2015 IL App (1st) 141079-U

FIRST DIVISION
AUGUST 24, 2015

No. 1-14-1079

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN CHARTERED BANK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
ROBERT W. SULLIVAN, JR.,	)	No. 09 L 6244
	)	
Defendant-Appellant	)	
	)	Honorable
(Steven Wegh,	)	Raymond Mitchell,
Defendant).	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying the defendant-appellant's motion to strike affidavits submitted by the plaintiff-appellee bank and in granting summary judgment in favor of the bank on the counts of conspiracy to defraud and breach of guaranty. The affidavits offered by the bank were based on the affiants' personal knowledge and thus did not require the attachment of additional documents to comply with Supreme Court Rule 191(a). The uncontroverted affidavits, combined with the undisputed allegations of the amended complaint, provided sufficient evidence to warrant summary judgment. Summary judgment was further supported by adverse inferences drawn against the defendant-appellant due to his invocation of the fifth amendment.

¶ 2 Defendant-appellant Robert W. Sullivan, Jr. appeals from the January 23, 2014 order of the circuit court of Cook County that: (1) denied his motion to strike affidavits submitted by plaintiff-appellee American Chartered Bank (the bank) in support of its motion for summary judgment, and (2) granted summary judgment in favor of the bank on its claims for conspiracy to defraud and breach of Sullivan's contractual guaranties to the bank.

¶ 3 BACKGROUND

¶ 4 This case arises from an alleged conspiracy formed by Sullivan and his co-defendant Steven Wegh (who is not a party to this appeal) to defraud the bank in connection with certain business loans. At all relevant times, Sullivan was the chief executive officer and a shareholder of Plitt Company of Chicago (Plitt Chicago) and Plitt Washington, Inc. (Plitt Washington) (together, Plitt). Plitt is a wholesale supplier of seafood to restaurants, caterers, and others. Wegh was at all relevant times Plitt's chief financial officer.

¶ 5 According to the allegations of the bank (which have never been disputed), the bank extended lines of credit and loans to Plitt in exchange for security interests in Plitt's inventory and accounts receivable. In July 2002, the bank entered into a loan and security agreement with Plitt Chicago in which the bank agreed to provided a revolving line of credit and a term loan. In connection with the loan to Plitt Chicago, in July 2002 Sullivan and Wegh executed personal guaranties of Plitt Chicago's obligations under the loan. The Plitt Chicago loan was amended thirteen times between 2003 and 2008; with each amendment, Sullivan and Wegh executed additional personal guaranties of Plitt Chicago's obligations.

¶ 6 On or about March 31, 2006, Plitt Washington entered into a separate loan and security agreement in which the bank provided a revolving line of credit and term loan to Plitt

Washington. At the same time, Sullivan executed a personal guaranty for the Plitt Washington Loan. Wegh later executed a personal guaranty of the Plitt Washington Loan in October 2006. The Plitt Washington loan was amended five times between 2006 and 2008; in conjunction with those amendments, Sullivan and Wegh executed corresponding amendments and acknowledgments of their personal guaranties of Plitt Washington's obligations under its loan.

¶ 7 Under the terms of its loans from the bank, Plitt was entitled to draw upon a total amount of credit determined by the value of Plitt's assets, including the value of Plitt's inventory and accounts receivable. Specifically, Plitt was permitted to draw up to the sum of 50% of the value of certain inventory and 85% of the value of "eligible accounts receivable." This sum was referred to as the "borrowing base." The bank required Plitt to submit periodic financial statements, referred to as "borrowing base certificates," in which Plitt represented to the bank the value of the assets comprising the borrowing base. In other words, if Plitt reported a larger borrowing base, Plitt was eligible to borrow larger amounts under the terms of the loans, up to a specified borrowing ceiling of $11.4 million on Plitt Chicago's loan and $3.6 million ceiling on Plitt Washington's loan.

¶ 8 Sullivan delegated to Wegh the responsibility for preparing and submitting the borrowing base certificates required by the bank. According to the bank (and Wegh's sworn affidavit), from 2006 until early 2009, Sullivan directed Wegh to submit borrowing base certificates that intentionally misrepresented the value of Plitt's accounts receivable in order to enable Plitt to borrow larger sums from the bank than Plitt could have obtained if it had reported the actual, lower amount of its accounts receivable. The bank alleged that both Wegh and Sullivan knew that the certificates submitted to the bank falsely inflated the value of Plitt's assets by millions of dollars. The bank alleged that, in reliance on the false certificates, it loaned millions of dollars to

Plitt, and further relied on the false representations contained in the borrowing base certificates by forbearing from enforcing Sullivan and Wegh's personal guaranties on Plitt's loans.

¶ 9 The bank alleged that, on March 26, 2009, Plitt's attorney first informed the bank that there were problems with previously submitted borrowing base certificates. At a meeting on March 30, 2009, Plitt's attorney first disclosed to that bank that its most recent borrowing base certificate overstated the value of Plitt's inventory and accounts receivables by several million dollars. According to the bank, the fraudulent overstatement of the borrowing base had allowed Plitt to borrow $6.6 million more than it was allowed to borrow under the terms of the loans.

¶ 10 On May 28, 2009, the bank filed its original verified complaint against Sullivan and Wegh, containing a total of four counts. The first two counts pleaded one count of fraud against both Sullivan and Wegh and one count of conspiracy against Sullivan and Wegh. For its third and fourth counts, the bank asserted an "action on guaranty" against each of Sullivan and Wegh, alleging that they had refused to pay their obligations as guarantors of Plitt's loans.

¶ 11 On July 31, 2009, Sullivan and Wegh filed a motion to dismiss the fraud and conspiracy counts of the complaint and on August 14, 2009 jointly filed a supporting memorandum of law. With respect to the fraud count, Sullivan and Wegh claimed that the bank had failed to adequately allege the elements of the defendants' awareness of the falsity of the borrowing base certificates, the bank's justifiable reliance on such statements, and loss causation. The motion also argued that the conspiracy count should be dismissed because a civil conspiracy cannot exist between a corporation's officers or employees. The bank filed its opposition to the motion to dismiss on September 4, 2009.

¶ 12 On October 21, 2009, the court entered an order finding that the count of fraud was sufficiently pleaded against Wegh, but not as to Sullivan. Specifically, the court found that the

bank "fail[ed] to plead facts that Sullivan had knowledge or direction over the submission of the overstated [borrowing base certificates]." The court also found that the original complaint failed to sufficiently allege conspiracy, because "no facts are pled to support the allegation that Sullivan participated in the agreement to defraud" the bank. Thus, the court dismissed the fraud count as to Sullivan and dismissed the conspiracy count as to both Sullivan and Wegh.

¶ 13 On November 12, 2009, the bank moved for leave to file an amended complaint, submitting a proposed amended complaint containing new factual allegations to support the fraud and conspiracy counts. The amended complaint pleaded two separate counts of fraud against each of Sullivan and Wegh. The amended complaint alleged that Sullivan was provided with copies of the fraudulent borrowing base certificates when they were submitted to the bank, and alleged that both Sullivan and Wegh knew that the accounts receivable totals reported to the bank were false. In particular, the amended complaint alleged that both Sullivan and Wegh were regularly provided with separate computer spreadsheets that showed the true value of Plitt's accounts receivable, which was "dramatically different from the accounts receivable amounts shown on the spreadsheets used to support Plitt's [borrowing base certificate] calculations."

¶ 14 In addition to the fraud and conspiracy counts, the amended complaint, like the original complaint, also pleaded separate counts against Wegh and Sullivan for breach of their personal guaranties on the Plitt loans. The amended verified complaint attached the various loan documents and personal guaranties of Sullivan and Wegh with respect to the Plitt loans, as well as a number of allegedly fraudulent borrowing base certificates submitted to the bank.

¶ 15 On November 20, 2009, the court granted the bank's motion to file an amended complaint, and directed the defendants to answer by December 18, 2009. In the same order, the court directed the defendants to respond to written discovery requests previously propounded by

the bank. On December 11, 2009 and December 14, 2009, Sullivan and Weigh submitted responses to the bank's discovery requests that asserted their right against self-incrimination under the fifth amendment of the United States Constitution in lieu of answering interrogatories or providing any responsive documents or information.

¶ 16 On December 18, 2009, Wegh filed his answer to the bank's amended complaint. In response to each allegation, Wegh answered: "On the advice of counsel, [Wegh] asserts his rights under the Fifth Amendment of the United States Constitution *** and declines to admit or deny the allegations in this Paragraph."

¶ 17 On December 28, 2009, Sullivan filed his answer to the bank's complaint. Similarly to Wegh, Sullivan responded to each factual allegation by stating that Sullivan "asserts his Fifth Amendment rights and declines to answer."

¶ 18 On June 21, 2010, the bank filed a motion to compel Sullivan and Wegh to answer the allegations of the amended complaint, as well as to provide substantive responses to the bank's discovery requests. On July 19, 2010, Sullivan and Wegh jointly opposed the motion to compel, arguing they had the right to assert the fifth amendment in response to the amended complaint and the bank's interrogatories. They argued the bank's claims of fraud and conspiracy "could conceivably support a criminal prosecution" and stated their belief that the bank had been in contact with federal authorities regarding a criminal investigation.

¶ 19 On August 17, 2010, the trial court denied the motion to compel in part and granted it in part. The court recognized that the fifth amendment protects against disclosures that could be used in a criminal prosecution but also recognized that a "nexus between the risk of criminal conviction and the information requested must exist" in order to permit a witness to refuse to answer on fifth amendment grounds. With respect to the amended complaint's allegations of

fraud and conspiracy and related discovery requests, the court found a sufficient nexus to permit invocation of the fifth amendment. However, the trial court found such a nexus was lacking with respect to the counts for breach of the loan guaranties and thus ordered the defendants to answer related allegations and discovery requests.

¶ 20 On September 9, 2010, Sullivan filed a motion for partial reconsideration of the order on the bank's motion to compel. Sullivan's attorney submitted a supporting affidavit stating that Sullivan was the target of a criminal investigation by the United States Attorney's office, and that certain of the allegations and interrogatories which Sullivan had been ordered to answer could provide prosecutors with a "substantial link in the chain of evidence in connection with its criminal investigation." While the motion to reconsider remained pending, the trial court, through a series of orders beginning on September 16, 2010, stayed the case for approximately three years, until September 25, 2013. According to Sullivan's appellate brief, the trial court stayed the action due to the possibility that Sullivan would face criminal charges.

¶ 21 According to Sullivan, in April 2013, Wegh pleaded guilty to one count of bank fraud pursuant to a plea agreement with federal prosecutors.

¶ 22 On August 30, 2013, the bank moved to lift the stay of the action, claiming it had been informed by the U.S. Attorney's office "that the criminal investigation against Sullivan is no longer ongoing, and thus, there is no reason for the stay to remain in place." On September 5, 2013, after the bank indicated that it would move for summary judgment, the trial court directed the bank to file that motion by October 10, 2013. The court entered and continued decision on Sullivan's motion for reconsideration with respect to the motion to compel.

¶ 23 On October 2, 2013, the bank filed its motion for summary judgment against Sullivan with respect to only two counts of the amended complaint: conspiracy to defraud (count III) and breach of Sullivan's personal guaranty of Plitt's loans (count IV).

¶ 24 The bank submitted two affidavits in support of its motion for summary judgment. First, the bank submitted an affidavit executed by Wegh on August 29, 2013. In that seven-page affidavit, Wegh details how he and Sullivan agreed to defraud the bank through the submission of false borrowing base certificates.

¶ 25 Wegh's affidavit avers that he was responsible for preparing monthly financial statements and borrowing base certificates presented to the bank, and that he reported directly to Sullivan. According to Wegh's affidavit, in late 2006 Sullivan approached him and "stated that Plitt Chicago needed to borrow more than the Borrowing Base, and asked [Wegh] whether there was a way to 'stretch' Plitt Chicago's accounts receivables (*i.e.*, delay reconciliation of cash received to accounts receivable) in order to borrow more money." Wegh "informed Sullivan that if Plitt Chicago were to delay recognition of payments made by customers, it would falsely increase the amount of the Borrowing Base shown" on the borrowing base certificates and that the "higher balance could then be reported to [the bank] in order to borrow more from [the bank] than would have been supported by a truthfully-reported" statement. Wegh averred that Sullivan instructed him to proceed to delay recognition of payments, and that he would not have done so without Sullivan's direction. Wegh further averred that "Sullivan assured [Wegh] on numerous occasions from 2006 through May 2009 that [their] actions were merely a temporary solution."

¶ 26 Wegh's affidavit described that during this time period, he prepared borrowing base certificates that "overstated the amount of Plitt's accounts receivables" which "allowed Plitt to borrow more from [the bank] than it would have if the [borrowing base certificates] had been

prepared using accurate account receivable figures." Wegh described how "Each month, [he] determined how long the delay in payment recognition needed to be in order to meet the requirements for the [bank's] Line of Credit" and that he "regularly informed Sullivan of the extent of the delay."

¶ 27 According to Wegh's affidavit, at the end of March 2009, "Sullivan announced that he no longer wanted to falsely inflate our accounts receivable balance" and thereafter the bank "became aware that Plitt's financial condition was far worse than what had been represented *** over the past 24-30 months." According to Wegh's affidavit, while he and Sullivan were under investigation by the United States Attorney's Office, Sullivan told Wegh that "he intended to blame the fraud on computer problems" and asked Wegh to tell the same story but Wegh refused.

¶ 28 The bank's summary judgment motion was also supported by an affidavit of one of its vice presidents, Bryn Perna. In her affidavit, Perna stated that she had been personally responsible for overseeing the servicing of the loans and line of credit extended by the bank to Plitt, as well as "the servicing of the personal guaranties executed by [Sullivan] as security" for Plitt's loans. Perna's affidavit further stated that "[t]rue and correct copies" of the loans and Sullivan's guaranties were attached to the amended complaint.

¶ 29 Perna's affidavit stated that on November 23, 2010, "[j]udgment was granted in favor of [the bank] separately against Plitt Chicago and Plitt Washington." Although the affidavit did not identify that proceeding, it stated that "[b]oth Judgments were entered in the amount of $4,561,101.54, which represented the amount of damages suffered by [the bank] as of that date as a result of Plitt Chicago and Plitt Washington's breach of contract under the Plitt Chicago Loan and Plitt Washington Loan." However, Perna's affidavit did not attach any document evidencing such a judgment and did not otherwise identify the underlying proceeding.

¶ 30 Perna's affidavit further stated that, at the time of the bank's original complaint in this case, $9,910,050.143 was due and owing under the Plitt Chicago's loan and another $2,671,886.82 was owed under Plitt Washington's loan. Perna's affidavit stated that, since that time, the "Plitt entities generated $3,098,779.89 of net cash flow" which was used to pay down the balance of the loans and that the bank had "administered several UCC Sales, the proceeds of which were used to pay down" the loans. The affidavit stated that, as of September 9, 2013, "[i]ncluding interest, [the bank's] damages as a result of Plitt Chicago and Plitt Washington's breach of contract total $5,299.376.22." Finally, Perna's affidavit stated that the bank had issued demand upon Sullivan to pay the amounts due pursuant to his guaranties, but that Sullivan had failed to make any payment.

¶ 31 In addition to relying on these affidavits, the bank's brief in support of its summary judgment motion argued that since Sullivan had asserted his fifth amendment rights in response to the amended complaint, the court could infer that its allegations were true. The bank similarly argued that adverse inferences could be drawn against Sullivan due to his invocation of the fifth amendment in response to the bank's interrogatories.

¶ 32 The bank thus argued that, with respect to the conspiracy count, there were "no genuine issues of material fact as to whether Sullivan knowingly participated in a scheme to commit an unlawful act whereby Wegh, with the assistance and at the direction of Sullivan, made knowing false statements to [the bank] with the intent to induce [the bank] to rely on those statements, [the bank] relied on those false statements, and [the bank] suffered damages as a result." Further, the bank argued that the loan documents and Sullivan's personal guaranties thereof (attached to the amended complaint), as well as the Perna affidavit, established that Sullivan breached his guaranties and that the bank had suffered damages.

¶ 33 On November 14, 2013, Sullivan moved to strike the affidavits of both Wegh and Perna for their failure to comply with the requirements of Supreme Court Rule 191(a). Sullivan argued that Wegh's affidavit made "conclusory statements about his communications with Sullivan about supposedly false financial statements" provided to the bank, but that the "supposed communications are not particularized as to time, date or place." Sullivan also asserted that the Wegh affidavit was deficient in that it failed to attach documentary evidence of his communications with Sullivan or any of the allegedly false financial statements.

¶ 34 Sullivan likewise argued that Perna's affidavit "should also be stricken as conclusory" as her affidavit did not attach any documents. Sullivan's motion noted that Perna's affidavit did not attach the referenced 2010 judgment against Plitt in another case. Sullivan likewise claimed that Perna's additional statements regarding the amounts due and owing under the loans were "conclusory and unsupported."

¶ 35 On the same date as his motion to strike the affidavits, Sullivan filed his opposition to the bank's motion for summary judgment. Sullivan argued that the bank had "failed to put on its own proof for its claims" and had instead erroneously relied solely upon adverse inferences from Sullivan's assertion of his fifth amendment rights. Sullivan acknowledged that such an adverse inference could be drawn, but emphasized that additional evidence must also be presented to warrant summary judgment and claimed that the bank had failed to present evidence supporting either the alleged conspiracy or breach of guaranty.

¶ 36 With respect to proof of conspiracy to defraud, notwithstanding Wegh's affidavit, Sullivan claimed the bank had not shown that that any particular financial statement was materially false. Sullivan further argued that the certificates attached to the amended complaint were not authenticated, and that the bank had failed to explain "which accounts receivable were

misstated or by how much." Sullivan also claimed that Wegh's affidavit did not demonstrate Sullivan's participation in a conspiracy, as the description of Wegh's communications with Sullivan were not particularized as to time or place and did not "establish any agreement by Sullivan to submit the false statements."

¶ 37 Sullivan further argued that the bank had failed to show evidence of its reliance on allegedly false statements in advancing money to Plitt, or any resulting damages. Although the Perna affidavit stated an amount of nearly $5.3 million remained owing on Plitt's loans, Sullivan argued that the affidavit was insufficient as it did not describe how that amount was calculated or attach supporting documents. Likewise, Sullivan argued that the Perna affidavit did not provide evidence to warrant summary judgment on the count for breach of guaranty.

¶ 38 On December 4, 2013, the bank filed a reply memorandum in support of its motion for summary judgment which also addressed the motion to strike the Wegh and Perna affidavits. The bank recognized that summary judgment could not be granted only on the basis of adverse inferences from asserting the fifth amendment, but argued that the affidavits of Wegh and Perna were ample additional evidence. The bank argued that those affidavits complied with Supreme Court Rule 191 as they were sworn, based on personal knowledge, and stated with particularity. The bank also noted that Sullivan had failed to offer any evidence contradicting the facts alleged by the bank in the pleadings and affidavits. The bank urged that the Wegh affidavit, combined with fifth amendment adverse inferences against Sullivan, established the conspiracy to commit fraud. The bank also argued that Sullivan's breach of guaranty was established by the uncontested allegations of the amended complaint and exhibits, as well as Perna's affidavit.

¶ 39 On January 23, 2014, the trial court issued a written order which denied Sullivan's motion to strike the Wegh and Perna affidavits and, at the same time, granted the bank's motion for

summary judgment with respect to both the conspiracy and breach of guaranty counts. Regarding the motion to strike, the court stated that under Supreme Court Rule 191, affidavits in support of motions for summary judgment must: "(1) be made on the personal knowledge of the affiants; (2) set forth with particularity the facts upon which the claim is based; (3) have attached thereto sworn or certified copies of all documents upon which the affiant relies, (4) not consist of conclusions but of fact admissible in evidence; and (5) affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." The court found that Wegh and Perna's affidavits complied with all of these requirements and concluded that there was "no basis for striking them."

¶ 40 The trial court proceeded to find that summary judgment was warranted on the bank's count of conspiracy to defraud. The trial court found that the bank had "submitted evidence that Sullivan and Wegh agreed to engage in a scheme to obtain funds through deception to which their company was not entitled under the loan agreements" and that "Sullivan and Wegh represented to [the bank] that Plitt had more assets than it truly did by manipulating their financial records." The court found that there was evidence that the bank "relied on the false financial statements as [it] extended credit based on the representations and ceased doing so when it learned the true financial health of the company."

¶ 41 The court recognized that civil conspiracy is often "a difficult cause of action to prove" upon circumstantial evidence, but that in this case the bank "submitted the affidavit of Sullivan's co-conspirator who offers direct evidence of the conspiracy." The trial court also noted that "Sullivan has submitted no evidence to contradict or even call into question the evidence that demonstrates his role in the conspiracy."

¶ 42 The trial court further observed that adverse inferences from invocation of the fifth amendment "can be drawn *** at the summary judgment stage of a civil proceeding, provided that additional evidentiary support for the motion is also presented." The court found that the bank had presented additional evidence and that, as "none of that evidence has been contradicted or even impeached, Sullivan's invocation of the fifth amendment only provides further justification" for granting summary judgment on the conspiracy count.

¶ 43 With respect to the count for breach of guaranty, the court likewise found that the bank had established that "Sullivan agreed to guarantee Plitt's obligations, that it extended credit to Plitt ***, that both Plitt and Sullivan defaulted as a result of non-payment and that Sullivan's failure to answer for his obligations has caused [the bank] to be unable to collect the outstanding funds." The court found that this uncontroverted evidence entitled the bank to summary judgment, noting this was "especially true in light of the fact that Sullivan has declined to answer the claim while invoking his Fifth Amendment rights."

¶ 44 As to damages, the court found that Perna's unopposed affidavit and the loan documents established "an outstanding balance of $5,299,376.22" on Plitt's loans, and observed that "[w]hen the facts in evidence are uncontradicted, they must be taken as true for purposes of a summary judgment motion." Accordingly, the court granted summary judgment on counts III and IV of the amended complaint and entered judgment against Sullivan in the amount of $5,299,376.22.

¶ 45 On February 25, 2014, the bank moved to voluntarily dismiss the amended complaint's remaining count against Sullivan (count II, alleging fraud), as well as all counts against Wegh. On March 11, 2014, the court dismissed all remaining counts of the amended complaint.

¶ 46 On April 9, 2014, Sullivan filed a notice of appeal from the trial court's order denying his motion to strike the Wegh and Perna affidavits and granting the bank summary judgment on the counts for conspiracy and breach of guaranty.

¶ 47 ANALYSIS

¶ 48 We note that we have jurisdiction because Sullivan filed a notice of appeal within 30 days after the March 11, 2014 judgment dismissing all remaining counts of the action. See Ill. S. Ct. R. 303(a) (eff. May 30, 2008).

¶ 49 We first address Sullivan's contention that the court erred in denying his motion to strike the affidavits of Wegh and Perna submitted in support of the bank's motion for summary judgment. "In general, this court reviews a circuit court's decision on a motion to strike an affidavit for an abuse of discretion, but when the motion was made in conjunction with the court's ruling on a motion for summary judgment, we employ a *de novo* standard of review with respect to the motion to strike." (Internal quotation marks omitted). *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 18.

¶ 50 Sullivan contends that the Wegh and Perna affidavits failed to meet the requirements of Supreme Court Rule 191(a), which provides, in relevant part, that: "Affidavits in support of *** a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 51 Our supreme court has held that "Rule 191(a)'s requirements are to be construed according to the plain language of the rule." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 339 (2002) (holding that expert witness affidavit that failed to attach papers relied upon by the expert was deficient, as "the plain language [of the rule] clearly requires that such papers be attached to the affidavit.")

¶ 52 With respect to Wegh's affidavit, Sullivan contends that because the affidavit failed to attach documents, it violated the requirement that an affidavit "shall have attached thereto sworn or certified copies of all documents upon which the affiant relies." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). Sullivan argues that while Wegh's affidavit discusses "financial statements, spreadsheets and other documents," including fraudulent documents, his affidavit fails to attach such documents.

¶ 53 Sullivan relies largely on *Robidoux*, which concerned an affidavit by the plaintiff's expert medical witness in a wrongful death action that failed to attach medical records or other materials relied on by the expert for his opinion that the defendant physician's conduct fell below the applicable standard of care. *Robidoux*, 201 Ill. 2d at 329-31. In that context, our supreme court held that Rule 191(a)'s requirement of attaching papers upon which the affiant relies "is not a mere technical requirement" but is "inextricably linked to the provision requiring specific factual support in the affidavit itself." *Id*. at 344. Thus, *Robidoux* held that it was "not error for the trial court to strike this affidavit and grant summary judgment in favor of defendants." *Id.* at 345.

¶ 54 We find that Sullivan's reliance on *Robidoux* is misplaced. Although it is true that Wegh's affidavit does not attach the financial statements discussed in his affidavit, Sullivan's argument ignores the important distinction from the expert affidavit in *Robidoux*: namely, that

the contents of Wegh's affidavit were based on his *personal knowledge* in creating and submitting those documents. In contrast, in *Robidoux*, there was no indication that the expert witness had independent *personal knowledge* of the documents in question that were relied upon in reaching the opinion set forth in his affidavit. Rather, the affidavit at issue in that case stated that the expert witness had reviewed medical records and depositions to reach his opinion that the defendant physician's treatment of the plaintiff's decedent fell below the standard of care, but did not attach those materials. *Id.* at 329-30.

¶ 55 This case is clearly distinguishable, as Wegh's affidavit indicates that he personally prepared the fraudulent documents discussed, and thus his statements were based on his personal recollection. Wegh states that "I have personal knowledge of the facts contained in this Affidavit and if called as a witness I could testify to these facts." That is, Wegh stated that he was relying on his personal memory of his role in the fraud in preparing the affidavit, rather than the actual documents. Where an affiant discusses documents that he personally created and describes them *based on his personal recollection*, we do not read Rule 191(a) to require the affiant to attach those same documents.

¶ 56 Separately, Sullivan also attacks Wegh's affidavit on the grounds that it makes "conclusory statements about his communications with Sullivan" regarding the submission of fraudulent statements to the bank, and that the "supposed communications are not particularized as to time, date or place." We do not find that the statements in Wegh's affidavit are "conclusory." Rather, the affidavit recounts in detail how the scheme to defraud was initiated by Sullivan and Wegh in 2006 in order to allow Plitt to borrow more money from the bank; that, with Sullivan's knowledge, Wegh manipulated Plitt's financial data to generate fraudulent borrowing base certificates, that between 2006 and 2009 Sullivan repeatedly assured Wegh that

the fraud was "merely a temporary solution" to Plitt's financial problems; and that, after Sullivan decided to discontinue the fraudulent practice, he sought to avoid liability by encouraging Wegh "to blame the discrepancy between accounts receivable figures *** on a computer problem, and claim to [the bank] that nothing was done intentionally."

¶ 57 Wegh's affidavit contains detailed statements of how he, with Sullivan's knowledge, altered borrowing base calculations to allow Plitt "to borrow more from [the bank] than it would have if the [borrowing base certificates] had been prepared using accurate accounts receivable figures." For example, Wegh's affidavit details how "[e]ach month, [he] determined how long the delay in payment recognition needed to be in order to meet the requirements for the [bank's] Line of Credit." It also describes how Plitt (with Sullivan's knowledge) maintained a separate spreadsheet containing accurate data on accounts receivables and how such data was segregated from the artificially inflated data that was reported to the bank. These are detailed statements of fact, not conclusory statements.

¶ 58 Moreover, although Sullivan complains that Wegh's affidavit does not specify the "time, date or place" of his communications with Wegh regarding the fraudulent financial statements, our court has not interpreted Rule 191(a) to require particularity with respect to each and every referenced conversation. See *Allerion, Inc. v. Nueve Icacos, S.A DE C.V.*, 283 Ill. App. 3d 40 (1996) (finding that Rule 191(a) was satisfied where, although affiant "failed to identify specific dates, details of each conversation and who had initiated each call, his assertion that he engaged in '25 telephone conversations *** with regard to the contract in question,' does indicate to whom he communicated, the extent of their contacts, and that the contract was the underlying subject matter on each occasions."). In this case, Wegh's affidavit, which describes ongoing discussions involving Sullivan and Wegh over a number of years and provides specific details of

how the fraud was carried out, satisfies the requirements of Rule 191(a). Thus, we agree with the trial court that there was no basis to strike Wegh's affidavit.

¶ 59 Sullivan's challenges to Perna's affidavit are also, for the most part, unpersuasive. Sullivan argues on appeal that Perna "simply gave conclusions about damages without attaching or authenticating any supporting documentation."

¶ 60 Notably, with respect to one portion of Perna's affidavit, Sullivan's argument appears to have merit. However, even if that portion should not have been considered, it did not warrant striking the affidavit as a whole.

¶ 61 For example, Perna's affidavit states that on November 23, 2010, judgment was granted in favor of the bank against Plitt in the amount of $4,561,101.54; however, the affidavit fails to attach that judgment. Moreover, the affidavit does not state the basis for Perna's knowledge of that judgment, and does not offer the name of the legal proceeding or even the court in which the judgment was entered. The bank's appellate brief argues that the trial court could take judicial notice of the bank's judgments on the loans.[1] However, the Perna affidavit did not offer the basic information that would have been necessary to confirm the existence of such a judgment in the public record. Thus, we find that this particular portion of Perna's affidavit did not comply with Rule 191(a).

[1] The bank's argument on appeal notes that, as an exhibit to its reply brief in support of its motion for summary judgment, the bank attached Sullivan's petition to intervene in a separate lawsuit by the bank against Plitt in the chancery division of the circuit court of Cook County, which is presumably the same proceeding that eventually led to the judgment referenced in Perna's affidavit. However, that submission was made to the court only *after* the bank submitted Perna's affidavit, which failed to identify that proceeding. Moreover, the actual judgment in favor of the bank that is referenced by Perna's affidavit does not appear in the record on appeal.

¶ 62 Perhaps recognizing that this portion of the Perna affidavit was defective, the bank's appellate brief proceeds to state that "even assuming *arguendo* that Ms. Perna's statements regarding [the bank's] judgments and damages lack foundation *** that does not merit striking the entirety of the Perna Declaration." We agree with the bank in this respect. That is, our conclusion that one part of the Perna affidavit was defective is not fatal to the remainder of the affidavit. "When only portions of an affidavit are improper under Rule 191(a), a trial court should only strike the improper portion of the affidavit." (Internal quotation marks omitted.) *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759. Applying that principle here, the exclusion of Perna's statements regarding the November 2010 judgment does not detract from the validity of the affidavit's other statements, including the averment that $5,299,376.22 was due under the loans in September 2013.

¶ 63 Sullivan argues that all of Perna's statements regarding the amounts due and owing under the loans were "conclusory and not supported with any authenticating documentation." With respect to Perna's statement that, as of September 2013, the bank's damages were $5,299.376.22, Sullivan argues the affidavit "did not purport to offer any business record or any other evidence to establish that amount, or show how it was calculated."

¶ 64 However, (other than the reference to the November 2010 judgment) we find that Perna's affidavit complies with Rule 191(a). Specifically, the statements of the affidavit regarding the status of the loans and guaranties were based on Perna's personal knowledge and experience in her role as an officer of the bank. Perna states that, as a senior vice present of the bank, she "oversee[s] the servicing" of the loans and the guaranties executed by Sullivan. Her affidavit also states: "I have personal knowledge of the facts contained in this affidavit and if called as a witness I could testify to these facts." Perna's averments that she was responsible for the

servicing of the loans and guaranties in question are sufficient basis for her statements of her knowledge of the amounts due and owing under the loans and guaranties. See *JP Morgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 97 (finding that averments in bank officer's affidavit "were sufficient to establish his personal knowledge" sufficient to authenticate loan documents, as "[h]is position as vice-president of Chase Bank provided him with familiarity with Chase Bank's loan operations").

¶ 65 Moreover, although the loan and guaranty documents are not attached to the Perna affidavit, she averred that "true and correct copies" of these documents were attached to the amended complaint. We decline to find that Rule 191(a) was violated because Perna's affidavit elected to authenticate those documents by referencing the copies already submitted with the amended complaint rather than attach duplicate copies. Thus, other than the affidavit's statement regarding the November 2010 judgment —which, in any event, was not necessary to support the subsequent statement that nearly $5.3 million was owed on the loans as of September 2013—we find that Perna's affidavit complied with Rule 191(a) and was properly considered by the court in deciding the bank's motion for summary judgment.

¶ 66 Having addressed the Wegh and Perna affidavits, we turn to Sullivan's arguments that the court erred in granting summary judgment on the counts of conspiracy and breach of guaranty. "We review *de novo* the circuit court's decision to grant a motion for summary judgment." *Avdic*, 2014 IL App (1st) 121759, ¶ 18. "Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted). *Id.* ¶ 21. Furthermore, of particular importance in this case, "[f]acts contained in an affidavit in support of

a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion." *Id.* ¶ 31.

¶ 67 We first examine Sullivan's claim that the court erred in granting summary judgment on the conspiracy count of the amended complaint. "The elements of a civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." (Internal quotation marks omitted). *Illinois State Bar Ass'n Mutual Insurance Co. v. Cavenagh*, 2012 IL App (1st) 111810 ¶ 37. "A conspiracy is not an independent tort. [Citation.] Where *** a plaintiff fails to state an independent cause of action underlying [the] conspiracy, the claim for a conspiracy also fails." *Id.*

¶ 68 In this case, the bank alleged that the conspiracy between Sullivan and Wegh was undertaken to commit the independent tort of fraud. Thus, we also examine whether there was evidence of the elements of fraud, which are: "(1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that person's injury." (Internal quotation marks omitted). *Id.* ¶ 38.

¶ 69 Having determined that the Wegh affidavit complied with Supreme Court Rule 191(a), and considering that Sullivan never submitted any counteraffidavit contradicting the allegations contained therein, we conclude that the trial court did not err in granting summary judgment on the conspiracy count. It is worth emphasizing that because Sullivan never submitted a

counteraffidavit, the statements in Wegh's affidavit "must be taken as true for purposes of the motion." *Avdic*, 2014 IL App (1st) 121759, ¶ 31.

¶ 70 Moreover, Sullivan pleaded the fifth amendment in response to every substantive allegation of the amended complaint, which additionally warrants adverse inferences to be drawn against him. "It is the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties in civil actions when they refuse to testify in response to probative evidence offered against them." *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 177 Ill. 2d 314, 332 (1997). Our court has held that such adverse inferences may be considered at the summary judgment stage. *People v. $174,980 United States Currency*, 2013 IL App (1st) 122480, ¶ 32.

¶ 71 Sullivan's primary argument on appeal is that summary judgment cannot be granted solely on the basis of fifth amendment adverse inferences, without additional evidence. See *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941 (2004) ("While the circuit court could draw a negative inference from the assertion of the privilege at this stage of the proceeding, it could only grant summary judgment if there was evidentiary support of the motion as well."). Sullivan proceeds to argue that the bank failed to provide evidence of the elements of the cause of action.

¶ 72 Although Sullivan is correct that adverse inferences from his invocation of the fifth amendment, standing alone, would not warrant summary judgment, he fails to account for the evidence put forth by the bank in support of its summary judgment—most notably, Wegh's sworn, uncontradicted affidavit detailing his conspiracy with Sullivan. Thus, as set forth below, we reject Sullivan's claims that the elements of the conspiracy count were not established.

¶ 73 Sullivan contends that the bank "did not provide evidence that Sullivan conspired with Wegh." This contention is clearly refuted by Wegh's affidavit. As the trial court stated, the bank "submitted the affidavit of Sullivan's co-conspirator who offer direct evidence of the conspiracy." Wegh's uncontradicted affidavit established that he and Sullivan agreed to submit borrowing base certificates falsely inflating the value of Plitt's assets, with the fraudulent intent of inducing the bank to lend more than Plitt would otherwise be entitled to under the terms of its loans. Moreover, Wegh specified how he took numerous acts in furtherance of the conspiracy by submitting fraudulent borrowing base certificates frequently between 2006 and 2009.

¶ 74 Sullivan argues that Wegh's statements were not "particularized as to time, date or place." Although the affidavit did not specify the date or place of each conversation between Sullivan and Wegh, Wegh's affidavit thoroughly detailed the origin and execution of the conspiracy. Wegh's affidavit describes the initial discussions between Sullivan and Wegh that led to their plan and how he, at Sullivan's direction, prepared and submitted false financial statements until Sullivan decided to halt the scheme in early 2009.

¶ 75 Sullivan also claims that "Wegh's affidavit is also inconsistent, which raises credibility issues that cannot be resolved at the summary judgment stage." Even if we agreed that Wegh's affidavit was inconsistent (which we do not), Wegh's affidavit was uncontradicted by Sullivan and thus "must be taken as true for purposes of the motion" regardless of Sullivan's claim on appeal that it lacks credibility. *Avdic*, 2014 IL App (1st) 121759, ¶ 31. Thus, we reject Sullivan's claim that there was insufficient evidence of the elements of a conspiracy.

¶ 76 Sullivan further argues that there was insufficient evidence with respect to the independent elements of the fraud that was the object of the conspiracy. First, Sullivan claims that the bank "did not provide evidence of materially false statements," and that the bank "did not

present evidence as to how *any* particular financial statement was, in fact, materially false." This argument is refuted by Wegh's affidavit, which detailed how he (at Sullivan's direction) systematically caused the borrowing base certificates submitted to the bank to overstate Plitt's accounts receivable in order to induce the bank to extend more credit to Plitt.

¶ 77 Specifically, Wegh's affidavit states that "The Borrowing Base reported to [the bank] on the [borrowing base certificates] was false in that it included receivables that had already been paid by Plitt Chicago's customers." Wegh elsewhere averred that "Plitt's financial condition was far worse than what had been reported in the financial statements and [borrowing base certificates] previously provided over the past 24-30 months." Wegh's affidavit—which was uncontroverted and must be accepted as true for this motion—thus established that Plitt made numerous materially false statements to the bank at Sullivan's direction. Moreover, we further note that the bank attached a number of the allegedly fraudulent borrowing base certificates to its amended complaint. Sullivan has never disputed their authenticity, or any of the corresponding allegations in the complaint. Thus, Sullivan's argument that the bank "did not provide evidence of materially false statements" is without merit.

¶ 78 In addition to the element of falsity, Sullivan argues that the bank did not offer evidence supporting the independent element of the bank's reliance on any false statement in the borrowing base certificates, or resulting damages. Sullivan argues that the bank "offered only complaint allegations" to support its claim of reliance, which was insufficient to prove that the bank "actually relied on the truth of the false statements in Plitt's financial documents" or "suffered damages proximately caused by reliance on the statements." Sullivan emphasizes that the bank did not offer testimony by Perna or any other employee stating that the bank relied on the false statements in the borrowing base certificates.

¶ 79 "Typically, justifiable reliance is a question of fact; however, the court may dispose of the issue on summary judgment if the facts are undisputed and only one conclusion is apparent." *D.S.A. Finance Corp. v. County of Cook*, 345 Ill. App. 3d 554, 560 (2003). Had Sullivan denied the relevant allegations of the complaint, we may have found the existence of an issue of fact with respect to the element of reliance precluding summary judgment. However, Sullivan's failure to dispute the well-pleaded allegations of the complaint permit summary judgment against him in this case.

¶ 80 In its amended complaint, the bank made explicit allegations of its reliance on the fraudulent statements. The bank pleaded that "[i]n reliance on the [borrowing base certificates]," it "advanced millions of dollars" to Plitt and "also relied on the [borrowing base certificates] by failing to enforce its security interest in Plitt's assets, and in forbearing from enforcing Sullivan's and Wegh's personal guaranties." Not only are those statements undisputed, they are further supported by the adverse inferences which may be drawn against Sullivan in asserting his fifth amendment rights with respect to each allegation.

¶ 81 In addition, Wegh's affidavit constituted independent evidence supporting the element of reliance. Wegh's affidavit states: "As Plitt's ability to borrow from [the bank] depended directly on the amounts of its accounts receivables, this overstatement allowed Plitt to borrow more from [the bank] than it would have if the [borrowing base certificate] had been prepared using accurate accounts receivable figures." Thus, Wegh's affidavit corroborates that the intentional misstatements contained in the borrowing base certificates were relied upon by the bank in extending further credit to Plitt. Thus, we conclude that the element of reliance was satisfied.

¶ 82 Sullivan also argues that the bank "failed to adequately support its claimed damages for conspiracy." Sullivan argues that the statement in Perna's affidavit that the outstanding balance

of the loan was $5,299.376.99 "should not have been considered by the trial court, and there was no additional evidence put forth by [the bank] on that matter." Sullivan also notes that Perna's affidavit referred to this figure as representing the bank's damages from "breach of contract" rather than fraud or conspiracy.

¶ 83 We do not find these arguments persuasive. As we have discussed above with respect to Sullivan's motion to strike, Perna averred that she had personal responsibility for servicing the loans, which provided a basis for her knowledge that approximately $5.3 million remained outstanding on those loans as of September 2013. Moreover, as Sullivan failed to provide any counteraffidavit, the statements in Perna's affidavit were admitted and must be taken as true for purposes of summary judgment. Although, as acknowledged by the bank's appellate brief, Perna's affidavit "inartfully" referred to the $5,299.376.99 figure as damages from Plitt's "breach of contract" rather than fraud, we do not find that this choice of words precludes a finding of damages for conspiracy to defraud, given Sullivan's failure to dispute any of the amended complaint's allegations or any of the statements in Wegh's affidavit. This is especially the case since fifth amendment adverse inferences may also be drawn against Sullivan for his refusal to answer the complaint's allegations. Thus, we agree with the trial court that summary judgment was warranted on the cause of action for conspiracy, count III of the amended complaint.

¶ 84 Similarly, we agree with the trial court that the bank was entitled to summary judgment with respect to its count for breach of Sullivan's guaranty. As a guaranty is a contractual obligation, the guaranty claim is governed by the same standards as a breach of contract claim. See *Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 402-03 ("General rules of contract construction apply to guaranty contracts, and where the language of a contract is unequivocal, it must be carried out according to its language." (Internal quotation marks omitted).) "To recover

for the breach of a contract, a party must establish the following elements: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant and (4) resultant injury to the plaintiff." *Zirp-Burnham, LLC v. E. Terrell Associates, Inc.*, 356 Ill. App. 3d 590, 600 (2005).

¶ 85 Sullivan argues that the bank "could not simply rely on an adverse [inference] due to Sullivan's assertion of this Fifth Amendment rights to support summary judgment, but needed to present sufficient additional evidence" of the breach of guaranty. Sullivan claims that "the only evidence that [the bank] submitted in support of its claim for breach was the Perna declaration." Sullivan argues that Perna's statements regarding amounts due and owing under the loans were "unsupported" and offered no basis or calculation for the statement that the bank suffered damages in the amount of $5,299,376.22.

¶ 86 We find Sullivan's arguments unpersuasive. First, we note that the bank did not rely merely on adverse inferences to seek summary judgment on Sullivan's guaranties. Rather, the documents evidencing the bank's loans to Plitt, as well as Sullivan's guaranties of those loans, were attached as exhibits to the amended complaint. As Sullivan elected not to answer the amended complaint, he did not dispute their authenticity. Further, Perna's uncontradicted affidavit averred that those documents were "true and correct" copies of the loans and guaranties.

¶ 87 Moreover, as explained above with respect to the motion to strike Perna's affidavit, Perna's averments regarding her responsibility for overseeing the loans and guaranties supported her statements regarding the amounts due and owing under those agreements. Likewise, Perna's statements regarding her responsibilities permitted her to state, based on personal knowledge that Sullivan had failed to respond to the bank's demands for him to satisfy his obligations under his guaranties. Again, we emphasize that Sullivan never submitted a counteraffidavit, and thus the

statements in Perna's affidavit "are admitted and must be taken as true for purposes of the motion." *Avdic*, 2014 IL App (1st) 121759, ¶ 31. In addition, as in the case of the conspiracy count, we again note that the adverse inferences from Sullivan's pleading the fifth amendment in response to the allegations of the amended complaint, including the allegations concerning his breach of guaranty, further weigh in favor of summary judgment on this count. Thus, we conclude that the trial court did not err in granting summary judgment with respect to count IV of the amended complaint for Sullivan's breach of guaranty.

¶ 88 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 89 Affirmed.