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2012 IL App (3d) 110030-U

Order filed March 26, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

HEARTLAND BANK AND TRUST)	Appeal from the Circuit Court
COMPANY, an Illinois state bank,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois.
Plaintiff-Appellee,)	
)	
)	
v.)	Appeal No. 3-11-0030
)	Circuit No. 10-L-16
)	
DAVID A. GOERS, SANDRA L.)	Honorable
BEELMAN, ARTHUR WAYNE FLITTNER,)	Joe Vespa,
MARK J. DOOLITTLE, CHARLENE J.)	Judge, Presiding.
DEVORE, NICHOLAS JIBBEN,)	
)	
Defendants-Appellants.)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly granted plaintiff bank's motion for summary judgment against defendant guarantors after a corporation defaulted on a debt that was guaranteed by the defendants. Under the guaranty agreements, the defendants waived all defenses that could be asserted by the corporation or the guarantors. Moreover, the defendants failed to raise a genuine issue of material fact as to

whether the bank caused the corporation to default or whether the bank breached its duty of good faith and fair dealing.

¶ 2 The plaintiff, Heartland Bank and Trust Company (Heartland), filed this action against the guarantors of a debt owed to Heartland by Ross Advertising, Inc. (Ross). On April 1, 2009, Heartland issued Ross a \$750,000 revolving line of credit for one year secured by a promissory note executed by Ross (the Note). After Ross defaulted on the Note, Heartland obtained a confession judgment against Ross in the amount of \$731,166.33, which represented all of the outstanding principal and interest due under the Note. Ross filed a motion to vacate the confession judgment, which the circuit court granted. However, Heartland subsequently filed a motion for summary judgment on its complaint, which was granted. We affirmed the circuit court's grant of summary judgment in appeal no. 3-10-0774, *Heartland Bank and Trust Co. v. Ross Advertising, Inc.*, 2012 IL App (3d) 100774-U (March 12, 2012) (unpublished order under Supreme Court Rule 23).

¶ 3 Heartland filed this separate action against the guarantors of Ross's debt and moved for summary judgment. The circuit court dismissed the counts against two of the guarantors. However, the circuit court granted Heartland's motion for summary judgment as to the four remaining guarantors. The guarantors appeal the circuit court's grant of summary judgment against them. They argue that summary judgment was inappropriate because there are genuine issues of material fact as to whether Heartland's actions prevented Ross from performing under the Note. In addition, the guarantors argue that there are genuine issues of material fact as to whether Heartland breached its contractual duty of good faith and fair dealing, thereby excusing Ross's default and the guarantors obligation to pay.

¶ 4

BACKGROUND

¶ 5 In 2005, Heartland issued Ross a revolving line of credit in the amount of \$650,000. Heartland renewed the line of credit for the next several years. On April 1, 2009, after performing a full review of Ross's financial condition, Heartland again renewed the loan, this time extending Ross a \$750,000 revolving line of credit for one year secured by the Note.¹ The Note provided that it was "secured by collateral described in a Commercial Security Agreement dated March 1, 2006." David Goers, the president of Ross, signed the Note on behalf of Ross. Goers and five other individuals signed individual guarantees of the Note.

¶ 6 The terms of the Note provided that Ross agreed to pay Heartland \$750,000, "or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance." Ross agreed to pay the loan "in one payment of all outstanding principal plus all accrued unpaid interest on April 1, 2010." The Note required Ross to make regular monthly payments off all accrued unpaid interest due as of each payment date on the first of each month, beginning on May 1, 2009. However, the Note did not require Ross to make any principal payments until April 1, 2010.

¶ 7 The Note provided that "[u]pon default, [Heartland] may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then [Ross] will pay that amount." The Note listed various events or conditions which "shall constitute an event of default" under the Note, including "[t]he dissolution or termination of

¹ Heartland renewed the loan despite the fact that Ross's December 31, 2008, financial statement showed that the company had a negative \$4,000 net worth at the time and negative working capital of \$131,000.

[Ross's] existence as a going business" and "the insolvency of [Ross]." The Note also stated that Heartland "will have no obligation to advance funds under th[e] Note" if: (a) [Ross] or any guarantor is in default under the terms of this Note or any agreement that [Ross] or any guarantor has with [Heartland], including any agreement made in connection with the signing of this Note; or (b) [Ross] or any guarantor ceases doing business or is insolvent[.]"

¶ 8 The Note also provided that Heartland reserved a right of setoff in all of Ross's accounts with Heartland to the extent permitted by applicable law (including checking, savings, and any other accounts), and that Ross authorized Heartland to "charge or setoff all sums owing on the debt against any and all such accounts, and, at [Heartland's] option, to administratively freeze all such accounts to allow [Heartland] to protect [its] charge and setoff rights provided in this paragraph." Similarly, the Note stated that Ross granted Heartland a contractual security interest in all of its deposit accounts with Heartland and that Ross authorized Heartland to "charge or setoff all sums owing on this Note against any and all such deposit accounts."

¶ 9 Moreover, the Note stated that Ross "and any other party that signs, guarantees, or endorses the Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor."

¶ 10 Each of the guaranty agreements signed by the individual guarantors provided that:

"Guarantor *** waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of *** (C) any disability or other defense of Borrower, *** or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment

in full in legal tender, of the Indebtedness; *** or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness."

¶ 11 Don Shafer was the loan officer for Heartland who handled the loan with Ross. On July 27, 2009, Shafer met with Goers and Mark Doolittle, a vice president of Ross and one of the guarantors of the Note. Goers testified in his deposition that the purpose of the July 27, 2009, meeting was to inform Mr. Shafer of changes that had recently taken place inside Ross, including the fact that two of Ross's shareholders had resigned that day. Both of the resigning shareholders were guarantors of the Note. During the meeting, Goers gave Shafer a document detailing the measures Ross was taking to deal with the recessionary economy (such as cost reductions and other measures) and describing Ross's current business plan, including its plan for servicing existing clients and acquiring new clients. The document also included cash flow projections. At the conclusion of the meeting, Shafer asked Goers to provide him with Ross's updated balance sheet and income statement so he could review Ross's current financial position.

¶ 12 The next morning, Shafer sent Goers an e-mail stating that, in light of their discussion during the meeting on July 27, 2009, Shafer was "sure" that Heartland would be requiring Ross's owners to provide Heartland with additional collateral in the form of cash, real estate, or securities. Shafer stated that the amount of additional collateral would depend upon Ross's current inventory, receivables, and equipment balances, but he guessed it would be approximately \$500,000. In addition, Shafer told Goers that Heartland might also require Ross's owners to provide a capital infusion of approximately \$100,000, but he wouldn't know for certain until he reviewed Ross's updated financial information.

¶ 13 During his deposition, Shafer testified that he sent this e-mail to Goers because Goers had told him during the July 27, 2009, meeting that Ross was suffering losses and that the decline in business had resulted in a drop in the company's receivables. Accordingly, Shafer was concerned that the outstanding balance on the line of credit was substantially higher than Ross's existing collateral for the loan (which consisted of Ross's receivables and inventory), and he wanted to get Ross back into a "positive position." However, Shafer admitted that Ross was current on its payments under the loan at the time and that Goers did not ask Heartland for more money or indicate that Ross would be unable to meet its obligations under the Note.

¶ 14 Later that day, Shafer received Ross's financial statement for the period ending June 30, 2009. The statement indicated that Ross's total capital was negative \$256,771.12. After reviewing this financial statement, Shafer told Goers that Heartland would require Ross to provide \$500,000 in additional collateral, plus a cash infusion of approximately \$300,000.

¶ 15 Shafer met with Goers and four other owners of Ross on July 29, 2009, to discuss these demands. Goers and three other shareholders who were present at the meeting testified that Shafer told them during the meeting that if Ross or the guarantors were not able to satisfy Shafer's demands for additional collateral and a cash infusion, Shafer would turn the loan over to Heartland's attorneys for collection against the guarantors. Shafer denied that he made this statement during the meeting. At the time of the July 29, 2009 meeting, the outstanding principal balance on the note was \$690,000. After the meeting, Ross took an additional principal advance of \$33,000.

¶ 16 Goers and three other Ross shareholders testified that, on or about September 11, 2009, Ross's shareholders decided that Ross could not meet Shafer's demands and, as a result, would

have to close the business. Ross's shareholders met with Shafer again on September 15, 2009, and told him that they were not able to meet his demands and that Ross would be closing the business on September 30, 2009. Later that day, Shafer terminated Ross's line of credit, placed a hold on Ross's checking account, and applied proceeds from Ross's checking account to pay the outstanding loan balance on the Note.

¶ 17 During his deposition, Shafer testified that, when he learned on July 28, 2009, that Ross had a "negative net worth" of approximately \$257,000, Heartland concluded that Ross was insolvent and that the bank considered this to be a "default situation" under the terms of the Note.

¶ 18 However, Thomas Sapp, the certified public accountant who prepared Ross's financial statements, testified by affidavit that, as of June 30, 2009, and July 31, 2009, Ross was a going business that was able to and did pay its debts in the ordinary course of business and was "not insolvent." Sapp noted that, as a service business, Ross had limited fixed assets and that the bulk of its assets consisted of cash, accounts receivable, work in progress, and "goodwill" (*i.e.*, Ross's reputation and client relationships). Sapp stated that goodwill was one of Ross's principal assets, but that goodwill assets were generally not included on the company's financial statements. Sapp noted that Ross's business, like the business of all advertisers, declined when the economy was in a recession, as it was in 2008 to 2009. However, Sapp stated that Ross was able to weather many cycles of prosperity and recession due to the company's "longstanding good reputation and goodwill throughout its history." Sapp opined that Heartland's termination of the credit line and placement of a hold on Ross's bank account on or about September 15, 2009 "prevented Ross from conducting business in the usual and customary manner." However, Sapp opined that, before Heartland took these actions, Ross was a "going business" that was "able to and did pay its

debts in the ordinary course of business," and that Ross was "not insolvent" from August 31, 2009, through September 15, 2009.

¶ 19 On October 22, 2009, Heartland sent Ross and the guarantors a notice of default due to insolvency and closure of the business and a demand for payment of the outstanding principal and interest under the Note.

¶ 20 On December 3, 2009, Heartland filed a complaint and confession of judgment against Ross in the circuit court of Peoria County, case no. 09-L-365. The only default alleged in Heartland's complaint was the closure of the business. Heartland obtained a judgment by confession against Ross in the amount of \$731,166.33. Pursuant to Illinois Supreme Court Rule 276, Ross filed a "Motion to Vacate Judgment by Confession," which the circuit court granted on March 19, 2010. Heartland subsequently filed a motion for summary judgment, which the circuit court granted. The court's order states that "there are no issues of material fact" because "[d]efendant was in default, as alleged, when it ceased operations at the end of September, 2009," and "[a]ny actions taken by Plaintiff prior to that date, which defendant alleges caused the default, were authorized by the loan documents." Ross filed a motion to reconsider, which the circuit court denied. In explaining its ruling, the court noted that it was undisputed that Ross went out of business, which was an event of default under the Note. Moreover, the court stated that it did not believe that Heartland did anything improper or illegal when it asked Ross to provide additional collateral. The court also noted that Ross could have simply refused to provide any additional collateral, but, instead, it voluntarily chose to go out of business, triggering Heartland's rights under the Note to demand payment and to freeze and setoff Ross's checking accounts. Ross appealed. This court affirmed the circuit court's judgment in case no.

3-10-0774, , *Heartland Bank and Trust Co. v. Ross Advertising, Inc.*, 2012 IL App (3d) 100774-U (March 12, 2012) (unpublished order under Supreme Court Rule 23).

¶ 21 Heartland filed a separate action against the six individual guarantors seeking to collect on the debt owed by Ross. Heartland filed a motion for summary judgment. In support of its motion, Heartland filed a "Request for Judicial Notice" which attached a copy of the circuit court's judgment order on the Note in case no. 09-L-365. Although the circuit court dismissed Heartland's claims against two of the guarantors, it granted Heartland's motion for summary judgment against the four remaining guarantors. This appeal followed.

¶ 22 ANALYSIS

¶ 23 Summary judgment is proper if the pleadings, depositions 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 judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). The purpose of summary judgment is not to try a question of a fact, but simply to determine whether a genuine issue of triable fact exists. *Watkins v. Schmitt*, 172 Ill. 2d 193, 203 (1996); *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). In determining whether a genuine issue of material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Watkins*, 172 Ill. 2d at 203; *Sameer*, 343 Ill. App. 3d at 85. However, if the movant presents evidence that would entitle it to a directed verdict, summary judgment will be entered in the movant's favor unless the opponent "present[s] a factual basis which would arguably entitle him to a judgment." *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996); see also *Hussung v. Patel*, 369 Ill. App. 3d 924, 931 (2007); see also *Triple R Development, LLC v. Golfview*

Apartments I, L.P., 2012 IL App (4th) 10-0956, ¶ 16. We review summary judgment rulings *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 24 A guaranty of the payment of an obligation of another is "an absolute undertaking imposing liability upon the guarantor immediately upon the default of the principal debtor." *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 927 (1992); see also *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 449 (2009) ("A guarantor's secondary liability is triggered by a default of the debtor on the obligation the debtor owes to the creditor."). However, "the liability of a guarantor is limited by and is no greater than that of the principal debtor[.]" *Hensler*, 231 Ill. App. 3d at 927. Accordingly, if no recovery could be had against the principal debtor, the guarantor is also absolved from liability. *Id.*

¶ 25 In this case, the guarantors challenge the circuit court's order granting summary judgment for Heartland on two grounds. First, the guarantors argue that there are genuine issues of material fact as to whether Heartland's demand for additional collateral and a cash infusion caused Ross to go out of business, thereby causing Ross to default and making it impossible for Ross to perform its obligations under the Note. Second, the guarantors argue that there are genuine issues of material fact as to whether Heartland breached its contractual duty to exercise its discretion under the Note in good faith, thereby excusing Ross's default and the guarantors' duty to pay. We discuss each of these arguments in turn.

¶ 26 1. Whether Heartland's Demands Caused Ross's Default

¶ 27 Under general principles of contract law, "when a party prevents performance of a contract, that party cannot recover for non-performance by the other party." *Knowles v. Westbrook Builders, Ltd.*, 188 Ill. App. 3d 343, 346 (1989); see also *Barrows v. Maco, Inc.*, 94 Ill. App. 3d 959, 966 (1981). In addition, impossibility of performance is a valid affirmative defense in an action for breach of contract. See, e.g., *Radkiewicz v. Radkiewicz*, 353 Ill. App. 3d 251, 259-60 (2004). The guarantors contend that Heartland's demands made it impossible for Ross to stay in business and to perform under the Note, thereby excusing Ross's default and the guarantors duty to pay.

¶ 28 The guarantors failed to create a genuine issue of material fact as to this issue because they explicitly waived all contract defenses in the guaranty agreements. Each guaranty agreement provides that:

"Guarantor *** waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of *** (C) *any disability or other defense of Borrower*, *** or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; *** or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." (Emphasis added.)

Accordingly, by the plain terms of the guaranty agreements, each guarantor unambiguously waived the right to assert *any* defenses that could be asserted by Ross or the guarantors other than

payment of the indebtedness. Such waivers are legally binding and enforceable. See, e.g., *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 172 (2010) (ruling that "a decision by a party to contractually agree to waive all defenses is permitted under Illinois law," and upholding trial court's order striking guarantors' affirmative defenses to plaintiff's foreclosure action where guarantors contractually agreed that they "did not have any defense, set-off or counterclaim to the payment or performance of any of their obligations under the Loan Documents"); *Chemical Bank v. Paul*, 244 Ill. App. 3d 772, 781 (1993) ("[g]uaranty agreements containing waivers of all defenses * * * have been upheld as validly binding"); see also *BA Mortgage & International Realty Corp. v. American National Bank and Trust Co. of Chicago*, 706 F. Supp. 1364, 1376 (N.D. Ill. 1989) ("[w]hen [waivers in a guaranty] are clear and unambiguous, Illinois courts consistently enforce them"); *Kolson v. Vembu*, 869 F. Supp. 1315 (N.D. Ill. 1994) (holding that a clause in a guaranty agreement, whereby corporate guarantor waived all defenses, counterclaims and setoffs was enforceable). Thus, even assuming *arguendo* that Ross could assert contract defenses in an action to collect on the Note, the guarantors may not raise them in this action.

¶ 29 In any event, even if the guarantors did not waive the defense that Heartland's actions caused Ross's default, summary judgment for Heartland would still be appropriate. The guarantors failed to allege facts which arguably suggest that Heartland caused Ross to go out of business. After reviewing Ross's most recent financial statement on July 27, 2009, Shafer concluded that Ross was insolvent and therefore in default under the Note. Instead of immediately closing the line of credit and attempting to collect on the Note, however, Heartland left the line of credit open and demanded that Ross provide additional collateral and a substantial

capital infusion. In response to these demands, Ross voluntarily decided to go out of business. That decision was not forced upon Ross by any action taken by Heartland. At the time Shafer demanded additional cash and collateral, Heartland did not close the credit line or freeze Ross's bank accounts, and there is no evidence suggesting that Heartland's demands made it impossible for Ross to draw from the existing line of credit or use the cash deposited in its Heartland bank accounts. In fact, it is undisputed that Ross continued to draw from the line of credit after Shafer made his demands. Accordingly, Ross could have refused Heartland's demands, continued to stay in business, and continued to perform its obligations under the Note. Instead, Ross responded to Heartland's demand by voluntarily deciding to go out of business.²

² The parties dispute what the consequences would have been for Ross if Ross had refused Heartland's demands. Goers and three other shareholders testified that Shafer threatened to turn the loan over to Heartland's attorneys for collection against the guarantors if Ross or the guarantors were not able to satisfy his demands for additional collateral and a cash infusion. Shafer denied making this threat. However, even assuming that Shafer made such a threat, the threat—standing alone—would not have forced Ross to go out of business. Ross could have stayed in business, continued to meet its obligations under the Note, and defended itself against any lawsuit brought by Heartland to collect on the Note. In that event, Heartland could have collected on the Note only if it could show that Ross was in default due to insolvency. Ross could have disputed the claim that it was insolvent, as it does in this appeal. Instead, Ross chose to go out of business, thereby voluntarily creating another type of default, one which is Ross cannot dispute.

¶ 30 In an attempt to create an issue of material fact, the guarantors rely upon the affidavits of Goers and three other Ross shareholders, which state that "[i]f Ross was not faced with Don Shafer's demands for capital and collateral, Ross would not only be operating and conducting business" as of the date of this affidavit" (August 16, 2010), "but it would also be satisfying its obligations of the loan agreement with Heartland." However, these statements do not necessarily suggest that Heartland's demand for additional cash and collateral made it *impossible* for Ross to stay in business and continue to meet its other obligations under the Note. Rather, they merely suggest that Ross's shareholders *would not have decided* to go out of business were it not for Heartland's demands. Even if true, that would not establish that Heartland's demands caused Ross to go out of business. Moreover, it is undisputed that Heartland did not terminate the line of credit or freeze and sweep any of Ross's bank accounts until *after* Ross decided to go out of business.³ Thus, Heartland's performance of these actions could not have caused Ross to go out of business. At the time Ross decided to go out of business, it was able to access the remaining funds in the credit line and all of its bank accounts. Accordingly, the undisputed evidence establishes that Heartland's demands for cash and collateral did not make it impossible for Ross to stay in business and perform its obligations under the note.

³ Heartland took control of Ross's bank accounts and terminated the line of credit on September 15, 2009. However, Goers and the other three Ross shareholder affiants testified that Ross's shareholders decided to close the business on or about September 11, 2009, *four days before* Heartland took over Ross's bank accounts and terminated the line of credit.

¶ 31

2. Heartland's Alleged Breach Of its Duty of Good Faith

¶ 32 The guarantors argue that the circuit court erred in granting summary judgment for Heartland because there were genuine issues of material fact as to whether Heartland breached its contractual duty to exercise its discretion under the Note in good faith, thereby excusing Ross's default. Every contract implies good faith and fair dealing between the parties. *First National Bank of Cicero v. Sylvester*, 196 Ill. App. 3d 902, 910 (1990). Thus, where a party to a contract is given broad discretion in performing its obligations under the contract, it must exercise that discretion "reasonably, and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *RBS Citizens, National Association v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 190 (2011); *Sylvester*, 196 Ill. App. 3d at 910-11; *Carrico v. Delp*, 141 Ill. App. 3d 684, 690 (1986). This rule applies to an action by a bank to enforce payment on a promissory note. *RBS Citizens*, 407 Ill. App. 3d at 190; *Sylvester*, 196 Ill. App. 3d at 910-11. For example, a bank that has extended a line of credit may not terminate the line of credit arbitrarily or without just cause under the loan agreement. *Carrico*, 141 Ill. App. 3d 684, 690.

¶ 33 A guarantor's general waiver of defenses in a guaranty agreement does not waive defenses based upon a lender's breach of its duty to act in good faith. See, e.g., *Chemical Bank*, 244 Ill. App. 3d at 782 ("Under Illinois law, a waiver of defense clause does not expressly disavow the covenant of good faith implied into all contracts.") (citation and internal quotation marks omitted); *Vincent v. Doeber*t, 183 Ill. App. 3d 1081, 1090 (1989) ("A covenant of good faith and fair dealing is implied in every contract as a matter of law, absent an *express* disavowal." (emphasis added)); *Foster Enterprises, Inc. v. Germania Federal Savings & Loan Association*, 97 Ill. App. 3d 22, 28 (1981).

¶ 34 The guarantors argue that Heartland breached its duty of good faith and fair dealing by: (a) making an arbitrary demand for additional collateral and a cash infusion and threatening to terminate the line of credit and sue to collect on the Note if Ross did not comply with this demand, knowing that this demand would put Ross out of business; (b) terminating the line of credit arbitrarily and prematurely when Ross was not in default under the Note; and (c) terminating the line of credit without giving Ross prior notice. We address each of these arguments in turn.

¶ 35 a. Heartland's Demand for Additional Cash and Collateral

¶ 36 Contrary to the guarantors' argument, there is no evidence suggesting that Heartland's demand for additional cash and collateral was made arbitrarily or in bad faith. As noted above, Shafer formally made this demand on behalf of Heartland after he reviewed Ross's June 30, 2009, financial statement which indicated that Ross's total capital was negative \$256,771.12. The Note provided that Ross would be in default under the Note if Ross became insolvent. The Note does not define "insolvency" or prescribe any particular test for determining whether Ross was insolvent. However, as Heartland notes in its brief on appeal, the Illinois version of the Unified Commercial Code (UCC) defines "insolvent" to mean: "(A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute; (B) being unable to pay debts as they become due; or (c) *being insolvent within the meaning of federal bankruptcy law.*" (Emphasis added.) 810 ILCS 5/1-201(b)(23) (West 2008). Section 101(32) of the United States Bankruptcy Code employs a "balance sheet" test for determining insolvency. 11 U.S.C. § 101(32)(A) (West 2008). Under this test, an entity is insolvent when "the sum of [its] debts is greater than all of [its] property, at a fair valuation," excluding exempt and

fraudulently-transferred assets. *Id.* Heartland argues that the federal bankruptcy "balance sheet" test applies and that Ross's June 30, 2009, financial statement—which was prepared by Ross's accountant, Thomas Sapp—established that Ross was insolvent under that test. Heartland maintains that it was therefore entitled to demand immediate payment of all unpaid principal and interest due under the Note as of June 30, 2009.

¶ 37 In opposition to Heartland's motion for summary judgment, the guarantors rely upon an affidavit signed by Sapp, which stated that Ross was a going business that was paying its debts in the ordinary course of business and was "not insolvent" at the time that Heartland demanded the additional cash and collateral. Sapp also stated that Ross's "goodwill" (*i.e.*, its reputation and client relationships) was one of Ross's "principal assets" and that goodwill assets were generally not included on the company's financial statements. However, these statements do not create a genuine issue of fact as to whether Ross was solvent. Sapp does not assign a value to Ross's goodwill or claim that Ross's assets exceeded its liabilities when the value of Ross's goodwill is taken into account. Thus, even if goodwill assets can be considered in determining whether an entity is solvent under the federal bankruptcy code's "balance sheet" test,⁴ Sapp's affidavit does

⁴ The federal courts are split on this question. See, *e.g.*, *In re Coated Sales, Inc.*, 144 B.R. 663, 672 (Bankr. S.D.N.Y. 1992) (refusing to consider alleged goodwill in determining the value of an entity's assets under the balance sheet test); *In re WRT Energy Corp.*, 282 B.R. 343, 369 (Bankr. W.D. La. 2001) (ruling that only assets capable of liquidation may be included in the valuation of assets under the balance sheet test); *In re Richmond Produce Co., Inc.*, 151 B.R. 1012, 1019 (Bankr. N.D. Cal. 1993) (ruling that intangible assets, such as goodwill, that are speculative and cannot separately be sold should be excluded from the value of a debtor's assets),

not suggest that Ross was solvent under that test. Nor does Sapp's affidavit explain why some other standard for determining insolvency should apply, or why Ross's goodwill rendered it solvent under any such standard.

¶ 38 Moreover, the guarantors presented no evidence suggesting that it was unreasonable for Shafer to conclude that Ross was insolvent based upon Ross's June 30, 2009, financial statement. That financial statement, which was prepared by Sapp, showed that Ross's liabilities exceeded its assets by more than \$200,000. It did not list Ross's goodwill as an asset or suggest that goodwill needed to be taken into account in assessing Ross's solvency. Nor did it state or imply that Ross had any assets not reflected in the financial statement that could affect Ross's financial position. In short, the June 30, 2009, financial statement—which was the only relevant information that Heartland had at the time—suggested that Ross was insolvent, and thus in default. Ross was

aff'd, 195 B.R. 455 (N.D. Cal.1996); but see *In re EBC I, Inc.*, 380 B.R. 348 (Bankr. D. Del. 2008) (ruling that in determining insolvency under the balance sheet test, it is appropriate to take into account intangible assets not carried on the debtor's balance sheet, including good will); *In re Winstar Communications, Inc.*, 348 B.R. 234, 274 (Bankr. D. Del. 2005) (indicating that the balance sheet test may take into account value not “used to prepare a typical balance sheet” because it is “based upon a fair valuation and not based on generally accepted accounting principles”); see also *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (3d Cir. 1991). However, even courts that embrace the latter view refuse to consider allegations of goodwill that are supported by “nothing more than mere self-serving statements.” *In re Roco Corp.*, 701 F.2d 978, 983-84 (1st Cir. 1983).

entitled to rely on the June 30, 2009, financial statement because it was provided by Ross and prepared by Ross's accountant.

¶ 39 Thus, after reviewing Ross's financial statement, Shafer could have reasonably concluded that Ross was insolvent and that Heartland was entitled to demand immediate payment of all unpaid principal and interest due under the Note. Accordingly, it would not be arbitrary or unreasonable for Heartland to offer to forego that remedy in exchange for Ross's agreement to provide additional cash and collateral as security for the loan.

¶ 40 b. Heartland's Termination of the Line of Credit

¶ 41 The guarantors also argue that Heartland breached its duty of good faith and fair dealing by terminating the line of credit arbitrarily and prematurely at a time when Ross was not in default under the Note. We disagree. The Note provides that Heartland "will have no obligation to advance funds under this Note if (A) [Ross] or any guarantor is in default under the terms of this Note *** (B) [Ross] or any guarantor ceases doing business or is insolvent, *** or (E) [Heartland] in good faith believes itself insecure." As noted above, Heartland terminated the line of credit only after Ross had given Heartland a financial statement which showed that Ross had become insolvent (an event of default under the Note), and after Ross informed Heartland that it had decided to go out of business (a second event of default). Although Ross could have reasonably believed that it had the right to terminate the line of credit and demand full payment under the Note immediately after it received Ross's June 30, 2009, financial statement, it left the line of credit open and allowed Ross to continue to draw down the line of credit until Ross informed Heartland that Ross was going out of business. Heartland's decision to close the line of

failure to provide notice before terminating the credit line was not inconsistent with the parties' reasonable expectations.

¶ 44

CONCLUSION

¶ 45 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County granting Heartland's motion for summary judgment.

¶ 46 Affirmed.