur. of Placer County, Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999).

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1 **I. Background.**

2 On November 2, 2006, Plaintiffs submitted to Defendants an application for a loan  
3 for \$7.7 million, to be secured by property known as Coconut Grove Apartments. Dkt. #1  
4 ¶ 6. On December 20, 2006, Plaintiffs and Defendants entered into an Advance Interest Rate  
5 Lock Agreement (“Rate Lock Agreement”) which stated that upon Defendants’ receipt of  
6 \$154,000, Plaintiffs would lock the interest rate on the proposed \$7.7 million loan through  
7 November 1, 2007. Dkt. #27-2 at 12. Plaintiffs paid the money, and on February 20, 2007,  
8 Defendants sent an interest rate lock confirmation acknowledging receipt of the deposit and  
9 confirming that the interest rate of 5.980% was locked until November 1, 2007. Dkt. #25 at  
10 41.<sup>2</sup> Both the loan application and the Rate Lock Agreement stated that a loan offer could  
11 only be made through the issuance of a commitment letter and that Defendants were under  
12 no obligation to make a loan offer. Dkt. ## 27-2 at 14, 21.

13 On October 31, 2007, the day before the Rate Lock Agreement was to expire,  
14 Defendants sent a commitment letter to Plaintiffs stating that a loan to Plaintiffs was  
15 approved for a reduced amount of \$6.4 million and an increase of 8 basis points in the  
16 interest rate. Dkt. #27-2 at 23. This letter also stated that the Rate Lock Agreement was  
17 extended until December 15, 2007. *Id.* Plaintiffs did not sign the commitment letter.  
18 Dkt. #1 ¶ 15. On December 3, 2007, Defendants sent Plaintiffs a restated commitment letter,  
19 stating that loan was now approved for only \$6.2 million and an increase of 40 basis points  
20 in the interest rate. Dkt. #27-2 at 26. Plaintiffs did not sign the restated commitment letter.  
21 Dkt. #1 ¶ 19.

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24 <sup>2</sup>Plaintiffs contend that they paid an additional \$154,000 on September 14, 2007 to  
25 extend the Rate Lock Expiration Date by one year. Defendants claim that this money was  
26 paid in response to a margin call on the hedge Defendants made to reduce the risk they took  
27 by locking the interest rate. This factual dispute does not preclude summary judgment  
28 because Defendants breached the Rate Lock Agreement when they issued a loan commitment  
letter on October 31, 2007, for an interest rate above the locked rate.

1 On January 17, 2008, Defendants advised Plaintiffs that Defendants were no longer  
2 considering the proposed loan because Plaintiffs failed to sign either commitment letter, and  
3 that Defendants were retaining \$258,396.18 in costs. *Id.* ¶¶ 21-22. Defendants attempted  
4 to refund \$61,603.82 – the amount of the rate lock deposit less Defendants’ costs – but  
5 Plaintiffs refused to accept the refund. Dkt. #27 ¶35-36.

6 Plaintiffs filed suit against Defendants claiming breach of contract and bad faith, fraud  
7 in the inducement, specific performance, scheme or artifice to defraud, and negligence.  
8 Dkt. #1. On July 31, 2008, Plaintiffs moved for partial summary judgment with respect to  
9 the breach of contract claim and requested \$308,000 in damages. Dkt. #23. On September  
10 2, 2008, Defendants cross-moved for partial summary judgment with respect to the breach  
11 of contract claim. Dkt. #28.

12 **II. Summary judgment legal standard.**

13 A court must grant summary judgment if the pleadings and supporting documents,  
14 viewed in the light most favorable to the nonmoving party, “show that there is no genuine  
15 issue as to any material fact and that the moving party is entitled to judgment as a matter of  
16 law.” Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Only  
17 disputes over facts that might affect the outcome of the suit will preclude the entry of  
18 summary judgment, and the disputed evidence must be “such that a reasonable jury could  
19 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
20 248 (1986).

21 **III. Breach of contract claim.**

22 Plaintiffs argue that Defendants breached the Rate Lock Agreement by issuing two  
23 commitment letters with an interest rate above the locked rate. Defendants contend that the  
24 Rate Lock Agreement was not a binding agreement and there was, therefore, no contract to  
25 be breached.

26 “Interpretation of a contract is a question of law for the court when its terms are  
27 unambiguous on its face.” *Ash v. Egar*, 541 P.2d 398, 401 (Ariz. App. 1975); *see Chandler*  
28 *Med. Bldg. Partners v. Chandler Dental Group*, 855 P.2d 787, 791 (Ariz. Ct. App. 1993).

1 Words in a contract are to be given their plain and ordinary meaning. *See Horton v. Mitchell*,  
2 29 P.3d 870, 874 (Ariz. Ct. App. 2001). “Language in a contract is ambiguous only when  
3 it can reasonably be construed to have more than one meaning.” *In re Estate of Lamparella*,  
4 109 P.3d 959, 963 (Ariz. Ct. App. 2005). The Court concludes that the contract in this case  
5 can have only one meaning.

6 Defendants prepared the document titled “Advance Interest Rate Lock Agreement.”  
7 Dkt. #25, Ex. 3. The Agreement stated that its purpose was “to set forth *the agreement*  
8 between you, as the Borrower (as defined in the Application), and Artesia, as to the  
9 conditions of this Advance Interest Rate Lock Agreement, which terms relate to the *locking*  
10 *of the interest rate* applicable to the amount of \$7,700,000 of the Loan (the “*Locked*  
11 *Amount*”)[.]” *Id.* (emphasis added). The Agreement provided that upon Plaintiffs’ payment  
12 of \$154,000, Plaintiffs “may *lock* the interest rate (“*Locked Interest Rate*”) on the Loan up  
13 to November 1, 2007[.]” *Id.* (emphasis added). Defendants’ form loan application stated that  
14 “the Advance Interest Rate Lock Agreement will become *a binding contract* between Artesia  
15 and the Borrower upon Artesia’s receipt of the Rate Lock Deposit.” Dkt. #27-2 at 17  
16 (emphasis added). Plaintiffs made the deposit, and Defendants responded with a document  
17 titled “Interest Rate Lock Confirmation” which stated that “[t]he Locked Interest Rate (as  
18 defined in the Rate Lock Document) is 5.980% per annum.” Dkt. #25, Ex. 4.

19 A binding contract clearly was intended. The meaning of the contract is clear. To  
20 “lock” means to fasten, secure, or fix firmly or irrevocably. *See Oxford English Dictionary*  
21 Online, <http://dictionary.oed.com>. The clear intent of the Rate Lock Agreement was to  
22 require Defendants to make the loan offer, if at all, at the locked interest rate and the locked  
23 loan amount. Defendant could elect not to make the loan, but if they chose to profit from the  
24 loan to Plaintiffs they were obligated to make the loan at the locked rate and locked amount.  
25 By making a loan offer at a higher interest rate and lower loan amount, Defendants breached  
26 the terms of the Rate Lock Agreement.

1 **IV. Damages.**

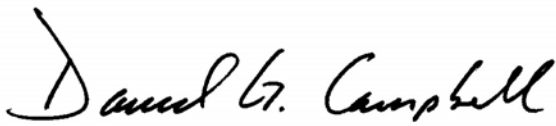
2 Plaintiffs contend that they are entitled to \$308,000 in damages, representing their two  
3 payments of \$154,000. In the alternative, Plaintiffs argue that they are entitled to their rate  
4 lock deposit less the amount it cost Defendants to unwind the hedge. Plaintiffs calculate that  
5 cost by multiplying the difference in the treasury yield interest rate at the time the Rate Lock  
6 Agreement was made and the time the Defendants unwound the hedge by the amount of the  
7 loan. Dkt. #29 at 9. Using this method, Plaintiffs calculate that it cost \$39,270 to unwind  
8 the hedge. *Id.*

9 Defendants contend that Plaintiffs calculations are incorrect because Plaintiffs fail to  
10 account for the duration of the loan. Dkt. #32 at 2. According to Defendants, the correct  
11 calculation is the loan amount multiplied by the change in interest rate, multiplied by the  
12 duration of the loan. *Id.* Using this formula, Defendants calculate the cost at \$274,890. *Id.*  
13 Defendants contend, however, that these calculations merely provide a prediction of the cost  
14 of unwinding the hedge and do not accurately reflect the actual cost. *Id.* Defendants assert  
15 that \$233,000 is the actual cost that was spent to unwind the hedge and that this amount was  
16 charged to Plaintiffs. *Id.* Because the parties genuinely dispute the correct damage  
17 calculation, summary judgment is not appropriate.

18 **IT IS ORDERED:**

- 19 1. Plaintiffs' motion to for partial summary judgment on the breach of contract  
20 claim (Dkt. #23) is **granted** with respect to liability and **denied** with respect  
21 to damages.
- 22 2. Defendants' cross-motion for partial summary judgment on the breach of  
23 contract claim (Dkt. #28) is **denied**.
- 24 3. The Court will set a final pretrial conference by separate order.

25 DATED this 7th day of November, 2008.

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David G. Campbell  
United States District Judge