SIXTH DIVISION
Order filed: December 22, 2017

No. 1-17-0622

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOHN Z. KOSOWSKI and THOMAS A. PATREVITO, individually and as assignees of Booklet Binding, Inc. and KP Industrial Properties, LLC,	)	Appeal from the Circuit Court of Cook County
Plaintiffs,	)	
v.	)	No. 13 CH 25905
MARY ALBERTS and MB FINANCIAL BANK, N.A., successor in interest to Cole Taylor Bank,	)	
Defendants-Appellees,	)	
(Thomas A. Patrevito, individually and as assignee of Booklet Binding, Inc. and KP Industrial Properties, LLC, Plaintiff-Appellant).	)	Honorable Margaret Ann Brennan, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunninghman and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's entry of summary judgment in the defendants' favor is affirmed where the plaintiffs failed to establish a genuine issue of material fact on their claims alleging breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, consumer fraud, tortious interference with prospective economic advantage, conversion, and disposition of collateral in a commercially unreasonable manner.

¶ 2 The plaintiff, Thomas Patrevito, as assignee of Booklet Binding, Inc. (Booklet) and KP Industrial Properties, LLC (KP), appeals from the circuit court's order granting summary judgment in favor of the defendants, Mary Alberts (Alberts) and MB Financial Bank, N.A., successor in interest to Cole Taylor Bank (Bank), on his claims of breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, consumer fraud, tortious interference with prospective economic advantage, conversion, and disposition of collateral in a commercially unreasonable manner. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The following factual recitation is taken from the pleadings, affidavits, and depositions of record.

¶ 5 Patrevito and John Kosowski were the founders and co-owners of Booklet and KP. Founded in 1976, Booklet was engaged in the business of trade binding, trade finishing, and direct mail advertising. By 1999 or 2000, the company had grown from 2 or 3 employees to 350 employees. At the time of the events at issue, Booklet operated out of a 366,000 square-foot building in Carol Stream, Illinois (facility) that it leased from KP.

¶ 6 On September 2, 2011, Booklet entered into a Loan and Security Agreement (Loan Agreement) with the Bank for a revolving line of credit in an amount up to $4 million or 80% of Booklet's eligible accounts receivable, whichever was less. Under this arrangement, the amount of available credit varied each month depending upon a formula tied to Booklet's eligible accounts receivable. As Booklet's eligible accounts receivable increased, it could borrow more money under the Loan Agreement. Conversely, when Booklet's eligible accounts receivable decreased, it could borrow less money. The Loan Agreement provided that advances were to be based upon monthly borrowing base certificates prepared by Booklet in "the form and substance

acceptable to the Bank."[1] Moreover, section 2.1(d) of the Loan Agreement stated that, if the aggregate outstanding principal balance of all revolving loans exceeded the available credit (an "overadvance"), Booklet was obligated to immediately, without notice or demand, take all actions and make all repayments to correct the overadvance and bring the loan back within formula. In exchange for the advances, Booklet promised to repay loan amounts and granted the Bank a security interest in substantially all of its assets, including the facility owned by KP.

¶ 7 Relevant here, section 10 of the Loan Agreement set forth various events of default. More specifically, pursuant to section 10.1, an event of default occurs where "[a]ny amount due and owing on the Notes or any of the Obligations *** is not paid within five Business Days of the date when due." Upon the occurrence of an event of default, the Bank was authorized to exercise an assortment of remedies. In general, sections 11.1 and 11.2 gave the Bank discretion to declare its commitments to Booklet to be terminated and to take possession of the collateral. Section 11.3, in turn, contained an "attorney-in-fact" provision, which allowed the Bank to act in Booklet's "name, place and stead" and to take any action to protect its security interest in the collateral and "carry out any remedy ***." In conjunction with the Loan Agreement, the parties also executed a Master Treasury Management Services Agreement (Treasury Agreement) and Reporter Services Agreement (Reporter Agreement) which governed, *inter alia*, Booklet's checking accounts and online banking.

¶ 8 Several months after the parties executed the Loan Agreement, Booklet endured a variety of challenges. In his deposition, Patrevito provided an overview of changes in the printing

[1] Banks and other lenders use borrowing base certificates to monitor a borrower's borrowing base over the life of a loan. For example, the borrowing base certificates submitted by Booklet list its accounts receivable balance, the revolving loan balance, the remaining availability of any loan advance, as well as other details relating to its assets.

industry and how the demand for print advertisements had fallen. He testified that Booklet experienced decreased sales volume, increased competition, and increased costs, all of which hampered its earnings and cash flow.

¶ 9 During the first quarter of 2012, Booklet experienced a "seasonal slowdown" which caused its cash-flow position to "soften." In an email dated April 4, 2012, John O'Sullivan, a senior vice president at the Bank, informed Booklet that it had an overadvance of $1,948,121.44 and that its checking accounts were overdrawn. The outstanding amount led the parties to execute a first amendment to the Loan Agreement on April 17, 2012, in which the Bank allowed a temporary overadvance of $1 million, maturing on July 1, 2012, and required Kosowski to execute a limited guaranty of $500,000.[2] Booklet, however, was unable to bring itself within the borrowing base formula and, on August 16, 2012, the parties entered into a second amendment to the Loan Agreement. Among other things, the second amendment extended the maturity of the overadvance to October 15, 2012. Kosowski testified that Booklet eliminated the overadvance and, in December 2012, the Bank had released his $500,000 personal guaranty. All told, Patrevito and Kosowski described 2012 as a "tough year" and acknowledged that Booklet sustained a year-end loss of approximately $990,000.

¶ 10 In 2013, Booklet's struggles continued. It experienced a cash-flow shortage of approximately $2 million and again found itself in an overadvanced position. On June 21, 2013, the parties executed a third amendment to the Loan Agreement in which the Bank agreed to, *inter alia*, allow a temporary overadvance in the amount of $350,000, maturing on September 1, 2013.

[2] The record is silent as to how Booklet planned to cure the remaining overadvance of $948,121.44 and bring its overdrawn checking accounts to a positive balance.

¶ 11 Also in 2013, Patrevito and Kosowski explored the possibility of hiring David Lemaster as a consultant to help with Booklet's vision and strategy and to help generate revenue. Patrevito testified that Booklet also considered the possibility of having an "angle investor" inject capital into Booklet and help stabilize its revenue. Patrevito and Kosowski met with Ray Frick, a potential investor, but no relationship ensued as Kosowski did not "feel comfortable" with him.

¶ 12 While the third amendment to the Loan Agreement temporarily resolved Booklet's overadvanced position, a string of emails reveal that its checking accounts became overdrawn. For example, in emails dated July 5 and 9, 2013, O'Sullivan informed Nathan Bockler, Booklet's controller, that "the negative cash accounts are getting old" and he is "getting heat" because Booklet missed its June projections and needs more money. O'Sullivan told Bockler to get the overdrafts "cleaned up." On July 16, 2013, O'Sullivan sent an email to Kosowski advising him that Booklet has "had excessive overdrafts the past two weeks" and that it "has created some real headaches." The record also reveals that Booklet's overadvanced position worsened. On July 21, 2013, Booklet submitted its June 30, 2013, borrowing base certificate, which disclosed an overadvance of $63,522.12, in excess of the $350,000 overadvance permitted by the third amendment.

¶ 13 Based upon Booklet's poor performance, O'Sullivan recommended that Booklet hire an outside consultant to create a budget and a plan for getting Booklet back within formula. The Bank also referred Booklet to two consultants it could consider hiring. In an email dated July 25, 2013, Kosowski informed O'Sullivan that Booklet decided to hire Lemaster as its consultant and that Lemaster would "be reviewing operations/ financials/ projections."

¶ 14 On August 1, 2013, Lemaster gave a presentation to the Bank, the purpose of which was to "tell the bank what he had in mind." Kosowski conceded that Lemaster's presentation did not

provide detailed financial information, propose a plan, or otherwise come to a conclusion as to how Booklet's business should proceed. The record reveals, however, that Lemaster later proposed that KP sell the facility to Panattoni, an industrial development company, and then have Booklet lease the facility back from Panattoni (a "sale-leaseback") with four months' free rent.

¶ 15 On August 9, 2013, Booklet submitted its July 31, 2013, borrowing base certificate to the Bank, revealing that Booklet's overadvance had grown to $233,120.10 in excess of the $350,000 overadvance permitted by the third amendment. Booklet never submitted a subsequent borrowing base certificate, it made no repayments to correct the overadvance reflected in the July 31, 2013, borrowing base certificate, and it failed to bring its bank accounts to a positive balance.

¶ 16 As a result of Booklet's failure to cure the overadvance and repay its checking account overdrafts, the Bank sent Booklet a letter of default on August 13, 2013. In it, the Bank advised Booklet that the following Events of Default had occurred and were continuing:

> "(i) Borrower's Borrowing Base Certificate dated July 31, 2013[,] delivered to Lender evinced the fact that the outstanding principal balance of all Revolving Loans exceeded the Revolving Loan Availability by the amount of $233,120.10 but Borrower has failed, within five Business Days of the date when due, to repay *** the Revolving Loans or take such other actions as necessary to eliminate such excess as required by Section 2.1(d) of the Loan Agreement, and (ii) Borrower's checking accounts maintained with Lender are overdrawn in the amount of $614,332.27[,] which amount has not been repaid by Borrower within five Business Days of the date when due ***."

As a result of the events of default, the Bank notified Booklet that, pursuant to section 3 of the Loan Agreement, it had no obligation to honor any request by Booklet to make any revolving loans. The Bank also expressly reserved the right, in its sole and absolute discretion, to pursue, at any time and without notice, any and all rights and remedies provided for in section 11 of the Loan Agreement.

¶ 17 In his deposition, Kosowski admitted that the overadvance and overdrafts referenced in the Bank's August 13, 2013, letter of default were accurate. He also acknowledged that Booklet had no means to cover the overdrafts and that the overdrafts reflected in the letter of default were never cured. Similarly, Bockler testified that Booklet had overdrawn its checking accounts and borrowed more than the Loan Agreement allowed. He also confirmed that Booklet's cash flow had "softened" as a result of it having missed its projected sales numbers and that Booklet had no means to cure the overdrawn checking accounts, cure the overadvance, pay payroll, or otherwise maintain its operations. Patrevito likewise conceded that Booklet was experiencing problems with its cash-flow, had missed its June 2013 projections, had overdrawn its payroll account, and was overadvanced on the revolving loan. At no point did Kosowski, Bockler, or Patrevito dispute the accuracy of the borrowing base certificates or the information contained in the Bank's default letter. Nor did they aver that Booklet cured the overadvance or overdrawn accounts.

¶ 18 Alberts, a senior vice president in the Bank's special assets division, testified that she met with Kosowski, Patrevito, and Bockler on August 13, 2013, and informed them that the Bank was not going to extend future financing and that no checks would be cleared, including payroll checks, unless Booklet's accounts had a positive balance. Although Patrevito and Kosowski offered to pay payroll using their personal funds, Alberts told them that the Bank would apply

any money deposited into the payroll checking account to the overdrafts. She also testified that she "froze" Booklet's accounts and removed its access to the online "reporter system."

¶ 19 In addition to refusing to honor payroll checks, freezing Booklet's checking accounts, and removing its access to online banking, Alberts testified that she attempted to collect on Booklet's accounts receivable. She explained that she worked with Booklet to draft letters instructing Booklet's customers to send any outstanding payments directly to the Bank. Alberts also acknowledged that she received a letter of intent from Panattoni regarding the "sale-leaseback" of KP's facility. She stated, however, that she took no action since an "asset purchase agreement was [not] on the table" and she could not facilitate a closing. Patrevito corroborated Albert's testimony, noting that Panattoni, the prospective purchaser, "went ballistic" after he informed it that Alberts wanted any offer to be in writing.

¶ 20 Although the Bank had declined to extend future financing to Booklet, Alberts sent an email to Patrevito and Kosowski on August 15, 2013, in which the Bank offered to loan Booklet $1 million on condition that the funds be used to clear the overdrafts and pay rent to KP. Patrevito and Kosowski were also required to execute joint and several guaranties of $500,000 "to be secured by assignment of investment accounts." Kosowski testified that he rejected Alberts's proposal because $1 million was not enough to eliminate the overdrafts and allow Booklet to maintain operations. He also claimed that Alberts required him and Patrevito to guarantee $1 million, not $500,000.

¶ 21 Meanwhile, Booklet was unable to fund payroll and it ceased operations on August 19, 2013. Following Booklet's closure, Kosowski testified that he continued to work with Alberts and had discussions with her about returning customer goods and completing work-in-process. He explained that Alberts refused to pay for the labor involved in "loading trucks and getting it

off racks" and the work-in-process was never completed. Alberts stated that she refused to complete work-in-process because it would have cost the Bank approximately $700,000 to finish the work. She also stated that she was "okay with" returning customer property.

¶ 22 On September 15, 2013, Booklet conveyed its assets to Mary Ellen Bowers, as assignee, pursuant to an assignment for the benefit of creditors.[3] On September 17, 2013, Bowers assigned "any and all claims [and] causes of action" that Booklet and KP might have against the Bank to Patrevito and Kosowski. After liquidating the collateral (*e.g.*, KP's facility and Booklet's equipment and inventory), and collecting Booklet's accounts receivable, the Bank was paid in full.

¶ 23 In July 2014, Patrevito and Kosowski, as assignees of Booklet and KP, filed a 12-count amended complaint in the circuit court of Cook County against the Bank and Alberts, alleging, *inter alia*, breach of fiduciary duty (count I), breach of contract (counts III-V), breach of the implied covenant of good faith and fair dealing (count VI), consumer fraud (count VII), tortious interference with prospective economic advantage (counts VIII-IX), conversion (count XI), and disposition of collateral in a commercially unreasonable manner (count XII).[4] The claims asserted in the amended complaint all relate, in one way or another, to the allegation that the

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[3] An assignment for the benefit of creditors is "a voluntary transfer by a debtor of its property to an assignee in trust for the purpose of applying the property or proceeds thereof to the payment of its debts." *Paul H. Schwendener, Inc. v. Jupiter Electric Co.*, 338 Ill. App. 3d 65, 74 (2005).

[4] The amended complaint also sought declaratory relief (count II) and contained a claim of defamation (count X), but those counts were dismissed with prejudice and are not at issue on appeal. All counts were brought against the Bank. The breach of fiduciary duty and tortious interference with prospective economic advantage counts were additionally brought against Alberts.

Bank prematurely declared a default under the Loan Agreement as amended and mishandled collateral that Booklet and KP had pledged to secure the loan.

¶ 24 On October 7, 2016, the Bank and Alberts filed a motion for summary judgment, arguing that they were entitled to judgment as a matter of law on counts I, III-IX, and XI-XII. Regarding count I, the claim of breach of fiduciary duty, the Bank and Alberts argued that no fiduciary duty exists between a debtor and creditor as a matter of law and, alternatively, the circumstances of their relationship did not demonstrate that the Bank or Alberts had superiority and influence over Booklet. As to counts III-VI, the breach-of-contract and good-faith-and-fair-dealing claims, the Bank maintained that Booklet had defaulted under section 10.1 of the Loan Agreement and it was entitled to protect its collateral and undertake debt recovery measures pursuant to section 11 of the Loan Agreement. Next, the Bank argued that the consumer fraud claim (count VII) is nothing more than "a redressed version of [the] breach of contract claims." With respect to counts VIII and IX, the tortious interference claims, the Bank and Alberts argued that their action in sending collection letters to Booklet's customers was permissible under section 11 of the Loan Agreement. They also argued that there is no evidence establishing that the Bank interfered with the sale of the facility. Last, regarding counts XI and XII, the Bank asserted that no evidence exists that it converted any of Booklet's assets or otherwise violated Article 9 of the Illinois Commercial Code (ICC) (810 ILCS 5/9-101 *et seq*. (West 2012)) by disposing of Booklet's assets in a commercially unreasonable manner. The Bank claimed that it is undisputed that it did not possess, control, or dispose of any collateral; rather, Bowers disposed of the collateral pursuant to the assignment for the benefit of creditors. The Bank and Alberts supported their motion with deposition testimony, and documents produced during the discovery phase of litigation.

¶ 25 In opposing the motion, Patrevito and Kosowski argued that questions of fact exist on all of their claims. As to count I, they asserted that a fiduciary relationship was created as a matter of law because the Loan Agreement contained an "attorney-in-fact" provision, in which the Bank served as Booklet's agent. Patrevito and Kosowski disputed the Bank's and Alberts's alternative claim that they did not stand in a position of dominance and superiority and, as a consequence, a question of fact remains as to whether the special circumstances of their relationship created a fiduciary duty. Regarding counts III-VI, alleging breach of contract and breach of the covenant of good faith and fair dealing, Patrevito and Kosowski maintained that a question of fact exists as to whether an "event of default," as that phrase is defined in section 10.1 of the Loan Agreement, occurred. They pointed out that Booklet had five days to cure any overadvance and the Bank submitted no evidence establishing that Booklet remained in an overadvanced position for five consecutive days. As to the consumer fraud claim (count VII), Patrevito and Kosowski asserted that the Bank engaged in a variety of deceptive acts and practices—*e.g.*, prematurely declaring a default and liquidating the collateral. They further argued that a genuine issue of material fact exists on their tortious interference claims (counts VIII and IX), based upon undisputed evidence that the Bank and Alberts (1) sent debt-collection letters to Booklet's customers and (2) refused to remove the Bank's lien on the facility, thereby interfering with the proposed sale and leaseback. Finally, Patrevito and Kosowski argued that the Bank converted the collateral held as security for the loan and disposed of it in a commercially unreasonable manner in violation of article 9 of the ICC.

¶ 26 In February 2017, the circuit court entered an order granting summary judgment in favor of the Bank and Alberts on counts I, III-IX, and XI-XII of the amended complaint. Patrevito filed

a timely notice of appeal. Kosowski has not appealed from the circuit court's order, and consequently, is not a party to this appeal.

¶ 27 II. ANALYSIS

¶ 28 A. Standard of Review

¶ 29 Summary judgment is appropriate where "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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016); *Blanchard v. Berrios*, 2016 IL 120315, ¶ 12. In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 34. However, the inferences drawn in favor of the nonmovant must be supported by the evidence. Mere speculation, conjecture, or guess is insufficient to defeat a motion for summary judgment. *Schade v. Clausius*, 2016 IL App (1st) 143162, ¶ 19. While a plaintiff need not prove his case at the summary judgment stage, he must present enough evidence to create a genuine issue of fact. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). We review the grant of summary judgment *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 30 B. Breach of Fiduciary Duty

¶ 31 We first address Patrevito's contention that the circuit court erred in granting summary judgment in favor of the Bank and Alberts on count I of the amended complaint, alleging breach of fiduciary duty.

¶ 32 To prevail on a claim of breach of fiduciary duty, a plaintiff must show (1) the existence of a fiduciary duty on the part of the defendants, (2) the defendants' breach of that duty, and (3) damages proximately resulting from that breach. *Lawlor v. North American Corp. of Illinois*,

2012 IL 112530, ¶ 69. In this case, the parties disagree as to whether a fiduciary relationship exists.

¶ 33 "A fiduciary relationship exists where one party reposes trust and confidence in another, who thereby gains a resulting influence and a superiority over the subservient party." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 58. A fiduciary relationship may arise as a matter of law, such as between agent and principal, or as a matter of fact due to the special circumstances of the parties' relationship. *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010). As a general rule, however, a fiduciary relationship does not exist between a debtor and creditor. *Paskas v. Illini Federal Savings & Loan*, 109 Ill. App. 3d 24, 31 (1982); see also *Santa Claus Industries v. First National Bank of Chicago*, 216 Ill. App. 3d 231, 238 (1991).

¶ 34 Here, Patrevito contends that a fiduciary relationship arose as a matter of law because the parties' relationship was governed by the Loan Agreement, and pursuant to section 11.3, the Bank served as Booklet's "agent-in-fact." The Bank and Alberts respond by citing to section 6.13 of the Loan Agreement, which states that the parties' relationship was conducted on an "arm's length basis in which no fiduciary relationship exists."

¶ 35 As the parties disagree on how the Loan Agreement should be construed, we turn to the well-settled rules of contract interpretation. In construing a contract, the primary objective is to give effect to the intention of the parties. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). A court will first look to the language of the contract itself to determine the parties' intent. *Id.* at 233. A contract must be construed as a whole, viewing each provision in light of the other provisions. *Id*. The parties' intent is not determined by viewing a clause or provision in isolation, or by looking at detached portions of the contract. *Id*. If the words in the contract are clear and unambiguous, they must be given their plain, ordinary, and popular meaning. *Central Illinois*

Light Co. v. Home Insurance Co., 213 Ill. 2d 141, 153 (2004). However, if the language of the contract is susceptible to more than one meaning, it is ambiguous, and a court can consider extrinsic evidence to determine the parties' intent. *Gallagher*, 226 Ill. 2d at 233. "When the language of a contract is clear and unambiguous, construction of the contract is a matter of law that is subject to *de novo* review." *Dean Management, Inc. v. TBS Construction, Inc.*, 339 Ill. App. 3d 263, 269 (2003).

¶ 36 Section 6 of the Loan Agreement sets forth various representations and warranties that Booklet made "[t]o induce the Bank to make the Loans." Section 6.13 states as follows:

> "6.13. Lending Relationship. The Borrower acknowledges and agrees that the relationship hereby created with the Bank is and has been conducted on an open and arm's length basis in which *no fiduciary relationship exists* and that the Borrower has not relied and is not relying on any such fiduciary relationship in executing this agreement and in consummating the Loans. The Bank represents that it will receive the Notes payable to its order as evidence of a bank loan." (Emphasis added.)

Section 11 of the Loan Agreement sets forth the Bank's remedies "[u]pon the occurrence of an Event of Default." Section 11.3 states, in pertinent part, as follows:

> "11.3. Attorney-in-Fact. The Borrower hereby *** appoints the Bank *** as the Borrower's true and lawful proxy and attorney-in-fact (and agent-in-fact) in the Borrower's name, place and stead, with full power of substitution, to (1) take such actions as are permitted in this agreement, (2) execute such financing statements and other documents and to do such other acts as the Bank may require to *perfect and preserve the Bank's security interest in, and to enforce such*

> *interests in the Collateral*, and (3) *carry out any remedy provided for in this agreement*, including, without limitation, endorsing the Borrower's name to checks, drafts, instruments and other items of payment, and proceeds of the Collateral ***." (Emphasis added.)

¶ 37 In our view, the language of sections 6.13 and 11.3 is incapable of being understood in more than one sense. Section 6.13 plainly and clearly states that it applies to the parties' relationship and that the parties intended that no fiduciary duty exists between the Bank and Booklet. Section 11, in contrast, does not govern the parties' relationship, but merely applies where an event of default occurs. It provides that, upon the occurrence of an event of default, the Bank shall have the option to declare that its commitments to Booklet be terminated, and authorized the Bank to take possession of the collateral for the loan. Sections 11.1 and 11.2 state the remedies available to the Bank while section 11.3 allows the Bank to act in Booklet's "name, place and stead" to "perfect and preserve" and "enforce" its interest in Booklet's collateral and "carry out any remedy" provided for in the Loan Agreement. Nowhere in the Loan Agreement does it say that the Bank's disposition of collateral must be done in Booklet's best interest. See *Harris v. Key Bank National Ass'n*, 193 F. Supp. 2d 707, 717 (W.D.N.Y. 2002) ("it would be absurd to think that [a bank] could never take its own interests into account, or that [the borrower's] interest had to be absolutely paramount at all times and in all situations"). Given the plain language of section 6.13, and viewing the Loan Agreement as a whole, we hold that the attorney-in-fact provision did not create a fiduciary relationship between the parties as a matter of law. See also *Layne v. Bank One, Kentucky, N.A.*, 395 F.3d 271, 282 (6th Cir. 2005) (holding that an attorney-in-fact provision in loan agreement did not create a fiduciary relationship). To hold otherwise would render section 6.13 meaningless. See *Thompson v. Gordon*, 241 Ill. 2d

428, 442 (2011) ("A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used.").

¶ 38 In so holding, we decline to follow *Knox v. Regions Bank*, 103 Ark. App. 99, 105 (2008), relied upon by Patrevito, which held that an attorney-in-fact provision in a loan agreement created a fiduciary relationship between a bank and a borrower. Rather, we follow the body of Illinois case law holding that a fiduciary relationship does not exist between a creditor and debtor as a matter of law. See *Paskas*, 109 Ill. App. 3d at 31; *Santa Claus*, 216 Ill. App. 3d at 238.

¶ 39 Having found that no fiduciary relationship existed between the Bank and Booklet as a matter of law, we next consider Patrevito's alternative argument that a fiduciary relationship existed as a matter of fact. A fiduciary relationship may arise between a bank and a debtor where the debtor is "subject to domination and influence on the part of the bank." *Paskas*, 109 Ill. App. 3d at 31. The essence of a fiduciary relationship is that one party is dominated by the other, and the dominant party has accepted the trust of the inferior party. *Tully v. McLean*, 409 Ill. App. 3d 659, 683 (2011). The party seeking to establish the relationship must show that he "placed trust and confidence in another so that the other gained influence and superiority over him." *Santa Claus*, 216 Ill. App. 3d at 238. "The degree of trust and confidence can be shown by such factors as degree of kinship, age disparity, health, mental condition, education, business experience, and extent of reliance" on the dominant party. *Id.*

¶ 40 Patrevito relies on the following facts to support his claim of a fiduciary relationship: the Bank "assumed the role of financial adviser;" Booklet trusted its banker, O'Sullivan, and "followed [him] from bank to bank;" the parties had a history of working together; the Bank advised Booklet to hire a financial consultant; and the Bank recommended the sale and leaseback

of the facility to increase Booklet's cash flow.

¶ 41 We find that none of the factors for consideration in *Santa Claus* support a finding that Booklet was dominated by the Bank or Alberts. There is no evidence of any kinship between the parties, and no suggestion of an age disparity—Patrevito and Kosowski were neither so young and naive as to be necessarily dominated by the bank, nor does the evidence show that they were so very old that they were no longer in possession of their faculties. There has been no evidence or allegation of failing health, or any mental condition which would leave Patrevito or Kosowski unable to conduct their own affairs. As to the parties' level of education, Patrevito testified that he received a bachelor's degree from Southern Illinois University and Kosowski testified that he attended a junior college for two years. There is no evidence that they lacked in this respect. The evidence of record also establishes that Patrevito and Kosowski were successful business partners, founding Booklet in 1976 and growing the company from 2 or 3 employees to over 350 full-time employees. Thus, they were not novices in the business world. Moreover, the record rebuts Patrevito's contention that the Bank recommended the sale-leaseback of KP's facility; rather, the evidence reveals Lemaster was the source of the proposal. And, to the extent Patrevito argues that the Bank exercised superiority and influence over Booklet by suggesting that it hire a financial consultant, the record reveals that Patrevito and Kosowski were already exploring the possibility of hiring a financial adviser before the Bank's suggestion and ultimately hired Lemaster after refusing to hire the two financial advisers recommended by the Bank. In any case, the Bank's recommendation that Booklet consider hiring a financial adviser, standing alone, is insufficient to establish that the Bank was in a position of significant dominance and superiority. See *In re Badger Freightways, Inc.*, 106 B.R. 971, 977 (N.D. Ill. 1989) (recommending a financial consultant, closely monitoring borrower's finances, and making business

recommendations is insufficient to establish a fiduciary relationship). In short, the documents, exhibits, and depositions establish that Booklet exercised independent judgment in the control of its business and Patrevito's evidence has not shown facts from which a fiduciary relationship can be inferred.

¶ 42 Therefore, because Patrevito failed to establish a genuine issue of material fact on the issue of whether the Bank and Alberts stood in a fiduciary relationship with Booklet and KP, the Bank and Alberts are entitled to judgment as a matter of law on count I of the amended complaint.

¶ 43 C. Breach of Contract

¶ 44 We next address Patrevito's contention that the Bank was not entitled to summary judgment on his breach-of-contract claims. In count III of the amended complaint, Patrevito alleged that the Bank breached the Loan Agreement by wrongfully declaring a default and liquidating the collateral. Counts IV and V allege that the Bank breached the Treasury Agreement and Reporter Agreement, respectively, by removing Booklet's access to checking accounts and online banking.

¶ 45 To prevail on a breach of contract action, a plaintiff must establish the following: (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) damages or injury to the plaintiff as a result of the breach. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 27. In this case, the parties' dispute centers on whether the Bank breached its contracts with Booklet by prematurely declaring a default under section 10 of the Loan Agreement.

¶ 46 Section 10 of the Loan Agreement sets forth various events of default. It provides, in pertinent part, as follows:

> "10. EVENTS OF DEFAULT. The Borrower, without notice or demand of any kind, shall be in default under this agreement upon the occurrence of any of the following events (each an 'Event of Default'):
>
> > 10.1. Nonpayment of Obligations. Any amount due and owing on the Notes or any of the Obligations, whether by its terms or as otherwise provided in this agreement, is not paid within five Business Days of the date when due."

Section 2.1(d) of the Loan Agreement governs Booklet's obligations in the event of an overadvance:

> "(d) In the event the aggregate outstanding principal balance of all Revolving Loans exceed the Revolving Loan Availability, the Borrower shall, without notice or demand of any kind, immediately make such repayments of the Revolving Loans or take such other actions as shall be necessary to eliminate such excess."

¶ 47 In support of its motion for summary judgment, the Bank presented evidence establishing that, as of July 31, 2013, Booklet's checking accounts were overdrawn in the amount of $614,332.27, and it was overadvanced in the amount of $233,120.10. The Bank also relied upon statements contained in the letter of default, dated August 13, 2013, in which Booklet was informed that an event of default occurred based upon its failure to cure the overdrafts and overadvance within five business days. The deposition testimony of Kosowski, Bockler, and Patrevito did not refute this evidence. In fact, Kosowski testified in his deposition that the overadvance and overdrafts referenced in the Bank's letter of default were accurate, and he admitted that Booklet had no means to cover the overdrafts and that the overdrafts were never

cured. Bockler similarly testified that Booklet had overdrawn its checking accounts, borrowed more than the Loan Agreement allowed, and had no means to cure the overdrafts, overadvance, or otherwise maintain its operations. Even Patrevito admitted that Booklet was experiencing cash-flow problems, had overdrawn its payroll account, and was overadvanced on the revolving loan.

¶ 48 Patrevito's brief on appeal does not controvert the Bank's evidentiary materials showing that Booklet's loan was overadvanced or that its checking accounts were overdrawn. Rather, he attempts to create a genuine issue of material fact by arguing that the Bank failed to explain how it determined that Booklet remained in an overadvanced position for five consecutive business days. We note, however, that any alleged failure to explain the default does not create an issue of material fact. Patrevito put forth no evidence to negate the facts that Booklet's revolving loan was overadvanced and that its checking accounts were overdrawn. Nor did he offer any evidence showing that Booklet cured the overadvance and overdrawn checking accounts within five business days. Instead, he relies solely upon the arguments of counsel. Such arguments, regardless of their quality, are not enough to prevent summary judgment in favor of the Bank. *Triple R Development, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 16 (mere argument alone is insufficient to raise an issue of material fact). Thus, there was no factual issue as to whether an event of default occurred.

¶ 49 As a result of Booklet's default, the Bank was entitled to exercise its remedies pursuant to section 11 of the Loan Agreement. That section allowed the Bank, upon the occurrence of an event of default, to "take possession of any or all of the Collateral *** wherever it may be found." Likewise, the Bank was entitled to deny Booklet access to its checking accounts under section 13.3 of the Treasury Agreement which stated that the Bank "may terminate this

Agreement and any or all Services immediately: *** (c) upon your default under any other agreement or instrument between you and us after giving effect to any notice or cure periods." Likewise, the Bank was permitted to deny Booklet access to online banking pursuant to section 3.1 of the Reporter Agreement, which states: "Upon your material default, we may terminate this [Reporter] Agreement immediately, without notice or other action." The Reporter Agreement "is subject to *** all of the terms and conditions contained in the [Treasury] Agreement ***." Simply put, because the uncontroverted evidence established that Booklet failed to cure its overadvance and overdrafts within five business days, the Bank was entitled to declare a default, liquidate the collateral, and deny Booklet access to its checking accounts and online banking.

¶ 50 We conclude, therefore, that no genuine issue of material fact exists on the question of whether the Bank breached the Loan Agreement, Treasury Agreement, or Reporter Agreement, and the Bank is entitled to judgment as a matter of law on counts III-V of the amended complaint.

¶ 51 D. Good Faith and Fair Dealing

¶ 52 In a related argument, Patrevito asserts that he raised a genuine issue of material fact on his claim that the Bank breached the implied covenant of good faith and fair dealing. Count VI of the amended complaint alleged that the Bank acted in bad faith by sending collection letters to Booklet's customers, refusing to complete work-in-process, refusing to allow the sale of KP's facility, refusing to honor payroll checks and lend additional money, and refusing to return customer goods. We address each allegation in turn.

¶ 53 Every contract has an implied covenant of good faith and fair dealing. *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 112 (1993). Breach of the duty of good faith and fair dealing arises only when one party is "vested with contractual discretion" and exercises that

discretion "arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectation of the parties." *Bank One v. Roscetti*, 309 Ill. App. 3d 1048, 1059-60 (1999). However, the duty of good faith and fair dealing is an implied covenant, and it cannot be used to overrule or modify the express terms of a contract. *Id.* at 1060. Nor may the implied covenant of good faith and fair dealing be used to read into a contract an obligation that does not exist. *J.P. Morgan Chase Bank, N.A. v. East-West Logistics, LLC*, 2014 IL App (1st) 121111, ¶ 48.

¶ 54 First, with respect to Patrevito's claim that the Bank acted in bad faith by sending collection letters to Booklet's customers, this assertion boils down to nothing more than his unhappiness with the Bank's decision to exercise its privileges and rights expressly reserved in the Loan Agreement. As discussed above, there is no dispute that Booklet's checking accounts were overdrawn and its revolving loan was overadvanced. Nor is there any dispute that Booklet failed to cure these defaults within five business days. As a result, an event of default occurred and the Bank had a clear contractual right, pursuant to section 11 of the Loan Agreement, to "take possession of any or all of the Collateral *** wherever it may be found." Since the Loan Agreement gave the Bank a security interest in all of Booklet's assets, including its accounts receivable, the Bank was authorized to send letters to Booklet's customers in an attempt to collect on its accounts receivable. See *Delcon Group, Inc. v. Northern Trust Corp.*, 159 Ill. App. 3d 275, 279 (1987).

¶ 55 We also disagree with Patrevito's contention that the Bank acted in bad faith by refusing to complete work-in-process. No provision, express or implied, in the Loan Agreement or its amendments required the Bank to do Booklet's work and the covenant of good faith and fair dealing may not be used to read into a contract an obligation that does not exist. As the first priority secured creditor, it was not unreasonable for the Bank to opt out of deals it considered to

be unfavorable, especially in light of Alberts's testimony that completing work-in-process would have cost the Bank $700,000. See *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1358 (7th Cir. 1990) ("the Bank was entitled to advance its own interests, and it did not need to put the interests of debtor and debtor's other creditors first.").

¶ 56 Likewise, Patrevito's claim that the Bank violated the covenant of good faith and fair dealing by refusing to allow the sale of the facility also fails. Again, there is nothing in the Loan Agreement—or any other agreement between the parties—that required the Bank to release its collateral (*e.g.*, the facility) or any liens thereon. To the contrary, section 11.2 expressly states that "the Bank *may* *** take possession of, use, remove, *keep* and store any of the Collateral ***." (Emphasis added.) In any case, Alberts testified that she took "no action" on the letter of intent because there was nothing she could do to facilitate a real estate closing until a written offer was "on the table." Patrevito did not offer any evidence to controvert Alberts's testimony, and he points to nothing in the record establishing that the Bank refused to allow the sale of the facility.

¶ 57 Similarly, Patrevito cannot establish a triable issue of material fact regarding the Bank's refusal to "honor payroll checks" and lend additional money. No provision of the Loan Agreement, Treasury Agreement, or Reporter Agreement, required the Bank to "honor payroll checks" from an overdrawn checking account or obligated it to lend additional money when Booklet was overadvanced. We also observe that the Bank submitted evidence showing that Alberts did, in fact, offer to loan Booklet an additional $1 million on August 15, 2013, but the offer was never accepted. As such, Patrevito's claim that the Bank refused to lend additional money is rebutted by the record.

¶ 58 Finally, with respect to Patrevito's assertion that the Bank failed to act in good faith when

it refused to return customer goods, we note that Alberts specifically testified that she was "okay with" returning customer goods. Patrevito presented no evidence disputing Alberts's testimony; nor did he introduce any evidence identifying the customer goods that the Bank withheld. Hence, Patrevito has failed to produce any evidence in support of this final allegation that the Bank breached its duty of good faith and fair dealing.

¶ 59 Based upon the foregoing analysis, we conclude that Patrevito failed to demonstrate a genuine issue of material fact as to whether the Bank breached the implied covenant of good faith and fair dealing. We conclude, therefore, that the Bank is entitled to summary judgment on count VI of the amended complaint.

¶ 60 E. Consumer Fraud

¶ 61 Next, Petrevito maintains that the circuit court erred when it entered summary judgment in the Bank's favor on count VII, his claim under the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2012)).

¶ 62 In order to establish a violation of the Consumer Fraud Act, a plaintiff must demonstrate: (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff, (5) proximately caused by the deception. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 72 (2007).

¶ 63 Patrevito argues that a triable issue of material fact exists on the question of whether the Bank engaged in a deceptive act or practice. Patrevito restyles his earlier arguments of breach of contract into consumer fraud claims. Specifically, he argues that the Bank engaged in a deceptive act or practice by: (1) improperly issuing a letter of default, (2) wrongfully shutting off Booklet's

access to online banking, and (3) improperly "dishonoring payroll checks" without notice. These arguments, however, amount to nothing more than allegations of breach of contract.

¶ 64 "A breach of contractual promise, without more, is not actionable under the Consumer Fraud Act." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 169 (2005). As our supreme court explained:

> "What plaintiff calls consumer fraud or deception is simply defendants' failure to fulfill their contractual obligations. Were our courts to accept plaintiff's assertion that promises that go unfulfilled are actionable under the Consumer Fraud Act, consumer plaintiffs could convert any suit for breach of contract into a consumer fraud action. However, it is settled that the Consumer Fraud Act was not intended to apply to every contract dispute or to supplement every breach of contract claim with a redundant remedy. We believe that a deceptive act or practice involves more than the mere fact that a defendant promised something and then failed to do it. That type of misrepresentation occurs every time a defendant breaches a contract." (Internal quotation marks and citations omitted.) *Id.*

¶ 65 As discussed above, the undisputed evidence established that, as of July 31, 2013, Booklet's checking accounts were overdrawn in the amount of $614,332.27, it was overadvanced in the amount of $233,120.10, and it failed to cure the overdrawn checking accounts and overadvance within five days. As such, Booklet had defaulted under section 10.1 the Loan Agreement. Consequently, the Bank was authorized to declare a default, deny Booklet access to online banking, "dishonor payroll checks," and protect its security interest in the collateral. Because Patrevito failed to produce any counter-evidentiary material establishing a breach of contract by the Bank, or conduct not authorized under the Loan Agreement, he cannot show that

the Bank engaged in a deceptive act or practice. Accordingly, summary judgment in the Bank's favor on count VII of the amended complaint was appropriate.

¶ 66 F. Tortious Interference

¶ 67 We next consider the question of whether summary judgment was properly entered in the Bank's and Alberts's favor on the claims of tortious interference with prospective economic advantage as set forth in counts VIII and IX of the amended complaint. More specifically, count VIII alleged that the Bank and Alberts interfered with Booklet's customers by sending collection letters to its customers, refusing to finish work-in-process, refusing to return customer goods, and refusing to "honor payroll checks." Counts VIII and IX both assert that the Bank's improper conduct "caused multiple lucrative clients *** to take their business elsewhere." Count IX of the amended complaint alleged that the Bank and Alberts interfered with the sale of KP's facility by refusing to release its lien on the property.

¶ 68 To recover for tortious interference with prospective economic advantage, a plaintiff must establish the following elements: "(1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference. [Citation.]" *Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 300-01 (2001). "A plaintiff states a cause of action only if he alleges a business expectancy with a specific third party as well as action by the defendant directed towards that third party." *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1020 (2005).

¶ 69 As to count VIII, Patrevito's claim that the Bank and Alberts interfered with Booklet's customers, we initially note that we do not consider the allegation that the Bank and Alberts

refused to "honor payroll checks." These actions were not directed toward anyone other than Booklet and, therefore, these facts cannot establish that the Bank or Alberts interfered with an economic advantage Booklet had with its customers. See *Boffa Surgical Group LLC v. Managed Healthcare Assocs. Ltd.*, 2015 IL App (1st) 142984, ¶ 28 ("It is not enough for the defendant's action to impact a third party; rather, the defendant's action must be directed towards the third party.").

¶ 70 Regarding Patrevito's argument that the Bank and Alberts tortiously interfered with Booklet's customers by sending collection letters, we believe this claim fails on the third element—namely, the requirement of an intentional and unjustified interference by the Bank or Alberts. As we noted above, there is no dispute that Booklet was in actual default by overdrawing its checking accounts, borrowing more than the Loan Agreement allowed, and failing to cure the overdraw and overadvance within five business days. Under section 11 of the Loan Agreement, the Bank had a clear contractual right to "take possession of any or all of the Collateral *** wherever it may be found." Thus, the Bank and Alberts were authorized to send letters to Booklet's customers in an attempt to collect on its accounts receivable. See *Delcon Group*, 159 Ill. App. 3d at 279.

¶ 71 We also reject Patrevito's contention that the Bank and Alberts interfered with Booklet's customers based on their refusal to complete work-in-process. As noted above, the Bank was the first priority secured lender and it was authorized under section 11 of the Loan Agreement to protect its security interest in the collateral—including Booklet's inventory. It was not unreasonable for the Bank to opt out of deals it considered to be unfavorable, especially in light of Alberts's testimony that completing work-in-process would have cost the Bank $700,000. Indeed, it would be absurd to think that the Bank could not take its own interests into account or

that it had to place the interests of Booklet's customers ahead of its own. See *Kham & Nate's Shoes*, 908 F.2d at 1358; *Harris*, 193 F. Supp. 2d at 717. Under these circumstances, we cannot say that the Bank's and Alberts's refusal to complete work-in-process was an *unjustified* interference with Booklet's customers. With respect to Patrevito's assertion that the Bank and Alberts interfered with Booklet's customers by refusing to return customer goods, we note that Alberts specifically testified that she was "okay with" returning customer goods and any property that did not belong to Booklet. Patrevito presented no evidence disputing Alberts's testimony; nor did he point to any evidence of record identifying the customer goods that the Bank intentionally and unjustifiably withheld.

¶ 72 Likewise, as to count IX, the claim that the Bank and Alberts interfered with the sale of KP's facility, Patrevito failed to produce any evidence establishing that the Bank's or Alberts's refusal to release its lien on the facility was an intentional and unjustified interference. Again, there is nothing in the Loan Agreement—or any other agreement between the parties—that required the Bank to release its collateral (*e.g.*, the facility) or any liens thereon. To the contrary, section 11.2 expressly states that "the Bank *may* *** take possession of, use, remove, *keep* and store any of the Collateral ***." (Emphasis added.) In any case, Alberts testified that she took "no action" on the letter of intent because there was nothing she could to do to facilitate a real estate closing until a written offer was "on the table." Patrevito did not controvert Alberts's testimony. And, even we accept his argument that the Bank and Alberts refused to release the lien on the facility, such conduct was not directed towards a third-party and cannot support a claim of tortious interference with an economic advantage. See *Boffa Surgical Group*, 2015 IL App (1st) 142984, ¶ 28.

¶ 73 In sum, we conclude that Patrevito failed to create a genuine issue of material fact on the

issue of whether the Bank or Alberts intentionally or unjustifiably interfered with Booklet's customers (count VIII) or the sale of KP's facility (count IX). Therefore, we affirm the circuit court's entry of summary judgment in the Bank's and Alberts's favor on counts VIII and IX of the amended complaint.

¶ 74 G. Conversion

¶ 75 Next, Patrevito contends that the circuit court erred in granting summary judgment in the Bank's favor on count XI of the amended complaint, which alleged conversion. He argues that Booklet and KP had the right to immediate possession of the collateral that secured the Loan Agreement, and that, since no event of default occurred under the Loan Agreement, the Bank had no right to take possession of the collateral. Again, we disagree.

¶ 76 To prevail on a claim for conversion, a plaintiff must demonstrate: (1) unauthorized and wrongful control, dominion, or ownership by the defendant over the plaintiff's property; (2) the plaintiff's right in the property; (3) the plaintiff's absolute and unconditional right to the immediate possession of the property; and (4) a demand for possession of the property. *Loman v. Freeman*, 229 Ill. 2d 104, 127 (2008).

¶ 77 Preliminarily, we note that Patrevito fails to identify the collateral that the Bank allegedly converted. To the extent he claims that the Bank converted the facility, we note that real property cannot be the subject of a conversion claim. See *In re Thebus*, 108 Ill. 2d 255, 260 (1985); Restatement (Second) of Torts § 222A ("Conversion is an intentional exercise of dominion or control *over a chattel* ***." (Emphasis added.)). Thus, Patrevito has failed to create a genuine issue of material fact on any claim that the Bank converted the facility.

¶ 78 Turning to Patrevito's claim that the Bank took unauthorized and wrongful control over Booklet's collateral—namely, its equipment, inventory, and accounts receivable—we have

already concluded that the Bank presented undisputed evidence that Booklet defaulted under the Loan Agreement. The Bank was therefore entitled to exercise its contractual rights under section 11 of the Loan Agreement, which permitted it to "take possession of any or all of the Collateral *** wherever it may be found." Consequently, Patrevito failed to establish a genuine issue of material fact on the issue of whether the Bank exerted "unauthorized" or "wrongful" control, dominion, or ownership over Booklet's collateral. The Bank was therefore entitled to judgment as a matter of law on count XI of the amended complaint, alleging conversion.

¶ 79 H. Commercial Reasonableness

¶ 80 We finally consider the question of whether summary judgment was properly entered in the Bank's favor on count XII of the amended complaint, which alleged that the Bank liquidated Booklet's collateral in a commercially unreasonable manner in violation of Article 9 of the ICC (810 ILCS 5/9-101 *et seq*. (West 2012)).

¶ 81 At the outset, we note that Patrevito's brief on appeal fails to explain why he believes the Bank was not entitled to summary judgment on count XII of the amended complaint. Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) provides that an appellant's opening brief must contain the contentions and reasons therefor, with citation to the authorities upon which the appellant relies. As a reviewing court, we are entitled to have the issues clearly defined, pertinent authority cited, and a cohesive legal argument presented. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5. The appellate court is not a depository in which the appellant may foist the burden of argument and research. *Lewis v. Heartland Food Corp.*, 2014 IL App (1st) 123303, ¶ 5. Arguments that are not supported with citations to authority fail to meet the requirements of Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) and are forfeited.

¶ 82 In this case, Patrevito has failed to provide a cohesive legal argument or a reasoned basis for his contention that the Bank was not entitled to summary judgment on the claim that the Bank liquidated Booklet's collateral in a commercially unreasonable manner. He also fails to cite to any statutes or case law. Accordingly, his argument on this issue is forfeited. Forfeiture aside, and to the extent that Patrevito has made a legal argument, his contention of error fails on the merits.

¶ 83 Article 9 of the ICC provides that, "[a]fter default, a secured party may sell *** or otherwise dispose of any or all of the collateral ***." 810 ILCS 5/9-610(a) (West 2012). "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) (West 2012). Commercial reasonableness is determined on a case-by-case basis unless the manner of the sale falls under one of the "safe harbor" exceptions in section 9-627 of the ICC. Relevant here, section 9-627(c) provides as follows:

> "(c) Approval by court or on behalf of creditors. A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:
>
> (1) in a judicial proceeding;
>
> (2) by a bona fide creditors' committee;
>
> (3) by a representative of creditors; or
>
> (4) by an assignee for the benefit of creditors." 810 ILCS 5/9-627(c) (West 2012).

Where collateral is disposed of pursuant to the safe-harbor provisions in section 9-627(c), the transaction is commercially reasonable as a matter of law. See, *e.g.*, *Frontier Investment Corp. v.*

Belleville National Savings Bank, 119 Ill. App. 2d 2, 11 (1969) (the disposition of stock was commercially reasonable as a matter of law where the circuit court had approved of the transfer).

¶ 84 In the case *sub judice*, the circuit court was correct to find that the disposition of Booklet's collateral was commercially reasonable. There is no dispute that Booklet entered into an assignment for the benefit of creditors and assigned its rights in the collateral to Bowers, as assignee. The undisputed evidence reveals that Bowers, not the Bank, disposed of Booklet's assets. Since the disposition of Booklet's collateral was approved by Bowers, as an assignee for the benefit of creditors, the safe-harbor provision contained in section 9-627(c)(4) applies and conclusively establishes that the disposition of collateral was commercially reasonable.

¶ 85 Accordingly, Patrevito has failed to raise a genuine issue of material fact on his claim that the Bank disposed of Booklet's assets in a commercially unreasonable manner and the Bank is, therefore, entitled to judgment as a matter of law on count XII of the amended complaint.

¶ 86 III. CONCLUSION

¶ 87 Based upon the foregoing analysis, we affirm the circuit court's summary judgment in favor of the Bank and Alberts on counts I, III-IX, and XI-XII of the amended complaint.

¶ 88 Affirmed.