SECOND DIVISION
June 9, 2015

No. 13-2310

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

GDI, LLC, BOB GILMOUR, ANDREW GILMOUR, AND BRIAN BOORSTEIN	)	Appeal from the Circuit Court of Cook County.
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 09 CH 16642
	)	
COLE TAYLOR BANK, N.A.,	)	
	)	
Defendant-Appellee.	)	Honorable Mary Mikva

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concured in the judgment.

O R D E R

¶ 1 *Held*: The trial court erred in finding that, as a matter of law, the borrower's failure to pay a certain sum by a certain date constituted a breach of a "financial covenant" resulting in an event of default. However, the record evidence supported the trial court's judgment because there were other reasons that the borrower was in default. The trial court's judgment that the lender disposed of the borrower's collateral in a commercially reasonable manner was not against the manifest weight of the evidence.

¶ 2 Plaintiffs GDI, LLC, Bob Gilmour, Andrew Gilmour, and Brian Boorstein (collectively, GDI) filed a complaint against Defendant Cole Taylor Bank claiming that Cole Taylor wrongfully declared them in default of a credit agreement, among other wrongful acts. Cole Taylor filed a counterclaim alleging that it was entitled to a judgment for loans disbursed, but never repaid. The trial court entered summary judgment in favor of Cole Taylor. The trial court subsequently gave GDI the opportunity to file a supplemental complaint to pursue a claim that Cole Taylor failed to dispose of the collateral pledged as security for the loan in a commercially reasonable manner. The commercial reasonableness issue proceeded to a bench trial and concluded with a judgment in favor of Cole Taylor. GDI appeals both rulings. We affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff GDI, LLC is a company that provided electronic perimeter fence systems for correctional facilities. Plaintiffs Bob Gilmour, Andrew Gilmour, and Brian Boorstein were members of GDI. Defendant Cole Taylor Bank, N.A. is a banking institution that, among other things, provides loans to commercial entities. GDI and Cole Taylor had a longstanding commercial banking relationship. On October 3, 2008, GDI and Cole Taylor executed an "amended and restated loan and security agreement" that amended their respective obligations under a previously existing loan agreement. GDI pledged all of its accounts receivable and inventory as collateral for the loan. The parties' arrangement allowed GDI to draw on a line of credit, but the amount available varied each month. To determine how much was available, GDI submitted financial information to Cole Taylor that was analyzed to create a "borrowing base." The amount of the borrowing base was arrived at principally by considering accounts receivable, inventory, and prior unrepaid advances. The loan agreements contemplated that from time to time, GDI was permitted to borrow more than what was specifically authorized by the borrowing base. Any amount exceeding the borrowing base was referred to as an "overadvance."

¶ 5 In December 2008, Cole Taylor determined that GDI had an overadvance of $1,000,000. The outstanding amount led the parties to negotiate an amendment that converted the overadvance into a term note that required GDI to pay down the balance in monthly installments while the line of credit remained in effect. A second amendment to the agreement was executed in February 2009 that required GDI to pay off the entire overadvance by March 31, 2009. The second amendment also called for Bob and Andrew Gilmour and Brian Boorstein to execute $300,000 guaranties in favor of Cole Taylor.

¶ 6 In early 2009, while all of these negotiations and amendments concerning the overadvance were ongoing between GDI and Cole Taylor, GDI was in negotiations with CapX Partners for a subordinated loan to supply GDI with additional working capital. The CapX loan would have purportedly supplied $2,000,000 to GDI, but GDI needed Cole Taylor's consent to take on additional loan obligations. Cole Taylor requested that Brian Boorstein pay $250,000 of the then-existing $550,000 overadvance. GDI claims that it entered into the second amendment to the agreement with Cole Taylor in anticipation of the CapX loan. GDI alleged that Cole Taylor subsequently sought to impose additional demands beyond the parties' original understanding before it would consent to the CapX loan. GDI purportedly found that the additional demands were oppressive and could not feasibly be met, and the negotiations with CapX fell apart.

¶ 7 The loan agreement required GDI to give Cole Taylor notice of any material adverse change in GDI's financial condition or business operations. The agreement declared that one event of default was GDI being unable to pay debts that became due. On April 2, 2009, GDI's president, Andrew Gilmour, notified Cole Taylor that GDI had stopped operating. GDI did not meet its payroll obligations on March 31, 2009, and it terminated all but three of its fifty-six employees. On April 3, 2009, Cole Taylor declared GDI to be in default. Cole Taylor cited only GDI's failure to reduce the overadvance to $0.00 as the basis of the default.

¶ 8 Cole Taylor then commenced efforts to realize on the pledged collateral. Cole Taylor froze GDI's accounts and attempted to collect on GDI's accounts receivable and to liquidate its inventory. Cole Taylor sent letters to GDI's creditors, but had little success collecting on the receivables. Cole Taylor held a UCC sale to dispose of GDI's inventory, but the auction apparently generated little interest. The only bid made at the auction was for $250,000 and was made by Cole Taylor. Cole Taylor also subsequently sold property from another warehouse for $10,000.

¶ 9 In the trial court and again here, the parties quarrel over the interpretation of the loan agreements and their construction when analyzed together. The parties dispute the ramifications resulting from a failure to pay the entire overadvance by March 31, 2009 as is required by the second amendment to the agreement. GDI contends that a failure to pay in full triggered an overadvance fee and gave it a period to cure. Cole Taylor contends that a failure to pay in full resulted in a default that rendered GDI liable for the entire outstanding balance without any period to cure.

¶ 10 GDI filed this case. The case proceeded to the summary judgment stage where the trial court ruled in Cole Taylor's favor as to the issues concerning which party breached the loan agreement. The trial court held that GDI was in default when it failed to bring the overadvance balance to $0.00 by March 31, 2009. The trial court reasoned that the failure to do so resulted in the breach of a "financial covenant" that provided no cure period. The trial court also held that Cole Taylor was not bound only to its stated reason for declaring default—the remaining overadvance—but that Cole Taylor's declaration of default was also proper because GDI terminated all but three of its fifty-six employees and failed to meet its payroll obligations.

¶ 11 After summary judgment was entered, GDI, with leave of court, filed a supplemental complaint alleging that Cole Taylor failed to act in a commercially reasonable manner when it disposed of GDI's collateral. The commercial reasonableness issue proceeded to a bench trial. The trial judge heard extensive testimony, made credibility determinations, and found that, under the circumstances, Cole Taylor acted in a commercially reasonable manner. The trial judge entered a judgment of no liability in Cole Taylor's favor. This appeal followed.

¶ 12 GDI argues that the trial court erred in its summary judgment ruling because Cole Taylor undertook premature debt recovery measures thereby violating the parties' agreement. GDI contends that the trial court misinterpreted the credit agreement and that it did not default. GDI also argues that the trial court erred in its bench trial ruling when it found that Cole Taylor acted in a commercially reasonable manner when disposing of GDI's collateral.

¶ 13 ANALYSIS

¶ 14 Event of Default

¶ 15 We begin with the trial court's summary judgment ruling. However, we note that although we have a full record including trial transcripts, our review is limited to the record that was available to the trial court at the time the summary judgment ruling was made. We review the grant of summary judgment *de novo*. *Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 24. Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012); *Progressive Universal Insurance Co of Illinois. v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 127-28 (2005). If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1016-17 (2005).

¶ 16 As an initial point, GDI makes various arguments that Cole Taylor acted wrongfully by initiating premature recovery procedures before March 31, 2009, when the overadvance balance was due, and before April 3, 2009, when default was declared. However, none of these allegations are supported by the evidence that was before the trial court at the summary judgment stage. GDI does not point to any record evidence to support its assertions that Cole Taylor took any recovery measures prior to declaring default.

¶ 17 The record reveals that there was uncontradicted evidence at the summary judgment stage that an overadvance remained beyond March 31, 2009, despite the contractual requirement that the balance be brought to zero at that point. Thus, the only question is whether there was a cure period and, if not, whether GDI's failure to bring the overadvance to zero by March 31, 2009 constituted an event of default.

¶ 18 Any issue concerning the construction, interpretation, or legal effect of a contract is a question of law. *Daniel v. Ripoli*, 2015 IL App (1st) 122607, ¶ 65. The primary goal of contract interpretation is to give effect to the intent of the parties. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 75. The words of a contract derive their meaning from the context in which they are used. *Northwest Podiatry Center, Ltd. v. Ochwat,* 2013 IL App (1st) 120458, ¶ 40. A contract must be interpreted as a whole and the plain and ordinary meaning must be ascribed to unambiguous terms. *Palm*, 2014 IL App (1st) 111290, ¶ 75. When multiple contracts exist or when amendments are made, all parts of the agreement are to be considered in conjunction in order to determine the parties' intent. *Downers Grove Associates v. Red Robin International, Inc.*, 151 Ill. App. 3d 310, 318 (1986).

¶ 19 The second amendment to the agreement modified the definition of the term "overadvance" as it was used in the original amended loan agreement to state that, "commencing March 31, 2009 and continuing thereafter, [overadvance meant] $0.00." The second amendment further states that "[c]ommencing on March 31, 2009, and continuing at all times thereafter, Borrowers shall not cause, suffer or permit the Overadvance in existence at any time to be greater than $0.00." Under the amended loan agreement, "event of default" is defined, and is triggered by the breach of certain covenants. Upon any event of default occurring, one of the remedies available to Cole Taylor was to "declare the principal of and interest on any or all of the Liabilities, and all other amounts owed under the Documents to be forthwith due."

¶ 20 An event of default would result, under section 7.01(D), if GDI should "default in the performance or observance of any term, covenant, condition or agreement on its part to be performed or observed under any of the reporting or financial covenants contained in the [loan] Documents." Section 7.01(D) goes on to signal what type of covenants would be considered "reporting or financial covenants" by indicating that the covenants described in Sections 5.01(A), (W), (X) and (Y) would be encompassed, but that the definition was not limited to those covenants. Subsections (A), (W), (X) and (Y) require GDI to furnish financial statements and to maintain certain leverage ratios and coverage ratios. Cole Taylor contends, and the trial court found, that an overadvance remaining beyond March 31st constituted a failure to comply with a "financial covenant," and thus that there was an event of default for which there was no cure period. The term "financial covenant" is not expressly defined in the agreement.

¶ 21 We disagree with the trial court's finding that, as a matter of law, the promise to eliminate the overadvance was a "financial covenant." There is nothing in any of the loan documents that reflects the parties' intent to consider the elimination of the overadvance to be a financial covenant. The covenants that are expressly denoted to fall within section 7.01(D) are not readily analogous. As observed in section 7.01(D), financial covenants concern maintaining certain leverage and coverage ratios and other financial vitality benchmarks, which are not necessarily the same as section 5.01(CC) which imposes an affirmative obligation to eliminate the existence of the overadvance by a date certain. The trial court explained that the provisions listed in section 7.01(D) were "similar." But the overadvance-elimination provision is just as similar to other covenants contained in section 5.01 that are not listed in section 7.01(D), such as keeping all liabilities current, paying all taxes, not incurring any additional indebtedness, etc.—covenants existing in the original amended agreement that are conspicuously not included as examples of financial covenants under section 5.01.

¶ 22 The term "financial covenant" does not lend itself to an easy, rigid definition. In general, financial covenants concern certain reporting obligations used to measure the financial state of a company. Melinda Davis Lux, *Negotiating Commercial Loans for Closely Held Companies When Credit is Tight*, 57 No. 4 PRACLAW 43, 46-48 (August 2011). Financial covenants may be either negative, and prohibit certain things, or affirmative, and require certain things. Steven

C. Alberty, *Financial Covenants*, 1 Advising Small Businesses § 12:30 (2015). Negative covenants are "incurrence covenants" and may, for example, prohibit the borrower from incurring more debt. *Id*. Affirmative covenants are "maintenance covenants" and may require such things as maintaining a minimum amount of net worth. *Id*. Neither party offers any authority to support their proffered interpretations of the term, but a survey of case law and commercial lending industry resources using the term reveals that financial covenants are different than monetary or expense covenants for which sums are due. See, *e.g.*, *Westmoreland Opportunity Fund, L.L.C. v. Zappala*, No. 2:13–cv–456, 2014 WL 3420129, at *6 (W.D. Pa. July 11, 2014) (distinguishing between "expense covenants" for which sums or expenses are due and "financial covenants"); Cameron S. McRae, *Understanding Financial Covenants*, Contract Management, May 2004, at p. 34-35 (available at https://www.ncmahq.org/files/Articles/A2B3D _CM_ May04_p34.pdf) (explaining the purpose of financial covenants, omitting any allusion to obligations to repay borrowed funds). Financial covenants are, in general, not affirmative obligations to make payments, but instead require the borrower to do or not to do certain things that would increase the risk borne by the lender or jeopardize the borrower's financial security.

¶ 23 For example, under these parties' agreement, a simple failure to make a payment when due would not be a breach of a financial covenant. There is a separate default provision for failing to timely make payments. Section 7.01(A) states that an event of default occurs when GDI fails to pay "any amount due and owing to the lender under any note and such default shall continue for a period of 5 days." As amended, section 5.01(CC) could reasonably be read to require GDI to pay an amount (the overadvance balance) when due (March 31st), and the failure to do so after five days would be an event of default. Additionally, the obligation incurred by GDI under the original conversion of the overadvance into a term note would not be construed to be a financial covenant. See Amend. Agr. Section 2.04. It was an affirmative obligation to pay an amount by a date certain. The second amendment requirement to pay the additional overadvance is not materially different. The term "financial covenant" was contained in the original amended agreement and so were the overadvance provisions. The terms were never linked. Of course, the parties could have easily included section 5.01(CC) as one of the covenants contemplated by 7.01(D), but they did not. At best, the conflicts render the terms ambiguous, and the parties' intent as to whether the existence of an overadvance beyond March 31, 2009 was a financial covenant is unclear. See generally, *Mellon Bank, N.A. v. United Bank Corp. of New York*, 31 F.3d 113 (2d Cir. 1994) (finding that the breach of a certain financial covenant might not fit within the scope of a breach of "any other covenant" so as to constitute an event of default). Accordingly, we disagree that the failure to bring the overadvance to zero by March 31st was, as a matter of law, a breach of a financial covenant and an event of default with no opportunity to cure.

¶ 24 However, after the trial court found that Cole Taylor properly held GDI in default for failing to comply with a financial covenant, it also found that there were justifications other than those set forth in the notice of default that made the declaration of default appropriate. The trial court found that the justifiability of the default was not limited to only the bases set forth by Cole Taylor in the notice of default. Cole Taylor asserts that GDI was in default under section 7.01(F) for "fail[ing] to pay, or admit in writing its inability to pay, [its] debts as they come due" and under section 5.01(U) for failing to give Cole Taylor "prompt written notice of any event, occurrence or other matter which has resulted in a material adverse change in its financial condition or business operations." In support of these justifications for default, Cole Taylor points to the fact that GDI admitted to Cole Taylor on April 2, 2009, before default was declared, that GDI had ceased operating.

¶ 25 GDI argues that Cole Taylor's conduct precipitated the layoffs by dishonoring payroll checks before declaring a default. But the record evidence does not support this argument. No checks were dishonored before April 3, 2009—the date that default was declared. Instead, GDI's president admitted the day before default was declared that GDI had effectively ceased operating. GDI had terminated all but three of its fifty-six employees. GDI failed to meet its March 31st payroll obligations—a debt that was due. In fact, the failure to pay the overadvance by March 31st constituted another example of a failure to pay a debt when it came due. GDI argues that, whether a material adverse change occurred is a question of fact. But the evidence is uncontradicted. There is no question of material fact that the cessation of operations and GDI's admitted failure to satisfy its financial obligations when they came due constituted an event of default. Although the trial court based its decision primarily on the financial covenant issue, we may affirm the trial court's ruling for any reason supported by the record, regardless of whether the trial court relied upon that basis. *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶ 25. The alternate reasons noted by the trial court represent an incontrovertible event of default and, therefore, Cole Taylor was justified in accelerating the debt and demanding payment for all outstanding liabilities.

¶ 26 GDI also argues that Cole Taylor precipitated the default and failed to act in good faith in regard to its attempt to secure mezzanine financing by way of the CapX loan. However, there was nothing in the parties' agreement that required Cole Taylor to assist GDI in securing financing. The trial court also noted that even if Cole Taylor had verbally agreed to sign off on the CapX loan and then reneged, as alleged, evidence of that purported agreement would have been barred by the Credit Agreements Act (815 ILCS 160/1 *et seq*.) which requires that all claims and defenses concerning credit agreements be in writing. See 815 ILCS 160/2. Moreover, there was nothing in the record at the summary judgment stage showing that Cole Taylor acted wrongfully concerning the CapX loan. After all, it was in Cole Taylor's best interest for GDI to pay down its indebtedness and operate profitably.

¶ 27 Finally, and although not outcome determinative, GDI has made no showing, nor has it even alleged, that it could have cured the default had it been given the opportunity. In fact, the events that followed confirmed that GDI could not have performed. Cole Taylor did attempt to work with GDI after the default was declared in an attempt to continue the banking relationship. GDI simply did not have the capital necessary to meet its obligations and continue its operations.

¶ 28 Commercial Reasonableness

¶ 29 GDI argues that the trial court's finding that Cole Taylor's disposition of collateral was commercially reasonable was against the manifest weight of the evidence. Specifically, GDI argues that Cole Taylor acted in a commercially unreasonable manner by failing to obtain reasonable compensation for the assets of GDI Australia; by "abandoning" collateral; and by making the only bid at an auction for $250,000 when the collateral was worth $8,000,000. As further evidence that Cole Taylor failed to act in a commercially reasonable manner, GDI points to Cole Taylor's failure to consult with industry experts regarding the collateral and the fact that Mary Alberts, the employee charged with collecting on the loan, was overburdened with 53 cases.

¶ 30 After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral. 810 ILCS 5/9-610(a). Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. 810 ILCS 5/9-610(b). Under the Illinois Commercial Code, "commercially reasonable" means that the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. 810 ILCS 5/9-627(b). Whether a sale is commercially reasonable is a question for the trier of fact. *Boender v. Chicago North Clubhouse Ass'n*, 240 Ill. App. 3d 622, 631 (1992). The trial court's findings are entitled to great weight and will not be reversed unless they are against the manifest weight of the evidence. *Voutiritsas v. Intercounty Title Co. of Illinois*, 279 Ill. App. 3d 170, 183 (1996).

¶ 31 GDI's argument leaves out, and fails to account for, several of the key factors that the trial court relied upon to find that the disposition of collateral was commercially reasonable. The trial judge found Mary Alberts, the employee charged with collecting on the loan and disposing of the collateral, to be credible. On the other hand, the trial judge found that Andrew Gilmour, the president of GDI, was not a fully credible witness. The important questions of fact were resolved in favor of Cole Taylor and against GDI. One of the main disputes in the testimony, and one of the most compelling reasons for the trial court's ruling, was that Gilmour and GDI were unavailable and actually even hostile to Cole Taylor's efforts to reap the most beneficial disposition of collateral. The trial court followed the trail of emails, recognizing that they demonstrated Alberts' efforts to set up meetings as well as Gilmour's failure to sufficiently communicate with Alberts throughout the process. Another witness, David Missner, confirmed GDI's lack of communication and cooperation.

¶ 32 GDI's contentions are further belied by the discoveries made by Cole Taylor concerning financial matters as GDI represented them and financial matters as they really were. GDI had listed certain receivables and upcoming funded projects as indicative of the value of its business. However, when pressed on these issues, the representations were revealed to be serious mistakes at best and perhaps intentional misrepresentations. Gilmour also opened an account at another bank three days after default was declared in violation of the loan agreement. Gilmour then proceeded to deposit checks from customers into that account and issued checks from the account to family members. Gilmour also, without permission from Cole Taylor, entered GDI's warehouse and removed inventory that served as collateral despite the fact that default had been declared.

¶ 33 The trial court also noted Alberts' particular efforts to maximize the return on collateral. Along with repeatedly trying to meet with Gilmour to gather information, Alberts met with an employee of GDI's main competitor. Alberts notified several industry players, including GDI's customers, about the UCC sale. Alberts also attempted to take at least one of GDI's customers through a warehouse it had in Indiana in an attempt to garner interest in the inventory. Cole Taylor also placed three advertisements in the Chicago Tribune about the auction and even postponed the auction in an attempt to garner interest. Despite Cole Taylor's efforts, there was simply little interest in the collateral. The inventory did not have a wide potential customer base. The court credited Alberts' testimony that it was her experience that the debtors themselves were typically the most useful in helping to achieve the best result for finding potential purchasers and garnering interest in the collateral. All of GDI's complaints concerning Cole Taylor's disposition efforts are made in the face of the finding of fact that GDI did not help and actually worked against Cole Taylor's efforts to maximize the return.

¶ 34 GDI also argues that the $250,000 bid was so low in comparison to the value of the collateral that the disposition was not commercially reasonable. The trial court found that GDI did not demonstrate the true value of the inventory. We agree. The trial court also found that the diminution of the return, if any, was largely attributable to the "deception and noncooperation of GDI." As the trial court observed, between the time the default was declared and the time the collateral was sold, GDI represented to Cole Taylor that "there is little to be salvaged" and that there were "very few assets from GDI." Yet GDI now maintains that the value of the collateral was $8,000,000.

¶ 35 In addition, at the time default was declared, GDI owed just $3.5 million to Cole Taylor. Thus, if: GDI's collateral was worth $8 million, GDI worked earnestly with Cole Taylor as it claimed to have done, and GDI's contention that Cole Taylor should have been able to get good value for the inventory was credible, the events would not have unfolded the way they did. GDI's arguments are simply not persuasive. After an eleven day bench trial, the trial judge issued a thoughtful and well-reasoned 17-page memorandum of judgment. The trial judge weighed all of the proper factors and considered the totality of circumstances to find that Cole Taylor acted in a commercially reasonable manner—a finding that is not against the manifest weight of the evidence.

¶ 36 CONCLUSION

¶ 37 Based on the foregoing, we affirm the trial court's judgment.

¶ 38 Affirmed.