IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HOSS MORTGAGE INVESTORS, INC., a Washington corporation, Appellant, v. THE SENATOR, LLC, a Washington limited liability corporation, Respondent.	No. 37960-1-II UNPUBLISHED OPINION

Bridgewater, J. — Hoss Mortgage Investors, Inc. appeals summary judgment granted in favor of The Senator, LLC. We hold that there are genuine issues of material fact that preclude summary judgment. We reverse and remand for trial.

FACTS

The Senator, LLC (Senator) owns three commercial properties in Yakima, Washington. Those properties, the Cascade, the Senator, and the Savoy, each secured the same two loans: (1) a loan from Fairway Commercial Mortgage for $900,000; and (2) a loan from Aspen Yak, LLC for $1,620,000.[1] Both loans were coming due in December 2007.

On July 18, 2007, Senator applied for three interest-only loans from Hoss Mortgage Investors, Inc. (HMI). Each of the three separate loan applications had a different loan amount: $1,600,000 secured by the Cascade, $1,200,000 secured by the Senator, and $850,000 secured by the Savoy. The loans had substantial fees, and each loan application stated:

> [HMI] has not committed to make a loan and . . . is under no obligation to grant borrower a loan on the terms set forth in this application until all exhibits are delivered to HMI's satisfaction and the senior loan committee has given its written approval. No oral commitments are ever given.

CP at 11, 16, 21 (capitalization omitted). Further, paragraph "E" of each loan application stipulated that Senator had 30 days to clear title and to finalize the transactions:

> In the event that borrower(s) should fail or refuse to complete the transaction or to clear title to the real property to enable HMI to close the loan within 30 days from the date hereof, borrower(s) shall be liable to HMI [for expenses it incurs].

CP at 9-10, 14, 19.

Also on July 18, 2007, Senator executed deeds of trust on all three properties in favor of HMI and authenticated a HUD[2] Settlement Statement. The HUD Settlement listed the Aspen and Fairway loan amounts, the proceeds of the three HMI loans, and an estimated surplus of approximately $690,000 payable to Senator.

On August 14, 2007, Senator wrote a letter to HMI explaining the way in which it would use the funds. Specifically, Senator said that "[t]he funds from all three loans will be used as

[1] The Senator's three properties allegedly secured a third loan from Remington Financial for $185,000. However, the loan documents for the Remington loan are missing a page, which, ostensibly, is the page that contains the security description. Therefore, this opinion omits reference to the Remington loan.

[2] Housing and Urban Development.

follows:" the $1,600,000 note secured by the Cascade to pay down the Aspen loan; the $1,200,000 note secured by the Senator to pay the remaining balance on the Aspen loan, the Fairway loan, and any remaining funds to pay points and closing costs; and the $850,000 note secured by the Savoy to pay remaining closing costs and be saved as capital reserve.

After Senator finished applying, HMI began looking for investors to buy securities backed by Senator's commercial loans. But before marketing securities to sell, HMI was required to submit a Special Offering Circular (SOC) for approval by the Washington Department of Financial Institutions (DFI). HMI submitted, and the DFI approved, an SOC indicating that the Aspen and Fairway loans, which totaled over $2,500,000, both encumbered each of Senator's three properties.

Upon DFI approval of Senator's SOC, HMI began marketing the loans to various investors. But due to property disrepair, HMI could not find any investors willing to buy securities for the $1,600,000 loan secured by the Cascade. Instead, HMI's only investor of record, Centurion Financial Group, LLC, agreed to invest $1,700,000 to fund a portion of the HMI loans secured by the Senator and the Savoy. Centurion conditioned its investment on having first priority in the deeds of trust, not subject to prior liens.

On October 17, 2007, HMI sent a letter to Senator representing that it would soon fund and close the proposed loans. Senator quickly responded that time was of the essence in funding the loans, citing its need to pay existing debt.

On October 30, 2007, still without funding, Senator demanded that HMI either immediately fund the loans or release the deeds of trust. In response, HMI agreed to fund the

$1,200,000 loan secured by the Senator and the $850,000 loan secured by the Savoy; however, HMI declined to fund the $1,600,000 loan secured by the Cascade for lack of an investor. On October 31, 2007, HMI claimed to fund the loans "to the extent funds were available." CP at 575. Senator never received any money, and HMI refused to release the deeds of trust.

On November 1, 2007, Senator refused to finalize the transactions and withheld escrow monies. HMI subsequently sued Senator for breach of contract and breach of warranty, seeking to recover fees under paragraph E. In preparation for trial, Todd Hoss, president of HMI, and John Nagle, senior loan officer, submitted affidavits in which they declared that HMI had the funds available—although not within 30 days after Senator applied[3]—to finance the two loans HMI agreed to finance.

Senator filed two motions for partial summary judgment. In its first motion, Senator argued that paragraph E allowed HMI to recover fees only if HMI funded the loan within 30 days and a borrower refused to complete the transaction within that period. Because HMI could not fund within 30 days and Senator did not otherwise refuse to complete the transaction, Senator claimed that no question of material fact existed and that it was entitled to summary judgment. The trial court denied this motion.

In its second motion, Senator argued that it bargained with HMI to fund three loans as a single transaction and that, in the alternate, HMI had not offered proof that it could fund the two loans that it ultimately agreed to fund. The trial court granted this second motion for partial summary judgment, finding as a matter of law that HMI and Senator bargained for three loans to

[3] HMI could have funded the loans "by early October 2007." CP at 398.

fund as a single transaction. HMI appeals.

ANALYSIS

I. Standard of Review

In reviewing a grant of summary judgment, we engage in the same inquiry as the trial court. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v Blume Dev. Co.*, 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990). Summary judgment is proper only when the trial court finds that no genuine issue of material fact exists, that the moving party is entitled to judgment as a matter of law, and that a reasonable person could reach but one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *see* CR 56(c). We consider all the facts and all reasonable inferences drawn from the facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

II. Three Loans As A Single Transaction

HMI contends that an issue of material fact exists as to whether it contracted with Senator to fund the three loans as a single transaction. HMI claims that the loan applications contained no language indicating that the three loans were a single transaction but rather "contained explicit language that showed they were separate agreements, for distinct loan amounts, and secured by separate parcels of property." Br. of Appellant at 17. Specifically, HMI argues that extrinsic evidence cannot contradict the following explicit contract language: "[HMI] . . . is under no obligation to grant [Senator] a loan on the terms set forth in *this application*." CP at 11, 16, 21 (emphasis added) (capitalization omitted). Senator counters that there is no issue of material fact as to whether the parties bargained to fund three loans as a single transaction because extrinsic

evidence proves that HMI knew all three loans needed to fund at the same time before Senator could pay off existing debt.

In construing a written contract, such as the loan applications here, we have consistently applied the following rules: (1) the intent of the parties control (2) we ascertain that intent from reading the contract as a whole, and (3) we do not read ambiguity into the contract. *Mayer v. Pierce County Med. Bureau*, *Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

A contract is ambiguous if its terms are uncertain or they are subject to more than one meaning. *Mayer*, 80 Wn. App. at 421. But words and provisions in a contract are not ambiguous simply because parties suggest opposing meanings. *Mayer*, 80 Wn. App. at 421. Here, the loan applications each unambiguously state that HMI is "under no obligation to grant [Senator] a loan on the terms set forth in this application." CP at 11, 16, 21 (capitalization omitted). Also, the separate loan applications do not otherwise contain language indicating that Senator's three loans were part of a single transaction. The contract's explicit language, however, is only one factor in determining what the parties intended the language "this application" to mean. *See Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993).

In determining the parties' intent, we also view "'the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d

221 (1973)). Extrinsic evidence may be used regardless of whether the contract language is ambiguous. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996) (citing *Berg*, 115 Wn.2d at 669). When extrinsic evidence is used to interpret a contract, summary judgment is appropriate only if one reasonable inference can be drawn from the extrinsic evidence. *Scott Galvanizing*, 120 Wn.2d at 582 (citing *Berg*, 115 Wn.2d at 668).

Here, the question is whether the only reasonable inference that can be drawn from the evidence in record is that HMI and Senator intended the three loans to comprise a single transaction. This evidence includes: (1) Senator's letter, (2) the HUD Settlement Statement, (3) the SOC preliminary title reports, and (4) HMI waiting months to notify Senator that it would only fund two of the three loans.

HMI argues that Senator's letter, which describes Senator's planned use of the loans, contradicts the written agreement and, thus, cannot support a finding that the parties had a contract for three loans to fund as a single transaction. Instead, HMI maintains that the letter expresses nothing more than Senator's unilateral and subjective understanding of the loan applications.

Extrinsic evidence may not be used (1) to establish a party's unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). For example, in *Hollis*, defendant-landowner submitted a developer's affidavit to show that the developers of a subdivision intended covenants to apply only to smaller parcels of land. *Hollis*, 137 Wn.2d at 696. Our Supreme Court held that the

affidavit was inadmissible extrinsic evidence because it was the unilateral and subjective intent of one of ten of the original contracting parties and because accepting it would require the court to redraft or add language to the covenant. *Hollis*, 137 Wn.2d at 696-97. "Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written." *Hollis*, 137 Wn.2d at 697.

Here, Senator said in its letter that "[t]he funds from all three loans will be used as follows," which is merely Senator stating unilateral and subjective intent about how it would use the loans. CP at 824. Senator did not refer to the bargain or application terms in the letter but only indicated how it planned to use the loan proceeds and what debt it planned to pay. Although Senator did not write the letter in anticipation of trial—which makes it a more credible indication of Senator's intent—nothing in the letter indicates that HMI agreed that the loans were a single transaction. Instead, Senator wrote the letter to the DFI as part of the SOC, not as part of its negotiations with HMI, nearly a month after signing the loan applications. Like in *Hollis*, relying on Senator's letter would require us to redraft or add language to the loan applications, which we will not do. The letter is therefore not admissible to show context. Our analysis does not stop here, however, because Senator does not rely on the letter to support a finding that the parties intended to contract for three loans as a single transaction.

Senator argues that no issue of material fact exists as to whether HMI contracted with Senator for three loans to retire its debt because the HUD Settlement Statement and the SOC preliminary title reports prove that HMI was always aware of Senator's existing debts. Otherwise, the parties would have contracted for the absurd result of Senator bargaining to cover a shortfall

at closing with its own cash or separate financing. Supporting Senator's argument is that HMI waited months to notify Senator that it would fund only two of the three loans. Nevertheless, even though Senator has a compelling common-sense argument that refinances are sought to retire *all* existing debt, this evidence supports more than one reasonable inference.

Assuming that HMI knew of Senator's existing debts from the outset, it does not necessarily follow as a matter of law that HMI and Senator agreed to finance three loans as a single transaction. While subsequent investors may not fund loans if they are second lien holders—just as Centurion refused in this case—paragraph E of the loan applications could be interpreted to require Senator to provide clear title. Numerous reasons exist for a sophisticated entity such as Senator to agree to clear title, such as competitive interest rates, availability of financing, creditworthiness, or immediacy of need. If the loan applications required Senator to clear title, whether HMI knew of the existing debt is inconsequential because the application required HMI to fund only what its senior loan committee approved, not what was necessary to retire Senator's entire existing debt.

Conversely, as investors are unlikely to take a second lien, requiring Senator to clear title before receiving money for a refinance may be inherently unreasonable. In this vein, HMI's knowing the level of Senator's existing debt from the outset is paramount in deciding whether the bargain was to fund three loans as a single transaction. Therefore, a question of material fact exists as to the reasonableness of Senator contracting to clear title for a *refinance* and to pay substantial fees in the event of breach.

III. Funding the Loans

HMI contends that an issue of material fact exists about whether it could fund the two loans that it agreed to fund. HMI argues that it could fund the loans because Centurion was a ready and willing investor and because, even though Centurion's investment left a $350,000 deficit, Todd Hoss and John Nagle both declared in affidavits that HMI had funds to cover the deficit. Senator counters that HMI cannot rely solely on affidavits to prove that it had funds to cover the deficit. We agree with HMI that Hoss's and Nagle's affidavits are sufficient to create a genuine issue of material fact.

Under CR 56(e), affidavits supporting or opposing summary judgment must be made on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to his averments. *Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys. (WPPSS)*, 104 Wn.2d 353, 360, 705 P.2d 1195 (1985). "Although CR 56(e) makes no distinctions between affidavits of the moving and nonmoving parties, the drastic potentials of a summary judgment motion compel the courts to indulge in leniency with respect to affidavits presented by the nonmoving party." *WPPSS*, 104 Wn.2d at 361. This leniency, however, does not extend to affidavits containing inadmissible evidence or conclusory statements; we disregard those affidavits as mere surplusage. *Wash. Pub. Util. Dists. Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 17, 771 P.2d 701 (1989); *WPPSS*, 104 Wn.2d at 361.

Here, HMI agreed to fund a total of $2,050,000, which included the $1,200,000 loan secured by the Senator and the $850,000 loan secured by the Savoy. Although Centurion agreed to invest only $1,700,000, thus leaving a $350,000 deficit, both Todd Hoss and John Nagle

declared in an affidavit that HMI had funds to cover this deficiency. Their declarations are based on personal knowledge, which is admissible testimony. And while the record lacks a paper trail showing that HMI had funds available, whether their personal assertions are credible in the absence of a paper trail is a question of fact. Thus, a genuine issue of material fact exists as to whether HMI could fund the two loans it agreed to fund.

IV. Interpreting Paragraph E

Finally, the parties dispute the meaning of paragraph E, which states, in pertinent part:

> In the event that borrower(s) should fail or refuse to complete the transaction or to clear tile to the real property to enable HMI to close the loan within 30 days from the date hereof, borrower(s) shall be liable to HMI [for expenses it incurs].

CP at 9-10, 14, 19.

Senator argues that even if HMI was not to fund the three loans as a single transaction or even if HMI was able to fund the two loans, summary judgment was proper because paragraph E, the provision under which HMI claims fees, does not apply as a matter of law. Specifically, Senator interprets paragraph E as unambiguously requiring a borrower to pay HMI's expenses only if the borrower keeps HMI from closing the loan within a 30-day time frame, beginning on the loan application date. To interpret it otherwise, Senator contends, would permit the absurd result of requiring a borrower to close or pay fees regardless of how long HMI takes to fund the loan.

HMI counters that Senator's interpretation of paragraph E cannot support summary judgment because the paragraph is ambiguous and has at least two reasonable interpretations: (1) a borrower must pay HMI's expenses if the borrower keeps HMI from closing the loan within a

30-day time frame or (2) a borrower must pay HMI's expenses if the borrower keeps HMI from closing within or after the 30-day time frame elapses. HMI interprets paragraph E as requiring Senator to clear title within 30 days or pay HMI's expenses even if HMI cannot close within 30 days. Thus, if Senator cannot clear title within 30 days, it cannot arbitrarily refuse to complete the transaction and escape paying fees even though HMI does not or cannot fund the loans within 30 days.

We incorporate the aforementioned rules of interpreting a contract and add the following. We read a contract as an average person would read it, giving it a practical and reasonable meaning, not a strained or forced meaning that leads to absurd results. *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 667, 865 P.2d 560 (citing *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987)), *review denied*, 124 Wn.2d 1010 (1994). If only one reasonable meaning can be attributed to the contract when viewed in context, that meaning necessarily reflects the parties' intent. *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999) (citing *Interstate Prod. Credit Ass'n v. MacHugh*, 90 Wn. App. 650, 654, 953 P.2d 812 (1998)). However, if two or more meanings of the contract are reasonable, a question of fact exists. *Martinez*, 84 Wn. App. at 943. We harmonize clauses that seem to conflict; our goal is to interpret the agreement in a manner that gives effect to all the contract's provisions. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007), *review denied*, 163 Wn.2d 1020 (2008).

HMI and Senator disagree whether a borrower's action or inaction to prevent HMI from closing the transaction must occur "within 30 days from the date hereof" for that borrower to be

liable for HMI's expenses. CP at 9-10, 14, 19. On this point, we hold that paragraph E is ambiguous in light of the contract as a whole and in the context of the parties' bargain.

An average person can read paragraph E's language alone to only mean that HMI contracted to have recourse from a borrower if the borrower keeps HMI from closing within 30 days. This is true for several reasons. First, paragraph E's language "to enable [HMI] to close the loan within 30 days" assumes that HMI will make the funding available within the 30 days; otherwise, the borrower could not "fail or refuse" to perform within the paragraph's meaning during the 30 days, which would render paragraph E useless. CP at 9-10, 14, 19. Corollary to HMI making funding available is HMI's commitment to make a loan. Second, paragraph E is silent about situations in which HMI takes longer than 30 days to close. Instead, its apparent purpose is only to give the borrower an incentive to close the loan within 30 days by providing HMI with recourse in the event that a borrower backs out. Third, interpreting paragraph E as allowing HMI to extend the closing date beyond the 30 days after it commits to making the loan while keeping borrowers liable for expenses is a strained interpretation that leads to an absurd result: keeping a borrower on the hook indefinitely for HMI's loan expenses. Thus, the only reasonable interpretation is that paragraph E, when read alone, was intended to provide HMI with recourse only if Senator kept HMI from closing the loan within 30 days.

Because paragraph E clearly provides HMI recourse only if a borrower backs out within 30 days, the question is within 30 days *of what*. At first glance, "the date hereof" seems to clearly refer to the date of the loan application.[4] CP at 9-10, 14, 19. A plain language dictionary defines

[4] Senator asserts, without support, that "the date hereof" is a clear reference to the date when a borrower signs the loan application. HMI does not contest Senator's interpretation and does not

"hereof" as "of this writing or document." Webster's Third New International Dictionary 1059 (2002). Black's Law Dictionary defines "hereof" as "Of this thing (such as a provision or document)." Black's Law Dictionary 795 (9th ed. 2009). Indeed, other than the principal and interest due date, the only other date contained in the loan application is the date when Senator signed.

Nonetheless, paragraph E is ambiguous when read with the contract as a whole. Whereas paragraph E assumes that HMI would make funding available, i.e., commit to making a loan, the last paragraph of each loan application clearly states that HMI has not committed to make a loan until it gives final written approval:

> [HMI] has not committed to make a loan and . . . is under no obligation to grant borrower a loan on the terms set forth in this application until all exhibits are delivered to HMI's satisfaction and the senior loan committee has given its written approval. No oral commitments are ever given.

CP at 11, 16, 21 (capitalization omitted). While paragraph E assumes that HMI agrees to fund within 30 days of "the date hereof," the above clause clearly states that HMI has not yet agreed to fund; thus a material issue of fact exists as to what the parties intended. CP at 9-10, 14, 19. Although one could reasonably interpret "the date hereof" as the date of application, another could reasonably interpret it as the date when the "loan committee has given its written approval." CP at 11, 16, 21 (capitalization omitted). In other words, "the date hereof" could mean the date on which HMI committed to make the loan because the purpose of paragraph E is to provide HMI with recourse from a borrower that backs out *after it commits to making a loan*. Because the date of application is different from the date on which it committed to make the loan, a

---

otherwise attempt to pinpoint its meaning.

question of fact remains.

Also, paragraph E is ambiguous when read within the context of the circumstances surrounding Senator's and HMI's agreement. Unlike a traditional bank, in which funds are available almost instantaneously, HMI was a mortgage company in the business of finding investors to buy securities backed by commercial loans. Aside from this time-consuming activity, HMI also needed to submit SOCs for DFI's approval, which takes time as well. HMI maintains that it told Senator about the nature of its business before Senator signed the loan applications. On the other hand, Senator claims that it believed HMI would fund the loans within 30 days. These are circumstances surrounding the contract that will aid a trial court in ascertaining the parties' intent; however, the circumstances involve unresolved questions of fact that are not within our province to decide.

Reversed and remanded for trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.