2016 IL App (1st) 141588-U

SIXTH DIVISION
April 29, 2016

No. 1-14-1588

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

REPUBLIC BANK OF CHICAGO, Plaintiff-Appellee and Cross-Appellant, v. FBOP CORPORATION, Defendant-Appellant, and MICHAEL E. KELLY, Defendant and Cross-Appellee (James I. McMahon, Jr., Patrick H. Arbor, Robert M. Beavers, Richard Benck, G. Michael Cronk, Gerald Catalano, John Gable, Matthew D. Lawton, Manuel Sanchez, Robert M. Heskett, Edward C. Fitzpatrick, Defendants).	)	Appeal from the Circuit Court of Cook County. No. 11 L 8671 Honorable Raymond W. Mitchell, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court erred in granting summary judgment in favor of plaintiff investor with respect to its breach of contract claim related to the failure to repay a junior subordinated debenture. As to cross-appeal, the trial court properly granted defendant cross-appellee's motion for summary judgment because plaintiff

investor ceased to be a creditor of the predecessor debtor corporation and because cross-appellee did not breach his fiduciary duty. We affirm in part, and reverse and remand in part.

¶ 2 Plaintiff Republic Bank of Illinois (Republic Bank) filed a three-count amended complaint against defendants United Financial Holdings, Inc. (United Financial), FBOP Corporation (FBOP), and Michael E. Kelly, alleging breach of contract against FBOP (count I) and various violations of the Business Corporation Act of 1983 (the Act) against Kelly (counts II and III). Republic Bank filed a motion for summary judgment on all counts, and Kelly filed a motion for summary judgment directed at counts II and III. The trial court granted Republic Bank's motion on count I and Kelly's motion on counts II and III. On appeal, FBOP contends that the trial court erred in granting Republic Bank's summary judgment motion on count I because Republic Bank failed to prove that FBOP breached the contract. On cross-appeal, Republic Bank contends that the trial court erroneously granted Kelly's motion for summary judgment on counts II and III because (1) Republic Bank remained United Financial's creditor under the contract even after FBOP assumed all of United Financial's obligations, and (2) Kelly breached his fiduciary duty to Republic Bank when he transferred United Financial's assets to FBOP, leaving United Financial insolvent. We affirm in part and reverse in part.

¶ 3 BACKGROUND

¶ 4 Republic Bank is an Illinois banking corporation. United Financial is an Illinois corporation whose principal operating subsidiary is United Community Bank of Lisle, Illinois. FBOP, an Illinois corporation, is the successor company to United Financial. Kelly was the president and chairman of the board of FBOP, as well as president and director of United Financial. This dispute arose from a financial transaction involving multiple parties in which United Financial sought to raise capital for its banking operations. The transaction at issue was structured to take advantage of favorable tax and regulatory treatment. To effect this transaction,

United Financial first created United Financial Holdings Trust I (the Delaware Trust), a statutory trust established under Delaware law. United Financial owned 100% of the Delaware Trust's common equity. United Financial then entered into a "Junior Subordinated Indenture" (the Indenture) for the issuance of "Series A Junior Subordinated Debentures" with Wilmington Trust Company (the Trustee), as trustee for the Delaware Trust.

¶ 5 The Indenture

¶ 6 Resolution of the issues on appeal turns on the interpretation of multiple provisions of the Indenture. Although the Indenture exceeds 70 pages, we summarize below only those sections that are pertinent to this appeal. On November 13, 2003, United Financial and the Trustee entered into the Indenture, which provided that United Financial would issue "Securities" (defined as "unsecured junior subordinated debt securities in one or more series") to evidence loans made from the Delaware Trust to United Financial. The source of funds for the loans from the Delaware Trust to United Financial would come from proceeds from the sale of "Capital Securities" (defined as "undivided preferred beneficial interests" in the Delaware Trust).

¶ 7 Section 1.11 of the Indenture, entitled "Benefits of Indenture," provided in relevant part that nothing in the Indenture (or any securities issued pursuant to it), either "express or implied, shall give to any Person, other than the parties hereto and their successors and assigns, *** and, to the extent expressly provided in Sections 5.2 [and] 5.8 ***, the holders of Capital Securities, any benefit or any legal or equitable right, remedy or claim under this Indenture." The definition of "Person" included, *inter alia,* individuals, corporations, and trusts.

¶ 8 Section 3.12 provided that United Financial had the right to defer interest payments for up to five years, after which the accrued interest would be payable. In pertinent part, sections 5.1(a) and (b) of the Indenture defined an "Event of Default" as the default in the payment of

principal or interest (but subject to deferrals under section 3.12). Sections 5.1(d) and (e) included as events of default: (1) United Financial seeking or obtaining relief under any applicable bankruptcy or similar law or (2) United Financial's consent to "the appointment of or taking possession by a *** receiver" of all or substantially all of the property of either United Financial or a principal subsidiary. Section 5.2 allowed for the acceleration of maturity upon the occurrence of an event of a default.

¶ 9 Under section 5.8 of the Indenture, registered holders of Capital Securities had the right to file suit directly against United Financial to enforce the payment of "principal of *** and *** interest *** on the Securities" upon an Event of Default described in "Section 5.1(a) or 5.1(b)" of the Indenture.

¶ 10 In relevant part, section 8.1 of the Indenture prohibited United Financial from merging with any other entity unless that entity expressly assumed the payment of principal and interest on the debentures through a supplemental indenture "in a form satisfactory to the Trustee." Section 8.2 provided, *inter alia*, that upon United Financial's merger or the transfer of substantially all of its assets into another corporation (and in accordance with section 8.1), United Financial "shall be discharged from all obligations and covenants under the Indenture."

¶ 11 The Transaction, Merger, and FDIC Action

¶ 12 The transaction at issue occurred on November 13, 2003, and involved three steps that took place simultaneously. First, the Delaware Trust entered into a "Capital Securities Purchase Agreement" with Hovde TPS Fund, LLC (Hovde), under which Hovde purchased $6 million in Capital Securities (*i.e.*, preferred equity in the Delaware Trust). Next, Hovde immediately assigned those Capital Securities to Republic Bank. Finally, pursuant to the Indenture, United Financial borrowed $6 million from the Delaware Trust and issued a $6,186,000 junior

subordinated debenture to evidence that indebtedness. Under the terms of the debenture, interest was payable quarterly, and the principal was due on November 13, 2033. The Trustee was listed as the holder of the debentures.

¶ 13 On January 1, 2007, FBOP Acquisition Company II, a wholly-owned subsidiary of FBOP, merged into United Financial. Under the terms of the merger agreement, FBOP acquired all of the voting stock of United Financial. On that same day, the Trustee entered into a Supplemental Indenture with FBOP, pursuant to which FBOP assumed all of United Financial's liabilities under the Indenture. FBOP then made all required payments under the Indenture from 2007 through May 13, 2009, at which point FBOP informed the Trustee that FBOP was electing to defer its required interest payments pursuant to section 3.12 of the Indenture. Republic Bank received no further payments of principal or interest following May 13, 2009. On October 30, 2009, FBOP's subsidiary banks were closed by their respective bank regulators, and the Federal Deposit Insurance Corporation (the FDIC) was appointed the receiver of the subsidiary banks.

¶ 14 Trial Court Proceedings

¶ 15 Republic Bank filed its initial complaint on August 19, 2011, and an amended complaint on February 21, 2012. Republic Bank alleged in count I that FBOP breached the Indenture when, on October 30, 2009, FBOP's principal subsidiaries "ceased to exist and their consolidated assets were sold by the FDIC," which Republic Bank argued was an event of default under section 5.1(e) of the Indenture. Republic Bank, however, did not allege in count I that FBOP breached the Indenture either for failure to pay principal or interest under sections 5.1(a) or (b), or that the FDIC action invalidated FBOP's prior deferral of interest under section 3.12. Counts II and III alleged that Kelly, as director of United Financial, was liable for Republic Bank's investment losses under section 8.65(a) of the Act (805 ILCS 5/8.65(a) (West 2014)) in two

respects. In count II, Republic Bank argued that Kelly was liable under section 8.65(a)(2) (805 ILCS 5/8.65(a)(2) (West 2014)) because he transferred all of United Financial's assets to FBOP without providing Republic Bank, a "known creditor" of United Financial, statutory notice of United Financial's voluntary dissolution under section 12.75 of the Act (805 ILCS 5/12.75 (West 2014)). In count III, Republic Bank alleged that Kelly was also liable under section 8.65(a)(1) (805 ILCS 5/8.65(a)(1) (West 2014)) because his distribution of United Financial's assets to FBOP rendered United Financial insolvent, in violation of section 9.10 of the Act (805 ILCS 5/9.10 (West 2014)).

¶ 16 On September 4, 2012, FBOP filed its answer to Republic Bank's amended complaint. FBOP admitted that, following its merger with United Financial, FBOP's banking subsidiaries were closed by their primary bank regulators, the FDIC was appointed as receiver of the banking subsidiaries, and the FDIC later sold several of the subsidiaries to a third party. With respect to count II, FBOP admitted that no notice of United Financial's dissolution under section 12.75 was given to Republic Bank. FBOP denied the allegations in count III.

¶ 17 On February 25, 2014, Republic Bank filed a motion for summary judgment on all three counts. FBOP filed a response to Republic Bank's motion as to count I, and Kelly filed his own motion for summary judgment directed at counts II and III. With respect to count I, Republic Bank argued, without citation to authority, that it was entitled to summary judgment on the breach of contract claim because each of the following judicial admissions constituted an Event of Default under section 5.1(e) of the Indenture: (1) FBOP's banking subsidiaries were closed by the FDIC, (2) the FDIC was appointed as receiver of the banking subsidiaries, and (3) the FDIC sold several of the subsidiaries to a third party. As to counts II and III, Republic Bank argued that Kelly was personally liable because Kelly failed to provide Republic Bank written

statutory notice of United Financial's dissolutions and because Kelly's transfer of United Financial's assets to FBOP rendered United Financial insolvent. FBOP responded that summary judgment was not warranted as to count I because United Financial's deferral of interest was not an event of default under the Indenture. In Kelly's cross-motion for summary judgment, he argued that section 8.65 of the Act, upon which counts II and III were predicated, did not apply because Republic Bank was a creditor of the Delaware Trust and not the dissolved corporation United Financial. Kelly further argued that no notice was required under section 12.75 because United Financial never took steps to bar any known claims against it, and that United Financial was not rendered insolvent as a result of a transaction prohibited under section 9.10 because FBOP acquired the liabilities as well as the assets of United Financial at the time of their merger. Attached to Kelly's motion for summary judgment was his affidavit, which stated that, as of January 1, 2007, United Financial's assets exceeded its liabilities by over $1.3 billion. Kelly's affidavit also had an attached exhibit that included United Financial's audited financial statements showing December 31, 2006, shareholders' equity of that amount.

¶ 18 On April 23, 2014, the trial court issued a written decision on the parties' motions for summary judgment. The trial court first granted Republic Bank's motion for summary judgment as to count I only, finding FBOP liable for breaching the Indenture because FBOP assumed United Financial's obligations under the supplemental indenture and "it [was] clear that the closing of a number of FBOP's principal subsidiaries constitute[d] an Event of Default." The trial court further found that FBOP's bankruptcy filing was also an event of default. Turning to the cross-motions for summary judgment on counts II and III, the trial court found that, under the Indenture, "Republic Bank was never United's creditor at all as the Trustee was the debenture holder." The trial court further observed that the Indenture only required an acquiring company

(here, FBOP) to obtain consent from the Trustee and to assume all of United Financial's obligations under the Indenture, and that both conditions were fulfilled. According to the trial court, since FBOP's assumption of United Financial's obligations was permissible without Republic Bank's knowledge or consent, United Financial had no duties to Republic Bank under the Act because Republic Bank was not United Financial's creditor and United Financial was not insolvent. The trial court then denied Republic Bank's summary judgment motion as to counts II and III, and granted Kelly's motion for summary judgment as to those counts.

¶ 19 This appeal followed.

¶ 20 ANALYSIS

¶ 21 FBOP contends that the trial court erred in granting Republic Bank's motion for summary judgment on count I. Specifically, FBOP argues that the trial court erroneously relied upon "the non-monetary defaults" under section 5.1(e) of the Indenture, namely, the closing of various principal subsidiaries of FBOP and FBOP's bankruptcy proceedings. FBOP argues that only the Trustee, and not Republic Bank, can bring suit for Events of Default under section 5.1(e). On cross-appeal, Republic Bank contends that the trial court erroneously granted summary judgment in favor of Kelly on counts II and III. As to count II, Republic Bank argues that it remained a creditor of United Financial even after FBOP's execution of the Supplemental Indenture, and therefore United Financial was not discharged of its obligations to Republic Bank. With respect to count III, Republic Bank argues that Kelly transferred United Financial's assets to FBOP before the execution of the Supplemental Indenture, and therefore United Financial was rendered insolvent in violation of section 9.10 of the Act.

¶ 22 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). To determine whether a genuine issue as to any material fact exists, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). If reasonable people would draw divergent inferences from undisputed facts, summary judgment must be denied. *Id.* In essence, summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Id.* We review the decision on a motion for summary judgment *de novo*. *Id.*

¶ 23 With respect to counts II and III (alleging violations of the Act against Kelly), we note that Republic Bank and Kelly filed cross-motions for summary judgment. As such, they agreed that no material questions of fact existed and that only a question of law was involved so that the court could decide based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The mere filing of cross-motions for summary judgment, however, does not establish that there is no issue of material fact, nor is a trial court obligated to render summary judgment for either party. *Id.* Our review of cross-motions for summary judgment is also *de novo*. *Id.* ¶ 30.

¶ 24 The Breach of Contract Claim in Count I

¶ 25 Although the Indenture specified that it was to be construed according to New York law (without regard to conflicts-of-law principles), the trial court noted that the parties did not cite New York law (and only cited Illinois law) and they did not raise any issue with respect to the application of Illinois law. The trial court thus found that the parties forfeited any reliance upon New York law and resolved this issue under Illinois law. FBOP contends that it did not "waive" the application of New York law, but it nonetheless argues that this issue is moot because New

York and Illinois law are "essentially the same." Forfeiture aside, the resolution of this issue would be the same under either Illinois or New York law.

¶ 26 The Indenture at issue here, "is essentially a contract, the interpretation of which involves the application of contract law principles." *Kardolrac Industries Corp. v. Wang Laboratories, Inc.*, 135 Ill. App. 3d 919, 920 (1985); accord *Quadrant Structured Products Co. v. Vertin*, 23 N.Y.3d 549, 559 (2014). Both parties agree that the Indenture is unambiguous. Therefore, where, as here, the words in a contract are clear and unambiguous, they must be given their "plain, ordinary and popular meaning." *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011); accord *Quadrant Structured Products*, 23 N.Y.3d at 559. "It has been repeatedly held that a court cannot add covenants to a contract simply to reach what may appear to be a more equitable result when the contract is an unambiguous expression of the entire agreement." *Touhy v. Twentieth Century-Fox Film Corp.*, 69 Ill. App. 3d 508, 513 (1979); accord *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir. 2000) (construing New York law). To prevail in a breach of contract action, a plaintiff must establish the following: (i) the existence of a valid and enforceable contract, (ii) performance by the plaintiff, (iii) breach of the contract by the defendant, and (iv) resultant injury to the plaintiff. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199 (1999); accord *First Investors Corp. v. Liberty Mutual Insurance Co.*, 152 F.3d 162, 168 (2d Cir. 1998) (construing New York law).

¶ 27 In this case, the trial court erred in granting summary judgment in favor of Republic Bank. The Indenture provided that Republic Bank, in its capacity as a holder of "Capital Securities" (*i.e.*, the preferred equity in the Delaware Trust), had the right to sue United Financial directly only in the event that United Financial breached section 5.1(a) or (b) of the Indenture. As noted above, those sections only referred to a failure to make required interest or principal

payments.[1] By contrast, Republic Bank's amended complaint only alleged an event of default under section 5.1(e), which related to the regulatory seizure of United Financial's assets and the FDIC's subsequent sale of those assets. Under the unambiguous terms of the Indenture, however, only the Trustee of the Delaware Trust (*i.e.*, Wilmington Trust Company) can declare an event of default under section 5.1(e). Construing the pleadings, depositions, admissions, and affidavits strictly against the moving party (Republic Bank) and liberally in favor of the opponent (FBOP), summary judgment should have been denied because it is clear that Republic Bank was unable to declare an event of default under section 5.1(e). See *Williams*, 228 Ill. 2d at 417. Since Republic Bank's right to judgment was not "clear and free from doubt" (*Id.*), the trial court erred in granting summary judgment.

¶ 28 Nonetheless, Republic Bank argues that it was a third-party beneficiary of the Indenture, and therefore it was entitled to bring suit for defaults under section 5.1(e). FBOP concedes that Republic Bank was a third-party beneficiary, but counters that it could not allege an event of default under section 5.1(e). We note that section 1.11 of the Indenture is what is commonly referred to as a "negating clause": This section operates to deny any "express or implied" right, remedy, or claim on the part of "holders of Capital Securities" (namely, Republic Bank) and limit its rights only "to the extent expressly provided" in section 5.8 (among other nonrelevant sections). It is axiomatic that, in Illinois, the rights of a third-party beneficiary may not be expanded beyond the unambiguous terms of the contract. See *155 Harbor Drive Condominium Ass'n v. Harbor Point Inc.*, 209 Ill. App. 3d 631, 646 (1991); see also *Carson Pirie Scott & Co. v. Parrett*, 346 Ill. 252, 258 (1931) (holding that a promisor's liability to a third-party beneficiary "cannot be extended or enlarged on the ground, alone, that the situation and circumstances of the

[1] We note that, under the terms of the junior subordinated debentures at issue here, no principal was due until maturity, 30 years after issuance, in 2033.

parties justified or demanded further or other liability") (citing *Hageman v. Holmes*, 179 Ill. 275, 280 (1899)). Similarly, under New York law, "even where a contract specifically states that performance is owed to an identified third party, a negating clause still operates as a decisive bar to enforcement of the contract by that third party." *In re Lehman Bros. Holdings Inc.*, 479 B.R. 268, 276 (S.D.N.Y. 2012), *aff'd*, 513 Fed. Appx. 75 (2d Cir. 2013); see also *India.Com, Inc. v. Dalal*, 412 F.3d 315, 319, 321-22 (2d Cir. 2005) (plaintiff not able to sue as a third-party beneficiary under an agreement because of the presence of a negating clause, despite the fact that the agreement identified plaintiff by name and indicated that he would be paid under a separate agreement in an attached schedule). Therefore, although Republic Bank was a third-party beneficiary of the Indenture, its ability to enforce its rights was strictly limited by section 1.11 of the Indenture, which only allowed it to directly sue FBOP for breaches involving a failure to pay interest or principal. Consequently, Republic Bank's argument is without merit.

¶ 29 The Business Corporation Act Claims in Counts II and III

¶ 30 Republic Bank's cross-appeal centers on the trial court's granting of Kelly's summary judgment motion on counts II and III, both of which alleged violations of the Act. Count II alleged that, in violation of section 8.65 of the Act, Kelly failed to provide statutory notice to Republic Bank that United Financial was dissolving, and therefore Kelly, as a director of United Financial, was liable for Republic Bank's investment losses. Count III alleged that Kelly violated section 9.10 when he transferred United Financial's assets to FBOP and left United Financial insolvent, and Kelly was thus liable to Republic Bank on this additional ground.

¶ 31 Section 8.65(a)(2) of the Act provides in part that, if a dissolved corporation "shall proceed to bar any known claims against it under Section 12.75, the directors of such corporation who fail to take reasonable steps to cause the notice required by Section 12.75 of this Act to be

given to any known creditor of such corporation shall be jointly and severally liable to such creditor." 805 ILCS 5/8.65(a)(2) (West 2014). Section 12.75(b) states that, within 60 days from the effective date of dissolution, a dissolved corporation must send a notification to a claimant setting forth various items of information, including the fact of the corporation's dissolution, the effective date thereof, a deadline and address for claims against the dissolved corporation, and a statement that the claim will be barred if not received by the deadline. 805 ILCS 5/12.75(b) (West 2014).

¶ 32 Section 9.10 permits corporate directors to authorize distributions, with the exception that, no distribution is allowed "if, after giving it effect" the corporation becomes insolvent. 805 ILCS 5/9.10 (West 2014). Section 8.65(a)(1) imposes joint and several liability upon corporate directors "who vote for or assent to any distribution prohibited by Section 9.10." 805 ILCS 5/8.65(a)(1) (West 2014).

¶ 33 Republic Bank's claims fail for multiple reasons. With respect to count II, sections 8.65(a)(2) and 12.75 of the Act both impose duties upon directors (such as Kelly) of a dissolved corporation (*i.e.*, United Financial) with respect to the corporation's creditors. Republic Bank, however, was never a creditor of United Financial; rather, it was a creditor of the Delaware Trust. As noted above, Republic Bank purchased "Capital Securities," which in essence were the preferred equity in the Delaware Trust. The Delaware Trust then became the creditor of United Financial when the Delaware Trust purchased United Financial's debt securities (the junior subordinated debentures) with the proceeds from the issuance of the preferred equity (that Republic Bank had purchased).

¶ 34 For this reason, Republic Bank's reliance upon the Trust Indenture Act (15 U.S.C.A. § 77aaa *et seq.* (2012)) and *UPIC & Co. v. Kinder-Care Learning Centers, Inc.*, 793 F. Supp.

448 (S.D.N.Y. 1992), is unavailing. Section 777ppp of the Trust Indenture Act provides in relevant part that "the right of any *holder of any indenture security* to receive payment of the principal of and interest on such indenture security *** shall not be impaired or affected without the consent of such holder" (Emphasis added.) 15 U.S.C.A. § 77ppp (2012). Similarly, the plaintiff in *UPIC* was the registered holder of the notes issued by the defendant. *UPIC*, 793 F. Supp. at 450. Here, by contrast, Republic Bank was the holder of capital securities issued by the Delaware Trust; it was not the holder of securities issued under the Indenture. Therefore, neither the Trust Indenture Act nor *UPIC* advances this claim.

¶ 35 Moreover, section 8.1 of the Indenture allowed for mergers so long as the surviving entity expressly assumed United Financial's obligations in a form satisfactory to the Trustee, and contrary to Republic Bank's argument, the record reveals that the Trustee did sign the Supplemental Indenture agreement with FBOP that contained a provision in which FBOP expressly assumed the payment of the principal and all interest on the debentures. Finally, as FBOP points out, there was no event of default as of January 2, 2007, United Financial's dissolution date and the day after the merger: Republic Bank's amended complaint specifically stated that payments of interest (and principal) had ceased as of May 13, 2009, more than two years *after* the merger and dissolution.

¶ 36 Turning to the allegations in count III, we note at the outset that 8.65(a)(1) of the Act only makes directors liable to *the corporation* for improper distributions under section 9.10. See 805 ILCS 5/8.65(a)(1) (West 2014). Republic Bank attempts to rescue this claim by arguing that Kelly's transfer rendered United Financial insolvent, and his fiduciary duty then extended to Republic Bank, which became a creditor of a dissolved corporation (*i.e.*, United Financial). This

claim is meritless. As discussed above, Republic Bank, the holder of the Delaware Trust's preferred equity, was at best a "creditor" of the Delaware Trust and not United Financial.

¶ 37 Republic Bank's citation to *Paul H. Schwendener, Inc. v. Jupiter Electric Co.*, 358 Ill. App. 3d 65 (2005), is unavailing. In *Schwendener*, although this court held that a corporate officer generally owes a fiduciary duty only to the corporation and its shareholders, we held that this fiduciary duty is extended to the corporation's creditors "*once a corporation becomes insolvent*." (Emphasis added.) *Id.* at 75. To reiterate, FBOP expressly assumed all of United Financial's obligations under the Indenture via the Supplemental Indenture that became effective on January 1, 2007. This took place immediately *prior* to the transfer of United Financial's assets to FBOP via United Financial's voluntary dissolution that became effective on January 2, 2007. In addition, Kelly's affidavit in support of his summary judgment motion included (1) his statement that, as of January 1, 2007, United Financial's assets exceeded its liabilities by over $1.3 billion; and (2) the December 31, 2006, audited financial statements indicating shareholders' equity of that same amount. Thus, at the time of dissolution, United Financial was not insolvent, and Kelly's fiduciary duties were not extended to the creditors of United Financial. Finally, as discussed above, under the structure of the transaction at issue, the Delaware Trust—and not Republic Bank—was a creditor of United Financial. Under such circumstances, we hold that the trial court properly entered summary judgment in favor of Kelly and against Republic Bank on counts II and III.

¶ 38 CONCLUSION

¶ 39 The trial court erred in granting summary judgment in favor of Republic Bank with respect to its breach of contract claim in count I. As to the cross-appeal, the trial court properly granted Kelly's motion for summary judgment on counts II and III because Republic Bank was

not a creditor of FBOP and because Kelly's fiduciary duties did not extend to United Financial's creditors. Accordingly, we reverse the judgment of the trial court with respect to count I and remand the matter for further proceedings, and we affirm the judgment of the trial court with respect to counts II and III.

¶ 40 Affirmed in part; reversed and remanded in part.