2014 IL App (1st) 131075-U

No. 1-13-1075

Filed March 31, 2015

FIFTH DIVISION

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF DENNIS NARDONI, Deceased	)	Appeal from the
	)	Circuit Court
(Standard Bank and Trust Company,	)	of Cook County
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 10 P 6715
	)	
Michael D. Hughes, Independent Executor of the Estate of Dennis Nardoni, deceased,	)	Honorable
	)	James G. Riley,
Respondent-Appellee).	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's order granting summary judgment to guarantor's estate and denying summary judgment to bank seeking payment from the estate under guaranties given for loans made by the bank is affirmed. The bank's

> conduct in holding collateral for over three years and refusing to cooperate with the estate in using the collateral to settle one of the loans was commercially unreasonable. The bank's issuance of a third loan after the guarantor's death was a novation of two earlier loans and extinguished the estate's liability under guaranties given for the earlier loans.

¶ 2 Petitioner Standard Bank and Trust Company (Standard Bank) filed two claims against Michael D. Hughes, as the independent executor of the estate of Dennis Nardoni, deceased, (the estate). Standard Bank sought to enforce two guaranties Nardoni had executed for loans Standard Bank made to Cap Estate Corp. (Cap) and Auster Acquisitions LLC (Auster). The trial court denied Standard Bank's motions for summary judgment, granted the estate's cross-motions for summary judgment and denied Standard Bank's motions to reconsider. Standard Bank argues on appeal that the court erred in denying its motions for summary judgment and granting the estate's cross-motions for summary judgment on (1) the Cap claim, asserting the court erred in (a) finding that Standard Bank had impaired collateral and discharging Nardoni as guarantor and (b) finding that Nardoni's guaranty was dependant on other guarantors and limiting Nardoni's liability under the guaranty based on a lost right of contribution; and (2) the Auster claim, asserting the court erred in (a) finding that the loan made to Auster after Nardoni's death was a novation, a new loan not subject to Nardoni's guaranties for two earlier loans to Auster and (b) finding that death revoked Nardoni's guaranty and that no new liability could be created after his death. We affirm.

¶ 3 BACKGROUND

¶ 4 Nardoni died on August 4, 2010. The trial court admitted Nardoni's will to probate in November 2010 and appointed Hughes as the independent executor of Nardoni's estate. On February 7, 2011, Standard Bank filed two claims against the estate,

asserting it had made loans to Cap and Auster, unpaid balances on the loans were due and owing and Nardoni was liable for the unpaid balances as a guarantor of the loans.

¶ 5 1. The Auster Loan

¶ 6 Nardoni, Thomas Bastounes and Paul Duggan were the three members of Auster, a limited liability corporation. In May 2006, Auster executed a $2 million promissory note in favor of Standard Bank (Loan 1). The collateral for the note consisted of several units in a Chicago building. Nardoni, Bastounes and Duggan each signed the note in their capacity as a member of Auster. Each also executed individual commercial guaranties. In Nardoni's guaranty, he agreed to personally guarantee the indebtedness of Auster to Standard Bank "now existing or hereafter arising or acquired, on an open and continuing basis." He agreed that his liability was "unlimited," his obligation was "continuing" and he could revoke the guaranty only in writing. The guaranty contained a provision binding Nardoni's estate "as to the Indebtedness created both before and after" his death regardless of whether Standard Bank had notice of the death. The executor of the estate could "terminate" the guaranty in the same manner as Nardoni, *i.e.*, in writing. Pursuant to the guaranty, Nardoni agreed he could not, without prior written consent from Standard Bank, "sell, lease, assign, encumber, hypothecate, transfer, or otherwise dispose of all or substantially all of [his] assets, or any interest therein." He also agreed that "[r]elease of any other guarantor or termination of any other guaranty of the Indebtedness" would not affect" his "liability" under the guaranty. As a result of several "change in terms" agreements executed by Auster and Standard Bank, the final amount of the promissory note was $4 million, all of which Standard Bank disbursed.

¶ 7 In May 2008, Auster executed a second promissory note for $4 million in favor of Standard Bank (Loan 2) and provided the same collateral. As before, Nardoni, Bastounes and Duggan executed the note in their representative capacity and each provided Standard Bank with an individual commercial guaranty for the indebtedness of Auster to Standard Bank. Nardoni's guaranty was almost identical to the guaranty he had executed for Loan 1. Standard Bank disbursed Loan 2.

¶ 8 Nardoni died on August 4, 2010. Four months later, on December 5, 2010, Auster executed a third promissory note in favor of Standard Bank (Loan 3) for $7,182,602.85. The collateral for the note was different than that provided for Loans 1 and 2. Bastounes and Duggan executed the note and each signed a commercial guaranty personally guaranteeing the note. Bastounes and Duggan also executed a "Limited Liability Corporation Resolution to Borrow." The resolution identified Hughes, in his capacity as executor of the estate, as the third member of Auster and provided that "[a]ny two" of the three members could enter into agreements with Standard Bank to bind Auster. Standard Bank did not ask Hughes/the estate to provide a guaranty or any other document with respect to Loan 3. The loan disbursement request executed by Bastounes and Duggan stated that the "specific purpose" of the Loan 3 disbursement was "restructure by payoff of [Loans 1 and 2]."

¶ 9 Auster used the $7,182,602.85 disbursement on Loan 3 to pay off the $7,182,602.85 total remaining balances of Loans 1 and 2. After the payments, the balances for Loans 1 and 2 were zero. Pursuant to the promissory note, Auster was to pay back Loan 3 in 12 installments, with the first due in January 2011. It never made any payments on the loan. On June 4, 2011, Standard Bank received $3.3 million from

Duggan and released him from liability on the Loan 3 promissory note.

¶ 10 2. The Cap Loan

¶ 11 Nardoni was the president of Cap. In August 2009, Cap executed a promissory note in favor of Standard Bank for a $1 million revolving line of credit. The note provided that Standard Bank could declare the balance and interest on the loan immediately due and that Cap would pay the amount due immediately upon demand. Collateral for the note was a security interest in "all personal and fixture property of every kind and nature" as well as by "[a]n assignment of various securities held by [Dennis Nardoni and his wife, Claire] and Cap."

¶ 12 As collateral for the promissory note, Cap and the Nardonis executed an agreement pledging their securities accounts at Jackson Boulevard Capital Management, Ltd. (Jackson) and granting a security interest in the accounts to Standard Bank. The pledge agreement provided that Standard Bank "may hold the Collateral until all indebtedness has been paid and satisfied." It also provided that the agreement was legally binding on the Nardoni's successors and assigns and that the Nardonis could not "sell, assign, transfer, encumber or otherwise dispose of any of [their] rights in the Collateral except as provided in this Agreement."

¶ 13 Cap also executed a business loan agreement. The business loan agreement contained an "affirmative covenant" in which Cap agreed it would:

> "Prior to disbursement of any Loan proceeds, furnish executed guaranties of the Loans in favor of Lender [Standard Bank], executed by the guarantors named below, on Lender's forms, and in the amounts and under the conditions set forth in those guaranties.

Names of Guarantors	Amounts
Dennis F. Nardoni	Unlimited
Thomas Bastounes	$700,000
Paul Duggan	$700,000[.]"

Nardoni signed the promissory note and the business loan agreement as president of Cap.

¶ 14 Nardoni and Bastounes each executed and delivered an individual commercial guaranty to Standard Bank but Duggan did not. Nardoni's guaranty provided that he was personally guaranteeing the indebtedness of Cap to Standard Bank "now existing or hereafter arising or acquired, on an open and continuing basis" and that his liability was "unlimited" and his obligation was "continuing." The guaranty bound his estate and could be revoked by him or by the executor of his estate only in writing. Standard Bank disbursed the $1 million to Cap.

¶ 15 In January 2011, five months after Nardoni's death, Jackson notified Standard Bank, Cap and the Nardonis (rather than Mrs. Nardoni or the estate) that it was liquidating Cap's and the Nardonis' accounts and distributing the stock and cash to Standard Bank since the accounts were pledged to Standard Bank. Kevin Boyle, the Standard Bank commercial loan officer involved in negotiating the Cap promissory note, stated in his discovery deposition that Standard Bank had not initiated the request to liquidate the accounts as the Cap loan was not in default and that Jackson had initiated the dissolution of the accounts of its own accord. Boyle testified that Standard Bank received from Jackson checks and stock certificates. The stock certificates were variously in the names of Cap and the Nardonis. Standard Bank applied the checks to

the outstanding balance of the Cap loan and notified Hughes, the executor of the estate, and Cap that it was returning the stock certificates to Jackson. Boyle testified that Hughes requested that Standard Bank deliver the stock certificates to Hughes or Cap as the estate and Cap intended to liquidate the stock and apply the proceeds to the Cap loan. Standard Bank refused and returned the stock certificates to Jackson. Jackson had the certificates reissued in Standard Bank's name and returned to Standard Bank.

¶ 16 Standard Bank received the reissued stock certificates in March 2011 and placed them a fireproof vault, where they remain today. Doyle testified that either Hughes or Cap told Standard Bank that Cap was not going to continue paying on the loan as the collateral had been liquidated and the debt paid in full. Doyle stated Standard Bank did not agree and asked to be paid in full. He explained that Standard Bank did not return the stock certificates to Hughes or Cap because it would not return collateral before the debt had been paid and it did not consider the stock to be payment for the debt. Cap made payments on the loan until July 2011. It notified Standard Bank in September 2011 that it would make no further payments on the loan**.**

¶ 17 3. The Probate Proceedings

¶ 18 On February 7, 2011, Standard Bank filed two claims against the estate. In one claim, it sought $7,182,602.85 plus interest, costs and fees for the unpaid balance on Auster Loan 3, asserting the monthly payments on the loan had not been made. It claimed that Nardoni was liable for the debt as guarantor under his guaranties for Auster Loans 1 and 2, in which he had promised to pay the "indebtedness" of Auster "now existing or hereafter arising or acquired." Standard Bank subsequently reduced this claim to $3,885,602.85 after receiving the $3.3 million from Duggan as his share of

the Loan 3 liability.

¶ 19 In the other claim, Standard Bank sought $992,936.65 plus interest, costs and fees for the unpaid balance on the Cap loan, asserting the loan had not been paid on demand. It claimed Nardoni was liable for the debt as guarantor for the Cap loan pursuant to his guaranty that he would pay the indebtedness of Cap "now existing or hereafter arising or acquired."

¶ 20 Standard Bank filed motions for summary judgment on its two claims and the estate filed cross-motions for summary judgment. The trial court denied Standard Bank's motions, granted the estate's cross-motions and, on March 20, 2013, denied Standard Bank's motions to reconsider.

¶ 21 The court granted summary judgment to the estate on the Cap claim on the bases that (1) Nardoni's August 2009 guaranty for the Cap promissory note was a conditional guarantee enforceable against the estate only to $300,000 and (2) Standard Bank's handling of the collateral was "commercially unreasonable" and the estate, therefore, owed no liability to Standard Bank under the guaranty. In the hearing on motions and cross-motions for summary judgment, the court stated Standard Bank had materially breached the business loan agreement which provided that there should be no disbursement without the three guaranties and Nardoni had a right to rely on that agreement. It stated that all documents involved in the loan transaction had to be read together, the three guaranties were a condition of the loan and Nardoni's guaranty was conditioned on the business loan agreement "that [Standard Bank] had other guarantors that he could take advantage of if there was a default." The court explained that, as Standard Bank had not obtained a guarantee from Duggan for $700,000 as required,

Nardoni/the estate had essentially lost $700,000 in recourse against a co-guarantor. The court, therefore, capped any judgment against the estate at $300,000. With regard to Standard Bank's holding the stock certificates in its name for over two years and refusing to sell them or allow the estate or Cap to sell them in satisfaction of the loan, the court stated the arrangement was illusory and commercially unreasonable and destroyed the guaranty.

¶ 22 During its hearing on the motions to reconsider, the court stated that, by keeping control over the stock certificates and refusing to allow the estate and Cap to sell the certificates to satisfy the outstanding loan, Standard Bank took Cap and the estate's control over the asset. It also stated that Standard Bank increased Nardoni's liability by $700,000 by dispersing the loan without Duggan's guaranty. The court explained that, of the $1 million claim against the estate, $700,000 "went out" on the basis of its finding on the conditional guarantee and the remaining $300,000 "went out" on its finding of impairment of collateral.

¶ 23 The court granted summary judgment to the estate on the Auster claim on the bases that (1) Nardoni's death operated to revoke the guaranties signed for Loans 1 and 2 and (2) Standard Bank could not recover for liability created after Nardoni's death. During the hearing on the motions and cross-motions for summary judgment, the court explained "the death terminated the guaranty." It found Loan 3 was a "whole new note" with new business partners providing new collateral and guaranties that did not bind Nardoni/the estate. The court denied Standard Bank's motion to reconsider its ruling for the same reasons, adding that Standard Bank's acceptance of the December 2010 promissory note was a novation that superseded Nardoni's prior obligations and

released Nardoni from liability to Standard Bank. The court reiterated that Standard Bank could not create liabilities after death. It noted that, if Standard Bank had not renewed the two earlier promissory notes for Loans 1 and 2 by entering into Loan 3 and, instead, had stood on the earlier guaranties for Loans 1 and 2, it would have found that death did not revoke those guaranties.

¶ 24 On March 25, 2013, Standard Bank filed a timely notice of appeal from the court's orders denying its motions for summary judgment, granting summary judgment to the estate on both claims and denying its motions to reconsider.

¶ 25 ANALYSIS

¶ 26 Standard Bank challenges the court's denial of its motions for summary judgment and grant of the estate's cross-motions for summary judgment on (1) the Cap claim and (2) the Auster claim. Summary judgment is a drastic means of disposing of litigation and should be granted only when " ' "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." ' " *Axen v. Ockerlund Construction Co.*, 281 Ill. App. 3d 224, 229 (1996) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986), quoting Ill. Rev. Stat. 1983, ch. 110, ¶ 2-1005(c)). The purpose of summary judgment is not to try a question of fact but to determine whether one exists or whether reasonable people could draw different inferences from the undisputed facts. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462 (2003); *Wood v. National Liability & Fire Insurance Co.*, 324 Ill. App. 3d 583, 585 (2001). We review the trial court's decision on a motion for summary judgment *de novo*, construing the pleadings, depositions, admissions and affidavits strictly against the moving party

and liberally in favor of the respondent. *Golden Rule Insurance Co.*, 203 Ill. 2d at 462; *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219 (1994).

¶ 27 "A guarantor's liability is determined from the guaranty contract, which is interpreted under general principles of contract construction." *Bank of America National Trust & Savings Ass'n v. Schulson*, 305 Ill. App. 3d 941, 945 (1999). Contract construction and interpretation are appropriate matters for disposition by summary judgment. *William Blair & Co., LLC v. FI Liquidation Corp.,* 358 Ill. App. 3d 324, 334 (2005). However, when the language of a contract is ambiguous, its meaning must be ascertained through a consideration of extrinsic evidence and summary judgment is, therefore, inappropriate. *Id.* (citing *Loyola Academy v. S & S Roof Maintenance, Inc.,* 146 Ill. 2d 263, 272 (1992) ("In cases involving contracts, there is a disputed fact precluding summary judgment when the material writing contains an ambiguity which requires admission of extrinsic evidence"). Whether a contract is ambiguous is a question of law. *Bank of America National Trust & Savings Ass'n*, 305 Ill. App. 3d at 945.

¶ 28 An unambiguous guaranty contract must be enforced as written. *Bank of America National Trust & Savings Ass'n*, 305 Ill. App. 3d at 945. "A contract term is ambiguous if it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning." *William Blair & Co., LLC,* 358 Ill. App. 3d at 334. In determining whether a contract is ambiguous, the court must construe the contract as a whole, reading each term in light of the others. *Bank of America National Trust & Savings Ass'n*, 305 Ill. App. 3d at 946. It must presume that each part of the contract was inserted deliberately and for a purpose consistent with the

overall intention of the parties and, if possible, interpret the contract in a manner that gives effect to all its provisions. *Id*. If a guaranty is not ambiguous, it must be construed according to its terms. *Id*. However, when doubts arise from the language of the guaranty, the guarantor will receive the benefit of that doubt and the contract will be construed in his favor. *Id*.

¶ 29 1. The Cap Claim

¶ 30 In 2009, Standard Bank disbursed a $1 million loan to Cap despite the fact that an "affirmative covenant" in the business loan agreement between Cap and Standard Bank provided that, prior to disbursement, Cap would furnish Standard Bank with guaranties executed by Nardoni (unlimited liability), Bastounes ($700,000 liability) and Duggan ($700,000 liability) and that Duggan did not provide his guaranty. Cap and Nardoni and his wife pledged investment accounts held at Jackson as collateral for the loan. In March 2011, Jackson sent Standard Bank stock certificates for the investment accounts pledged by Cap and the Nardoni's. The certificates were in Standard Bank's name. Standard Bank has kept the certificates in a vault since receiving them four years ago and refused to consider the certificates as payment for the Cap loan, liquidate the certificates to discharge the loan or allow the estate and/or Cap to liquidate the certificates to discharge the loan.

¶ 31 The trial court denied Standard Bank's motion for summary judgment on its claim against the estate for the Cap loan and granted the estate's cross-motion for summary judgment. It first found that Nardoni's guaranty for the $1 million Cap loan was conditioned on there being two other guarantors for the loan and, as Standard Bank disbursed the loan without receiving Duggan's guaranty, it limited the estate's liability

under Nardoni's guaranty to $300,000 given Nardoni's lost right of contribution against Duggan for $700,000 of the $1 million loan. The court then discharged the estate from that $300,000 liability, finding that Standard Bank's holding of the stock certificates and refusal to sell them or allow them to be sold to satisfy the loan was commercially unreasonable. Standard Bank challenges both determinations, arguing: (a) Standard Bank impaired the collateral in its handling of the stock certificates and (b) Nardoni's guaranty was conditioned upon receipt of Bastounes and Duggan's guarantees..

¶ 32 We note, *ab initio*, that there is no issue raised regarding whether Nardoni's guaranty for the Cap loan was revoked by his death. Further, even if his death did revoke the guaranty, a guarantor's revocation does not release him from any liability incurred prior to the revocation. *City National Bank of Murphysboro, Illinois v. Reiman*, 236 Ill. App. 3d 1080, 1090-191 (1992). Therefore, under the guaranty, Nardoni/the estate's liability would extend to the Cap loan, which was incurred prior to Nardoni's death.

¶ 33 (a) *Standard Bank's Handling of the Collateral*

¶ 34 Standard Bank argues that the court erred in finding Standard Bank impaired the collateral by its handling of the stock certificates representing the collateral Cap and the Nardonis provided for the Cap promissory note. It raises five assertions of error: (i) Nardoni's guaranty contains a clear waiver of an impairment of collateral defense, (ii) an impairment of collateral defense is not available as a matter of law, (iii) Standard Bank's treatment of the collateral was not "commercially unreasonable" as it was within its rights with regard to the collateral, (iv) there is no evidence of damages from the alleged impairment of collateral and (v) constructive strict foreclosure is not available as a

matter of law.

¶ 35 Much of Standard Bank's argument here is directed to challenging the court's "finding" that Standard Bank impaired the collateral. Pursuant to section 3-605(e) of the Uniform Commercial Code (UCC) (810 ILCS 5/3-605(e) (West 2012)):

> "If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (i) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (ii) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge." 810 ILCS 5/3-605(e) (West 2012).

¶ 36 Standard Bank first argues that Nardoni's guaranty contains a waiver of the impairment of collateral defense. However, we need not address this issue since, as Standard Bank correctly asserts in its second argument, the impairment of collateral defense is not available for Nardoni's guaranty as a matter of law. In order to be discharged from liability under section 3-605(e) as a result of Standard Bank's impairment of collateral, Nardoni/the estate must be a party to an "instrument" as defined in the UCC. 810 ILCS 5/3-605(e) (West 2012). "It is well settled that a loan guaranty agreement cannot be classified as a negotiable instrument" and "[t]herefore,

the provisions of the UCC do not apply to the guaranty agreement."[1] *Addison State Bank v. National Maintenance Management, Inc*., 174 Ill. App. 3d 857, 863 (1988) (citing *Federal Deposit Insurance Corp. v. Hardt*, 646 F.Supp. 209, 211 (C.D.Ill.1986); *Ishak v. Elgin National Bank*, 48 Ill. App. 3d 614, 617 (1977)). As Nardoni's guaranty is not a negotiable instrument under the UCC, Nardoni was not a party to an "instrument" as used in section 3-605(e) and Standard Bank is correct that the section 3-605(e) defense of unjustified impairment of collateral is not available to the estate as a matter

[1] Under the UCC, an "instrument" is a "negotiable instrument," which is "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order." 810 ILCS 5/3-104(a), (b) (West 2012). A guaranty does not satisfy this definition as it is not "an unconditional promise or order to pay a fixed amount of money" (810 ILCS 5/3-104(a), (b) (West 2012)). Instead, since a guaranty is conditioned on the principal debtor's failure to pay and the amount to be paid under the guaranty is dependent on the amount the debtor has already paid toward the debt, a guaranty is a *conditional* promise to pay an *unfixed* amount of money and is, therefore, not a negotiable instrument under the UCC.

Although Illinois courts consistently hold that a guaranty is not a negotiable instrument under the UCC, in *McHenry State Bank v. Y.A. Trucking, Inc*., 117 Ill. App. 3d 629 (1983), the court found impairment of collateral where a guarantor had raised the defense on the basis of a guaranty written on the back of a promissory note. *McHenry State Bank*, 117 Ill. App. 3d 629 (considering former UCC section 3-606(1)(b) (Ill.Rev.Stat.1981, ch. 26, par. 3-606(1)(b)), now section 3-605(e))). However, the court did not address, let alone explain, why or how the guaranty was a negotiable "instrument" under the UCC such that the impairment of collateral defense was available to the guarantor. Given that the *McHenry State Bank* court stated the promissory note was a negotiable instrument, we presume the court found the guaranty was negotiable in the narrow circumstance where it was written and executed on the back of the negotiable instrument.

Here, Nardoni's guaranty is in a document entirely separate from the negotiable instrument, the promissory note, and is, therefore, not a negotiable instrument under the UCC. See *City National Bank of Murphysboro, Illinois v. Reiman*, 236 Ill. App. 3d 1080, 1090 (1992) (impairment of collateral defense is unavailable to a guarantor executing a separate contract from the negotiable instrument) (following *Ishak v. Elgin National Bank*, 48 Ill. App. 3d 614, 616-17 (1977) (court found a guaranty entered into separately and independently from a promissory note was not a negotiable instrument under the UCC; therefore, the UCC did not apply to the guaranty and the guarantor could not be discharged from liability arising under the guaranty by the bank's impairment of the collateral for the note)).

of law.

¶ 37 Further, although the trial court heard argument regarding impairment of collateral, it did not find, as Standard Bank claims here, that Standard Bank impaired the collateral, Instead, the court held that Standard Bank's treatment of the collateral was "commercially unreasonable." The defense of commercially unreasonable disposition of collateral arises under an entirely different section of the UCC, section 9-610 (section 9-610 (810 ILCS 5/9-610 (West 2012))), than the impairment of collateral defense (section 3-605(e)). Section 9-610 provides:

> (a) *** After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.
>
> (b) *** *Every aspect of a disposition of collateral*, including the method, manner, time, place, and other terms, *must be commercially reasonable*. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms." (Emphasis added.) 810 ILCS 5/9-610(a), (b) (West 2012).

Impairment of collateral and commercial reasonableness are both defenses arising from a secured party's conduct with regard to collateral. Impairment of collateral arises when a party entitled to enforce a secured instrument impairs the value of the interest in collateral and, if proven, discharges the obligation of an indorser or accommodation party having a right of recourse against the obligor to the extent of the impairment. 810 ILCS 5/3-605(e) (West 2012). In contrast,

commercial reasonableness arises when a party entitled to enforce a secured instrument does not dispose of collateral in a commercially reasonable manner. 810 ILCS 5/9-610(a), (b) (West 2012).

¶ 38 Commercial reasonableness is generally a question of fact (*Boender v. Chicago North Clubhouse Ass'n, Inc.*, 240 Ill. App. 3d 622, 627 (1992)), and thus is not appropriate for determination on a motion for summary judgment. However, where facts are undisputed, the question of reasonableness becomes one of law. *Frontier Investment Corp. v. Belleville National Savings Bank*, 119 Ill. App. 2d 2, 10-11 (1969) (commercial reasonableness of disposition of collateral); *Strom International, Ltd. V. Spar Warehouse & Distributors, Inc.*, 69 Ill. App. 3d 696, 700-02 (1979) (reasonableness of time limitations provided in warehouse receipts for bringing suit as provided by UCC); *Kerr v. Illinois Central RR Co.*, 283 Ill. App. 3d 574, 583 (1996) (reasonableness of notice to an insurer). The facts regarding Standard Bank's handling of the stock certificates, the collateral, are undisputed.

¶ 39 It is undisputed that Standard Bank has had the stock certificates, which were issued in its name, in its vault since March 2011 and that Cap defaulted on the loan in September 2011. It is undisputed that Standard Bank has, for more than three years since Cap's default, refused to sell the collateral and apply the proceeds to the loan. It is undisputed that Standard Bank has refused to allow the collateral to be sold by Cap or the estate to be applied to the loan and refused to accept the collateral as payment in full of the loan, preferring instead to retain the stock certificates in its vault and require Cap pay the loan in full by some other means. Therefore, as the facts regarding Standard Bank's handling of the stock certificates were undisputed, the court did not err

in determining the question of commercial reasonableness as a matter of law on the motions for summary judgment. *Frontier Investment Corp. v. Belleville National Savings Bank*, 119 Ill. App. 2d 2, 10-11 (1969) (affirming trial court's determination on a motion for summary judgment that secured party's disposition of stock was commercially reasonable as a matter of law; trial court's conclusion was "not contrary to the uncontroverted facts" in the record).

¶ 40 The trial court found Standard Bank's handling of the collateral "commercially unreasonable," stating that, by accepting the securities titled in its own name, Standard Bank had "essentially taken" the securities from Nardoni/the estate and the estate should be allowed to have control over its own asset. The court summarize the situation as follows:

> "But you [Standard Bank] think you can come after me [the estate] and get a judgment and penalize me and get attorneys' fees and run interest up on me and in the meantime, you're holding all of my collateral that I can't sell in order to satisfy you? You have created this Catch-22."

Standard Bank responded that it did not have to "move" on the collateral since, as a creditor, it had a choice of remedies (sue on the promissory note, sue on the guaranty or move against the collateral) and here chose to sue on the note. It asserted it was not required to sell the stock and would return the collateral as soon as the loan was paid. The court was unconvinced. It questioned the reasonableness of allowing Standard Bank to "take" the collateral, deny the estate access to the collateral so that it could be liquidated and let the collateral "sit there" until the note was paid off by some other means. It stated that, under Standard Bank's argument, Standard Bank could

"effectively run [the estate's] entire life" and "force [the estate] to liquidate other collateral versus the collateral [Standard Bank] was already holding for this exact reason to secure the note."

¶ 41 Standard Bank responded it had not "taken" the collateral because Nardoni had pledged the securities to Standard Bank and had signed control of the securities over to Standard Bank. It argued further that it did not "accept" the collateral. Standard Bank asserted that, when Jackson sent Standard Bank the securities, Standard Bank had a duty to secure the collateral, which it did by placing them in a vault, and it had no duty to move on the collateral or accept the collateral as payment in full on the Cap loan. The court held it was "not reasonable" to "just *** put [the stock] in the vault for two years." It stated "I reject it totally. They can't force me [the estate] into this Catch-22 that they're trying to put me in. I'm rejecting that." It questioned "where in the contract does it state I can't use my own property to satisfy the note that I owe you?" It found it "ludicrous" that Standard Bank was holding the estate's property when the estate was entitled to pay off the loan whenever it wanted and wanted to pay off the loan but Standard Bank refused to allow the sale. The court stated: "the question is who has the right to tell the bank to liquidate the stock so that they can satisfy that note?" It found the "arrangement is illusory," and "commercially unreasonable" and "destroy[ed]" the guaranty.

¶ 42 The trial court's finding that Standard Bank's handling of the stock certificates was commercially unreasonable is not contrary to the uncontroverted facts in the record and must be affirmed. As explained in the comments to section 9-610, although section 9-610 does not specify a period within which a secured party must dispose of collateral in a commercially reasonable manner, "under subsection (b) every aspect of a

disposition of collateral must be commercially reasonable" and this "explicitly includes the 'method, manner, time, place and other terms.' " 810 ILCS 5/9-610 (West 2012), comment 3.

> "*If a secured party does not proceed under Section 9-620* ['Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral' (810 ILCS 5/9-620 (West 2012))] *and holds collateral for a long period of time without disposing of it, and if there is no good reason for not making a prompt disposition, the secured party may be determined not to have acted in a 'commercially reasonable' manner*. See also Section 1-203 (general obligation of good faith) [now section 1-304 (810 ILCS 5/1-304 (West 2012))]." (Emphasis added.) 810 ILCS 5/9-610 (West 2012), comment 3.

¶ 43 Standard Bank did not proceed under section 9-620, which provides: "a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if: *** the debtor consents to the acceptance." 810 ILCS 5/9-620(a)(1) (West 2012). Instead, it undeniably held the collateral for "a long period of time without disposing of it" (two years by the time of the hearing on the motions for summary judgment and currently running to four years) and, as the trial court necessarily found, has provided no "good reason" for its failure to make a prompt disposition of the collateral after receipt of the stock. The various agreements between the Nardonis, Cap, Standard Bank and Jackson arguably support Standard Bank's claims that, under the terms of those agreements, Nardoni had pledged the securities to Standard Bank and signed control of the securities over to Standard Bank and Standard Bank did not *have to* move on the

collateral or accept the collateral as payment in full on the Cap loan. Indeed, under the pledge agreement signed by the Nardoni's, Standard Bank has the right to hold the collateral until the underlying indebtedness was paid off. However, the fact that, by agreement of the parties, Standard Bank did not have to dispose of the collateral or agree to accept the collateral in satisfaction of the loan does not make its refusal to do so, despite repeated requests by the estate and Cap, commercially reasonable.

¶ 44 Section 1-304 of the UCC (former section 1-203), referenced in the above-cited comment to section 9-610, provides that *"[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement*." (Emphasis added.) 810 ILCS 5/1-304 (West 2012). Indeed, "once a contract of guarantee has been established it imports good faith and confidence between the parties with respect to the whole transaction." *McHenry State Bank v. Y & A Trucking, Inc.*, 117 Ill. App. 3d 629, 632-33 (1983). There is no "good faith" in refusing to cooperate with the estate and Cap in resolving the default on the loan by granting their request that the stock be liquidated and the proceeds used toward the loan. Under the UCC, Standard Bank was required to "use reasonable care in the custody and preservation of collateral in [its] possession" (810 ILCS 5/9-207 (a) (West 2012)) and, therefore, was undeniably correct in putting the stock certificates in its vault when it first received them. However, it had no basis for keeping the certificates there for more than three years. We understand Standard Bank's argument to the trial court that, if it liquidates the collateral, it would have no recourse against Mrs. Nardoni, the estate or Cap if the proceeds of the liquidation fall short of the outstanding debt. However, this concern could be easily remedied by coming to an agreement with the debtors to

provide for such a circumstance.

¶ 45 As the trial court stated, it is unreasonable to "just *** put [the stock] in the vault for two years" and hold it when the estate was entitled to pay off the loan, wanted to pay off the loan and was unable to pay off the loan because Standard Bank would not agree to liquidate the stock so that the loan could be satisfied.

> " 'It would be unfair to allow a creditor to deprive the debtor of the possession and use of the collateral for an unreasonable length of time and not apply the asset or the proceeds from its sale toward liquidation of the debt. Moreover, it would be equally unfair to allow a creditor to take possession at all, if the creditor never intended to dispose of the security. For during the period that the debtor is deprived of possession he may have been able to make profitable use of the asset or may have gone to far greater lengths than the creditor to sell. Once a creditor has possession he must act in a commercially reasonable manner toward sale, lease, proposed retention where permissible, or other disposition. If such disposition is not feasible, the asset must be returned, still subject, of course, to the creditor's security interest. To the extent the creditor's inaction results in injury to the debtor, the debtor has a right of recovery. (8 U.C.C.Rep.Ser. 1375, 1379-80 (1971) (Citations omitted).' " *First National Bank of Thomasboro v. Lachenmyer*, 131 Ill. App. 3d 914, 925-26 (1985) (quoting *Michigan National Bank v. Marston*, 29 Mich. App. 99, 105-08 (1978~~8~~0))

Accordingly, we agree with the trial court that, as matter of law, Standard Bank's holding

of the stock certificates for over three years and refusal to liquidate the certificates and put the proceeds toward the outstanding debt was commercially unreasonable.

¶ 46 On this basis, we affirm the trial court's denial of summary judgment to Standard Bank and its grant of summary judgment to the estate on the Cap claim, finding that Standard Bank's failure to dispose of the collateral in a commercially reasonable manner operates to discharge the estate from any obligations under Nardoni's guaranty for the Cap loan. Standard Bank has the collateral.

¶ 47 Citing section 3-605(e) of the UCC, Standard Bank argues that there is no evidence of damages as required under the UCC to show impairment of collateral.[2] Putting aside the fact that the trial court did not find that Standard Bank impaired the collateral, we have previously held that an impairment of collateral defense is not available for Nardoni's guaranty as a matter of law as it is not a negotiable instrument under the UCC. Standard Bank's argument regarding the estate's failure to show damages for impairment of collateral is, therefore, moot.

¶ 48 Standard Bank also argues that its conduct in holding of the stock certificates did not amount to its having retained the collateral in lieu of payment of the loan as there is no constructive strict foreclosure under the UCC. Given our determination that the trial court properly discharged the estate's liability under the guaranty on the basis of the commercial unreasonableness of Standard Bank's conduct in holding the stock, we

[2] Section 3-605(e) of the UCC provides that the debtor seeking discharge on the basis of impairment of collateral has the burden of proving a reduction in the value of the collateral "to an amount less than the amount of the right of recourse of the party asserting discharge" or that a reduction in the value of the collateral "cause[d] an increase in the amount by which the amount of the right of recourse exceeds the value of the interest" (810 ILCS 5/3-605(e) (West 2012)).

need not address this issue.

¶ 49 *(b) Conditional Guaranty*

¶ 50 Standard Bank also challenges the court's finding that Nardoni's guaranty for the Cap loan was conditioned on Standard Bank receiving Bastounes' and Duggan's guaranties prior to disbursement of the loan and its capping the estate's liability at $300,000 as result of Nardoni's lost right of contribution against Duggan, raising four assertions of error. Given our holding that Nardoni's guaranty for the Cap loan was discharged in its entirety as a matter of law as a result of Standard Bank's commercially unreasonable failure to dispose of the collateral in a timely manner, we need not address whether the court correctly put a cap on the estate's liability under the guaranty.

¶ 51 For the foregoing reasons, we affirm the judgment of the trial court denying summary judgment to Standard Bank on its claim against the estate for the balance due on the Cap loan and granting summary judgment to the estate on that claim.

¶ 52 2. The Auster Claim

¶ 53 Standard Bank filed a claim against the estate on the basis of the loan Standard Bank made to Auster in December 2010 (Loan 3), four months after Nardoni's death. Duggan and Bastounes had executed guaranties for the loan and the loan was in default, Auster not having made any payments on the loan. Standard Bank claimed the estate was liable for Loan 3 on the basis of two guaranties Nardoni had executed in conjunction with two earlier loans Standard Bank had made to Auster, one in May 2006 (Loan 1) and the other in May 2008 (Loan 2). Standard Bank argued Nardoni's guaranties for Loan 1 and Loan 2 continued after his death and encompassed the indebtedness incurred by Auster in Loan 3. The trial court denied Standard Bank's

motion for summary judgment on the Auster claim and granted the estate's cross-motion for summary judgment on the claim. It first held that Nardoni's death operated to revoke the guaranties signed for Loans 1 and 2 and Standard Bank could not recover for liability created after Nardoni's death. Then, on Standard Bank's motion to reconsider, the court added that promissory note for Loan 3 was a novation, a "whole new note" with new business partners providing new collateral and guaranties that superseded Nardoni's prior obligations, did not bind Nardoni/the estate and released him from liability to Standard Bank. Standard Bank challenges both bases for the court's decision, asserting (a) Loan 3 was not a novation and (b) Nardoni's death did not revoke the guaranties for Loans 1 and 2.

¶ 54 (a) Novation

¶ 55 Standard Bank challenges the court's finding that Auster Loan 3 was a novation of Loans 1 and 2 discharging Nardoni's liability under the two guaranties he executed in conjunction with Loans 1 and 2. It raises two points of error, arguing (i) the third Auster loan was not a novation independent of the two loans it consolidated and (ii) even if loan 3 was a novation, the estate is still liable under the guaranty.

¶ 56 "Novation is the substitution of a new debt or obligation for an existing one, which is thereby extinguished." *First Midwest Bank v. Thunder Rd., Inc.*, 359 Ill. App. 3d 921, 924 (2005). "The elements of novation are: (1) a previous valid obligation; (2) a subsequent agreement by all of the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract." *Id*. As the party asserting the existence of a novation, the estate has the burden of establishing it by a preponderance of the evidence. *Alton Banking & Trust Co. v. Schweitzer*, 121 Ill. App.

3d 629, 634 (1984). It must show that all parties to both the old and new agreements intended to substitute the new agreement for the old. *Id*. "The intention of the parties may be inferred from the circumstances and actions of the parties." *Id*.

¶ 57 We find the undisputed facts, shown by the face of the agreements comprising Loans 1, 2 and 3, support the trial court's finding that Auster Loan 3 and Bastounes' and Duggan's guaranties for that loan constituted a novation of Loans 1 and 2 and the three guaranties given for those loans. The contracts show that the parties to Loans 1, 2 and 3 were the same (Auster and Standard Bank) and Loan 3 was for the exact amount due on Loans 1 and 2 combined. Undisputed facts in the record show Loans 1 and 2 were paid off on the same day that Loan 3 was issued and the disbursement request and authorization form for Loan 3 shows the "purpose" of the loan was to "restructure by payoff" Loans 1 and 2.

¶ 58 Giving "restructure" its ordinary meaning, it means "to alter the make-up of." *The American Heritage Dictionary*, 2nd College ed. 1985, 1054. The ordinary meaning of "payoff," in the context of financial obligations, is "final settlement or reckoning." Id at 912. Accordingly, the purpose of Loan 3 was to "alter the make-up of" Loans 1 and 2 by the "final settlement or reckoning" of those loans. "Final" means "last," "ultimate and definitive[,] unalterable" and occurring at the end." *Id* at 504. Necessarily, therefore, a *final* settlement or reckoning of Loans 1 and 2 means that this will be the last reckoning for the loans, that there will be no further liability for those loans as the loans are paid in full and extinguished, in this case by the proceeds of Loan 3. We are hard pressed to understand Standard Bank's argument that, although Loan 3 paid off Loans 1 and 2, Loans 1 and 2 somehow continued to exist despite their extinguishment by the funds

from Loan 3.

¶ 59 If Loans 1 and 2 are extinguished and there is no further liability for these loans, the guaranties underlying these loans are similarly extinguished. It is undisputed that Bastounes and Duggan provided Standard Bank with new guaranties for Loan 3, that Auster gave Standard Bank new collateral for Loan 3 and that Loan 3 was issued on different terms than Loans 1 and 2. We see no reason why Standard Bank would require new collateral and guaranties for Loan 3 if, as Standard Bank claims, Loan 3 was merely a consolidation of or substitution for Loans 1 and 2. Standard Bank already had guaranties for Loans 1 and 2 from Nardoni, Bastounes and Duggan. If Loan 3 was the same debt as Loans 1 and 2, Standard Bank would not need new guaranties for this same debt. We find Loan 3 was an entirely new loan, intended by the parties to payoff Loans 1 and 2 such that those earlier loans were finally settled and the obligations there under, as well as the underlying guaranties, extinguished.

¶ 60 We recognize that Nardoni's guaranties for Loans 1 and 2 provide that, if the guaranties are revoked, the revocation would apply only to "new indebtedness," which "does not include all or part of Indebtedness that is: incurred by Borrower [Auster] prior to revocation; incurred under a commitment that became binding before revocation; any renewals, extensions, substitutions, modifications of the Indebtedness." However, as held above, the proceeds of Loan 3 were used to extinguish Loans 1 and 2. Loan 3, therefore, was not a renewal, extension, substitution or modification of Loans 1 and 2 but rather an entirely new loan, a novation of loans 1 and 2. On this basis, we affirm the trial court's grant of summary judgment to the estate and denial of summary judgment to Standard Bank on the Auster claim.

¶ 61 (b) Revocation by Death

¶ 62 Standard Bank also challenges the court's decision that Nardoni's death revoked the guaranties on Loans 1 and 2 and Standard Bank could not recover for liability created after Nardoni's death. Given our determination that Auster Loan 3 was a novation of Loans 1 and 2 and that Loans 1 and 2 and their underlying guaranties were extinguished by the payoff from Loan 3, any discussion of whether Nardoni's death revoked those same guaranties is unnecessary. We note there is no question that, even if Nardoni's death did revoke the guaranties for Loans 1 and 2, such revocations did not release him from any liability he incurred under those guaranties *prior* to his death. *City National Bank of Murphysboro, Illinois*, 236 Ill. App. 3d at 1090-91; *In re Steagall's Estate*, 111 Ill. App. 3d 992, 993 (1983) ("the death of the guarantor does not terminate liability for the guarantee of debts incurred by the principal before the guarantor's death"). However, this liability does not include Auster Loan 3, an entirely new loan and not, as Standard Bank asserts, merely a consolidation or continuation of Loans 1 and 2. Accordingly, we affirm the trial courts grant of summary judgment to defendant and denial of summary judgment to Standard Bank on the Auster claim.

¶ 63 CONCLUSION

¶ 64 For the reasons stated above, we affirm the judgment of the trial court denying Standard Bank's motion for summary judgment on both the Auster and Cap claims and granting summary judgment to the estate on both claims.

¶ 65 Affirmed.