FOURTH DIVISION
August 23, 2018

No. 1-17-1939

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MB FINANCIAL BANK, as successor in interest to AMERICAN CHARTERED BANK, Plaintiff-Appellee, v. CLAYTON D. JACOBS and DWYER PRODUCTS CORP., Defendants, (Clayton D. Jacobs, Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 14 L 2769 Honorable Lorna E. Propes, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not misapply the legal standard of commercial reasonableness because Bank, as the secured creditor, did not sell Dwyer's assets and, accordingly, was not required to prove commercial reasonableness; (2) the commercial reasonableness of the sale was clearly established; and (3) the trial court did not miscalculate the damages due by Jacobs for the deficiency judgment.

¶ 2 Defendant Clayton D. Jacobs appeals from the trial court's judgment following a bench trial in favor of plaintiff, MB Financial Bank, as successor in interest to American Chartered Bank (the Bank), on a breach of guaranty claim. Jacobs had executed a guaranty of a commercial loan made to Dwyer Products Corp. (Dwyer) by the Bank. Following a default on the loan, the Bank sought a deficiency judgment against Jacobs. The trial court awarded $369,004.33 in damages plus $190,325 in interest and $68,577.81 in attorney fees and costs, for a total of $627,907.14.

¶ 3 Jacobs appeals, arguing that (1) the trial court improperly applied the law regarding the commercial reasonableness of the disposition of Dwyer's assets at an auction and because the disposition was not commercially reasonable, Jacobs does not owe a deficiency, and (2) in the alternative, the trial court erred in calculating the amount owed in the deficiency judgment. The Bank responds by pointing out that it has no duty to show the sale was commercially reasonable because it did not market or sell Dwyer's assets, Howard Samuels as assignee under an assignment for the benefit of creditors, and his company Rally Capital Services LLC (Rally) handled the liquidation of Dwyer, including the sale of assets. The Bank asserts in the alternative that even if it had to establish the question of commercial reasonableness, the evidence in the record established that the sale was commercially reasonable. The Bank also maintains that the trial court did not err in calculating the deficiency judgment. In his reply brief, Jacobs contends for the first time on appeal that the Bank was acting as a principal with Howard Samuels and Rally acting as its agents.

¶ 4 Dwyer was a business engaged in the design, production and installation of cabinets, casework, modular kitchens and other products in medical facilities. Jacobs was the president of Dwyer and had executed a personal guaranty for a commercial loan for Dwyer. Following a

default on a loan with the Bank, Dwyer operated under an assignment for the benefit of creditors for a short time until an auction was conducted for Dwyer's assets. The Bank filed its initial complaint in March 2014. The second amended complaint was subsequently filed in November 2015, alleging two counts against Jacobs (1) a breach of the guaranty and seeking a deficiency judgment against Jacobs for the remaining balance on the loan and (2) fraud. Following discovery a bench trial was conducted over several dates in the fall of 2016. After the Bank presented its case, Jacobs moved for a directed verdict on the fraud count, which the trial court granted and noted that it was "concerning" that the Bank had destroyed emails between Jacobs and his banker William Deeds during the relevant time period. No issue has been raised regarding the fraud claim and we discuss the allegations of the fraud claim only to the extent necessary to issues on appeal.

¶ 5 In 2004, Jacobs became president of Dwyer. In November 2006, the Bank entered into a line of credit with Dwyer for $500,000. The loan was amended and increased multiple times, and eventually increased to $1,500,000. William Deeds handled the Dwyer account at the Bank from the initial line of credit. At times, Jacobs or members of his family would personally contribute funds to pay the loan.

¶ 6 In April 2012, Jacobs executed a commercial guaranty in which he guaranteed payment of all amounts owed to the Bank by Dwyer. Specifically, the guaranty provided that Jacobs as the Guarantor "absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower [Dwyer] to Lender [the Bank], and the performance and discharge of all Borrower's obligations under the Note and the Related Documents." The guaranty defined "Indebtedness" as "all of the principal amount outstanding from time to time

and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses relating thereto," including attorney fees.

¶ 7 In November 2012, Bryn Perna, a senior vice president with the Bank, had recently taken over the Dwyer account. Deeds testified at trial that the Dwyer loan was transferred to Perna because the loan had been downgraded and "anytime a loan is at risk of not being repaid in full, it's transferred to [Perna]." According to Deeds, it was a policy to take bankers off accounts when there is a risk management. At the request of the Bank, Rally Capital Services (Rally) had recently performed a financial evaluation of Dwyer. At a November 16, 2012 meeting between Jacobs and bank representatives, Perna informed Jacobs that the Bank was no longer supporting Dwyer and was calling the loan, which was set to mature on November 30, 2012. Deeds testified that Dwyer was "basically in default for being over-advanced and projections showing that things weren't going to get much better." The note was not paid in full by the maturity date and Dwyer defaulted on the loan. Mary Alberts, a senior vice president for the Bank, testified at trial that as of November 30, 2012, the principal balance owed was $1,175,987. At the time of trial, she stated that the principal balance owed was $587,828.93.

¶ 8 After the default, Dwyer opted to enter into an assignment for the benefit of creditors to wind down the business. Perna suggested Dwyer hire Howard Samuels (Samuels), who was employed by Rally. Deeds testified that the Bank referred businesses in trouble to Rally. In December 2012, the Dwyer board of directors and shareholders executed a trust agreement and assignment for the benefit of creditors agreement of Dwyer (the ABC), which named Howard Samuels of Rally as "trustee/assignee." The ABC transferred its property to Samuels as assignee "so that the property so transferred may be expeditiously sold or liquidated" with the proceeds distributed to creditors. Pursuant to the ABC, a trust was created, named Dwyer Products

Creditors Trust, and "its object shall be the orderly liquidation of assets and property of [Dwyer] and the distribution of the proceeds of the liquidation to creditors of [Dwyer.]" Samuels's duties as assignee were to sell and dispose of secured creditors' collateral, pay the unsecured creditors of Dwyer with funds not subject to any valid liens, and "to do and perform any and all other acts necessary and proper for the orderly liquidation or other distribution *** and the distribution of the proceeds therefrom to the creditors of Dwyer."

¶ 9 In his capacity as assignee, Samuels hired Rally to run Dwyer's operations during the liquidation process. Howard Samuels's son, Jeffrey Samuels (Jeffrey Samuels) testified at the 2016 bench trial that he was a senior consultant at Rally and Rally was hired by the trustee to do the work. According to Jeffrey Samuels, Rally handles approximately 10 to 12 assignments for the benefit of creditors annually and it handles most assignments in the Chicago area. Rally and Howard Samuels have 25 years of experience in the field, and that experience was used to collect Dwyer's account receivables and market Dwyer for sale. In his testimony, he described an assignment for the benefit of creditors as "a nonstatutory common law device used to transition assets from a debtor to a fiduciary for the purposes of liquidation." Rally worked to keep Dwyer operating in order to help maximize Dwyer's assets, including collecting Dwyer's outstanding account receivables.

¶ 10 Jeffrey Samuels's role was working onsite with remaining Dwyer staff and communicating with vendors and customers on the status of orders and payments to Dwyer. Jeffrey Samuels worked with Paula Sund, a Dwyer employee who remained employed during the liquidation, to help maintain customer relationships during collection of accounts receivables. According to Jeffrey Samuels, this action helped to increase the amounts collected. Jeffrey Samuels testified at trial that all amounts received by Rally, including accounts receivable, were

recorded in the Dwyer assignment accounting. Rally would apply payment to operate Dwyer because Rally was operating Dwyer as a "going concern."[1] Then he would remit the rest of the funds to the Bank as payment on the default. Jeffrey Samuels explained Rally's process under an ABC.

> "What Rally does, what we've established over the years is to operate a business through an assignment process as a going concern to maximize the value of those assets rather than take an assignment, close it down, liquidate, and sell the equipment. Operating a business pursuant to a budget with the secured creditor's consent over a 30 to 45-day period increases the value of those assets. We're allowed to complete jobs, work through a lot of situations much easier than not."

Jacobs cooperated with Rally during the liquidation process, and for his cooperation, he discussed with Perna a credit toward any shortfall based on the accounts receivable collected.

¶ 11 Also in December 2012, a management services agreement was entered between Samuels, the Bank, Dwyer, DPC Acqusition Corp. (DPCAC) and Millenia Products Group (Millenia), who was a vendor of Dwyer. The agreement stated that Samuels as assignee "intends to sell certain assets of Dwyer to [DPCAC] upon receiving an agreement for the purchase and sale of assets" and the Bank has agreed, while the negotiation for the sale and until the bidding process and sale of Dwyer is complete, Samuels and Millenia may use a portion of the collateral

[1] "Going concern" is defined as "An enterprise which is being carried on as a whole, and with some particular object in view. The term refers to an existing solvent business, which is being conducted in the usual and ordinary way for which it was organized. When applied to a corporation, it means that it continues to transact its ordinary business. A firm or corporation which, though financially embarrassed, continues to transact its ordinary business." Black's Law Dictionary 691 (6th ed. 1990).

"to produce goods and operate Dwyer's business under the terms and conditions specified herein."

¶ 12 Under the agreement, Samuels as assignee appointed Millenia to act as a manager of Dwyer, with "the authority and responsibility to manage, conduct, supervise and administer all of Dwyer's business lines with respect to" (a) the fulfillment of Dwyer's completed orders, (b) the evaluation, approval for completion, purchase of materials and assembly of orders in process as of the date of this agreement, (c) the generation, purchase of materials and assembly of new orders, and (d) the collection of accounts receivable. As consideration, Millenia was to receive 5% of all accounts receivable to be created during the terms of the agreement.

¶ 13 As part of his duties as assignee, Samuels was directed to liquidate Dwyer for sale. Jeffrey Samuels testified that an auction and sale needed to be conducted in a timely manner because "the longer an assignment or a process such as this drags on, additional expenses are likely to be incurred." According to Jeffrey Samuels, the auction included "the general tangible and intangible assets of Dwyer."

¶ 14 Jeffrey Samuels testified that the sale of Dwyer was marketed by calling industry contacts, such as business within the industry or similar industries as Dwyer, and valuing the equipment for a forced liquidation value. The auction was set for January 3, 2013 and was advertised on two consecutive Sundays, December 23, 2012 and December 30, 2012, in the Chicago Tribune, "which is widely regarded as the gold standard in Chicago." The marketing of the auction was handled by Samuels as the assignee.

¶ 15 A "stalking horse bidder" was established through an asset purchase agreement with DPCAC and approved by the Bank. This agreement allowed Rally to operate Dwyer as a going concern and "advertise this bid for the goal to obtain a higher and better bid." The stalking horse

bid was $200,000, exclusive of accounts receivable and no real estate was included in the sale. Jeffrey Samuels further explained the auction process:

> "So the stalking horse bid is the offer that is advertised to the general public, like I mentioned earlier, in the Chicago Tribune. The stalking horse bidder is granted a break-up fee for their -- any fees and expenses that may be incurred during what we call the re-marketing period. And typically once that offer is advertised, additional interest is generated.
>
> We field all of the inquiries, allow the prospective interested parties to come in and see whatever the operations are of that business at that time, review documents, review whatever they want to see, all parties must sign a nondisclosure agreement prior to review, and more often than not it generates additional interest."

¶ 16 According to Jeffrey Samuels, the stalking horse bid is used to establish a floor. DPCAC terminated its stalking horse bid the evening before the January 3, 2013 auction. The auction took place at 10 a.m. of January 3, 2013, with Samuels, Jeffrey Samuels, Perna and Jacobs present telephonically as well as individuals from DPCAC and Elite Manufacturing, including Jim Fitch. The auction was conducted by Samuels. He detailed multiple exhibits for the auction, including reading a letter notice to all creditors as well as the advertisements for the auction that were published in the Chicago Tribune. Samuels described that assets for sale, "exclusive of cash and accounts receivable included all of Dwyer's tangible and intangible assets wherever located, including but not limited to all furniture, fixtures, vehicles, equipment, and inventory (including raw materials, work-in-progress, and finished goods)," customer records, company documents,

and intangible items such as goodwill, brand names, trademarks and copyrights, designs, software, logos, or any other intellectual property.

¶ 17 Samuels stated that as a result of the ad, he had received inquiries from three individuals, including Jim Fitch of Elite Manufacturing. The auction proceeded for several rounds between DPCAC and Elite Manufacturing. At the conclusion, the final winning bid was from DPCAC for a total of $310,000.

¶ 18 When asked if it would have been better to maximize the effort by advertising at a different time, Jeffrey Samuels responded that, "The asset values were depleting rapidly. And to maximize the value of the assets and to further preserve the customer base, we needed to sell the assets." He stated he did not know how the assets were depleting in this case, but that typically was what occurred in his 15 years in the business. Jeffrey Samuels maintained that Dwyer's assets were "properly marketed" and "several bidders" attended the auction. While onsite, he observed "several parties that came in to inspect the assets." He explained:

> "The date or the time of year really doesn't come into play, because the assignee properly marketed the assets. And the proof of that is that there were several bidders that attended the auction.
>
> An auction is more than one bidder. And the assignee had more than one bidder present to bid on the assets of Dwyer Products."

¶ 19 Jim Fitch from Elite Manufacturing testified at trial that he first learned of the auction from Samuels, who called to inquire if Elite was interested in purchasing Dwyer. Fitch explained that Elite was a vendor for Dwyer. He stated that he expressed interest, but did not receive additional details about Dwyer before the auction, but Fitch was not prevented from visiting the

facilities. Fitch was contacted the night prior to the sale by Jacobs. Jacobs sent Fitch a document listing open orders and some prospective orders for Dwyer. He visited Dwyer's location with Jacobs, which was a new location and he was unfamiliar with it. He testified that Elite capped its bid at $300,000 based on what they "perceived the asset value of the hard goods in the back, the machinery." He agreed that he had a fair opportunity to provide the highest bid, "given the very limited nature, time to evaluate it."

¶ 20 Jacobs testified at trial that he contacted Samuels after he learned that the stalking horse bid had been withdrawn. He learned of Fitch's interest in Dwyer and contacted Fitch to provide statements and information about Dwyer. The morning of the auction Jacobs asked Perna to delay the auction a few hours to allow Fitch more time to conduct due diligence, but Perna denied the request and the auction proceeded as scheduled.

¶ 21 Jacobs further testified at trial that based on his experience in evaluating a business that Dwyer was worth "substantially more" than it owed the Bank. According to Jacobs,

> "Valuations are subjective, but you buy on future cash flow; and we had a very large backorder position that could be valued, you know, anywhere from -- and all of our assets, intellectual property, work-in-process, brand name, all of those things, I don't know, anywhere from two to $5 million."

¶ 22 According to Jacobs, he was entitled to a credit toward the deficiency amount based on his agreement with Perna to assist in the liquidation and collection of accounts receivable. He presented two emails between himself and Perna from 2012 and 2014 discussing Perna offering a 0.5% credit for the liquidation proceeds above $238,000 based on Jacobs's cooperation. Both emails discuss the structure of the note for the repayment, including the credit. The 2012 email

used example figures while the 2014 email calculated actual figures. The 2014 email indicated a discount of the balance by $108,000. Perna offered a note payable for the amount remaining and asked to discuss a "collateral pledge and a repayment." No note was signed by Jacobs. Jacobs denied considering a note for his repayment.

¶ 23 During his testimony, Jacobs presented two exhibits which he contended established that accounting errors in his favor existed on the balance sheet from Rally. He claimed that an additional $418,329 had been paid from accounts receivable. He based this calculation on the Bank's answer to an interrogatory, which stated as follows.

> "6. State whether Plaintiff recovered all of the monies due from the invoices billed to:
>
> a) The Stellar Group;
>
> b) Distel Construction, Inc.;
>
> c) Innovax-Pillar, Inc.;
>
> d) Department of Veteran Affairs ('DVA');
>
> e) Dormitory Authority of the State of New York d/b/a Medgar Evers College;
>
> f) Korte Company
>
> If not all monies were collected, how much was not collected and why were the funds not collected?
>
> ANSWER: Objection. Interrogatory 6 does not state the relevant time period in which the invoices were billed. Subject to and without waiving said objections, Plaintiff responds as follows: The below is in response only to those amounts receivable on or after November 16, 2012. Plaintiff

further objects to the portion of the interrogatory relating to why such parties did not pay. That information is known to the relevant parties listed in (a)-(f) only, and any response from Plaintiff would require speculation.

a) Stellar Group: $253,890.00

b) Distel Construction, Inc.: $32,135.38

c) Innovax-Pillar, Inc.: $4,507.28

d) DVA: $4,507.28

e) Medgar Evers College $9,859.00

f) Korte Company: $132,000.00"

¶ 24 Jacobs's position was that the amounts listed in the answer to the interrogatory had been paid, but were not listed on Rally's accounting. He believed those payments should be deducted from any outstanding balance. The Bank maintained that the response was listing the amounts of the accounts receivable as of November 16, 2012, and was not an admission that the amounts had been paid.

¶ 25 In its findings, the trial court considered Jacobs's defense that the sale of Dwyer was not commercially reasonable. Defense counsel argued that based on Jacobs's testimony, Dwyer's value was between $2 and $5 million dollars and the sale for $310,000 was not commercially reasonable. The Bank's attorney responded that the value provided by Jacobs was not "well-thought value" and was unsupported. Counsel asserted that the best indicator of market value was the amount paid at the auction for Dwyer's assets. Jacobs's attorney further argued that advertising the sale close to Christmas and New Year's Eve did not maximize the amount that could have been recovered. The trial court observed that Bank did not conduct the auction and

that Rally was responsible for the sale. The court rejected defense counsel's argument that the Bank hired Rally, finding that Jacobs hired Rally. The court found as follows:

> "The problem you have, [defense counsel], is that there just is inadequate testimony that had Rally acted in a different way, or the bank acted in a different way, there would have been a different result. What kind of testimony, expert testimony, someone who would come in and say I do this assignee stuff and I'm telling you this is against any common practice or any -- for the want of a better word, standard of care or reasonable behavior by an assignee, this should never have been done in three days over New Year's Eve, this was a wrong thing; and by the way, we permission [*sic*] to have a valuation of the company and it's clearly worth more than it was sold for, and provided us with that pesky thing known as proximate cause, which I just don't see adequate evidence, enough evidence, evidence really at all, to suggest that had Rally acted differently in a way that suggests they should have, that there would have been a different result for this company and sold for more. That is absent in this proof.
>
> ***
>
> But the bottom line is, either way, no matter whose fault it was, there's no evidence that it caused damages to the plaintiff -- I mean, to the defendant. There's no evidence that the reason the company sold for less was because of this, that the actions for your

> affirmative defense, essentially that the actions of the plaintiff somehow caused this company to sell for less, I don't think we have that proof, no."

¶ 26 The court did not find Jacob's valuation of Dwyer to be "persuasive" to sustain his claim for commercial unreasonableness. The court then denied Jacobs's claim for commercial unreasonableness.

¶ 27 Over several hearings, the trial court and the parties debated the amount of the judgment, including attorney fees, costs, and interest. The trial court held that the interrogatory answer was not responsive and was not evidence that the amounts receivable were paid. After significant discussion of payments to the Bank on the loan, the court found that $136,490.40 was the amount Jacobs had proven as collected, but not applied to the balance. The court declined to reduce the deficit by a credit based on Jacobs's assistance in collecting account receivables during the liquidation because no signed contract was presented to modify the guaranty and there was no provision in the note executed by Jacobs for any repayment. The court concluded that the amount due and owing on the loan was $419,004.33. The court later reduced the judgment by $50,000 as a sanction against the Bank based on a frivilous fraud claim, for a total judgment of $369,004.33. The court awarded interest of $190,325 and attorney fees and costs of $68,577.81, and entered a total judgment of $627,907.14.

¶ 28 This appeal followed in compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015) with a timely notice of appeal filed on August 4, 2017. Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 29 On appeal, Jacobs first argues that the trial court improperly applied the wrong legal standard for commercial reasonableness by shifting the burden to him to prove the sale was

commercially unreasonable rather than determining that the sale was commercially reasonable as a threshold issue. The Bank responds that Jacobs's argument is misplaced because Rally, not the Bank, directed the liquidation and sale, and thus, this argument cannot be used as a defense against the Bank's claim for a breach of the guaranty. In the alternative, the Bank maintains that it presented evidence of commercial reasonableness and the trial court properly rejected Jacobs's argument. In his reply brief, Jacobs contends for the first time in response to the Bank's assertion that Rally directed the liquidation and sale that Rally was acting as an agent of the Bank under Perna's management.

¶ 30 Generally, we review the trial court's judgment following a bench trial as against the manifest weight of the evidence. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 12. However, where the issue on appeal is whether the trial court applied the correct legal standard to the evidence presented, a question of law is raised and we review the issue *de novo*. *Id*. ¶ 13.

¶ 31 Article 9 of the Illinois Commercial Code (ICC) provides that, "[a]fter default, a *secured party* may sell *** or otherwise dispose of any or all of the collateral ***." (Emphasis added.) 810 ILCS 5/9-610(a) (West 2014). " 'Unless there is an agreement to the contrary, the debtor is liable for any deficiency that results from the sale. [Citation.] Absent such an agreement, the only defenses available to a debtor against a deficiency judgment are lack of reasonable notice of the sale and commercial unreasonableness of the sale.' " *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1074 (2007) (quoting *Standard Bank & Trust Co. v. Callaghan*, 177 Ill. App. 3d 973, 977 (1988)).

¶ 32 Jacobs relies on section 9-610 of the ICC to support his claim that the Bank was required to prove the sale of Dwyer's assets was commercially reasonable. However, as the Bank

contends, Jacobs's argument is misplaced because it is based on the assertion that the Bank, as the secured party, sold Dwyer's assets. We agree with the Bank. As the trial court held and the record on appeal shows, Howard Samuels and Rally sold Dwyer's assets under the ABC.

¶ 33 " '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 and returning the surplus, if any, to the debtor.' " *First Bank v. Unique Marble & Granite Corp.*, 406 Ill. App. 3d 701, 707 (2010) (quoting *Illinois Bell Telephone Co. v. Wolf Furniture House, Inc.*, 157 Ill. App. 3d 190, 194-95 (1987)). "A debtor may choose to make an assignment for the benefit of creditors, which is an out-of-court remedy, rather than to petition for bankruptcy, because assignments are less costly and completed more quickly." *Id.* The assignment is " 'a unique trust arrangement in which the assignee (or trustee) holds property for the benefit of a special group of beneficiaries, the creditors.' " *Id.* (quoting *Illinois Bell*, 157 Ill. App. 3d at 195). The assignee owes a fiduciary duty to the creditors. *Id*. "Absent some defect in the creation of the assignment itself, an assignment passes legal and equitable title to the debtor's property from the debtor to the assignee." *Id*. In such case, the assignment is valid without the consent of any of the debtor-assignor's creditors. *Id*.

¶ 34 Here, Jacobs and the Dwyer shareholders executed the ABC naming Howard Samuels as the assignee. Samuels then retained Rally to manage Dwyer's operations during the liquidation. Howard Samuels marketed and conducted the auction for Dwyer's assets. None of these activities were undertaken by the Bank. Jacobs fails to cite any authority discussing the sale of assets under an ABC, but instead focuses on the Bank's position as a secured creditor. While it is true that the Bank was a secured creditor for Dwyer, the Bank did not sell the assets and any argument related to section 9-610 of the ICC is misplaced. As the Bank correctly points out,

section 9-610 applies when the "secured party" seeks to sell the collateral after a default. 810 ILCS 5/9-610(a) (West 2014). Since the secured party, *i.e.*, the Bank, did not sell the collateral, section 9-610 does not apply in this case. All of the cases cited by Jacobs involve sales of the respective collateral by the secured party, not an assignee under an assignment for the benefit of creditors as occurred here. See *Heritage Standard Bank & Trust Co. v. Heritage Standard Bank & Trust Co.*, 149 Ill. App. 3d 563, 571 (1986), *Ford Motor Credit Co. v. Jackson*, 126 Ill. App. 3d 124, 128 (1984), *General Foods Corp. v. Hall*, 39 Ill. App. 3d 147, 153 (1976), *Executive Commercial Services, Ltd. v. Vapor Corp.*, 134 Ill. App. 3d 558, 561 (1985), *First National Bank v. Wolfe*, 137 Ill. App. 3d 929, 932 (1985), *Boender v. Chicago N. Clubhouse Association*, 240 Ill. App. 3d 622, 627 (1992), *Commercial Discount Corp. v. Bayer*, 57 Ill. App. 3d 295, 301-02 (1978), and *Voutiritsas v. Intercounty Title Co.*, 279 Ill. App. 3d 170, 183 (1996). Since these cases do not involve a sale under an assignment for the benefit of creditors, these cases are inapposite to the facts present on appeal. Because the Bank did not undertake the sale of Dwyer's assets, it was not required to establish commercial reasonableness at trial. Any claim regarding the commercial reasonableness of the sale must be directed to Samuels and Rally, neither of whom are parties in the case.

¶ 35 In his reply brief, Jacobs advanced a new position, that the Bank was responsible because Samuels and Rally acted as the Bank's agents. These claims of agency were raised in the trial court and the court implicitly rejected the argument, finding that Jacobs hired Samuels and by extension, Rally. We agree with the trial court's conclusion.

¶ 36 "An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf." *Board of Managers of Park Point at Wheeling Condominium Association v. Park Point at Wheeling, LLC*, 2015 IL

App (1st) 123452, ¶ 49. An agent's authority may be actual or apparent. *McNerney v. Allamuradov*, 2017 IL App (1st) 153515, ¶ 65. "Actual agency consists of a principal/agent, master/servant, or employer/employee relationship and the principal's control or right to control the conduct of the agent, servant, or employee." *Jacobs v. Yellow Cab Affiliation, Inc.*, 2017 IL App (1st) 151107, ¶ 64. "Apparent agency liability occurs when a purported principal has created the appearance that someone is his or her agent, and an innocent third party has reasonably relied on the appearance to his or her detriment." *Id*. The existence of an agency relationship is a question of fact and "the burden of proving the existence of an agency relationship and the scope of authority is on the party seeking to charge the alleged principal." *McNerney*, 2017 IL App (1st) 153515, ¶ 64. "A trial court's findings of fact will only be set aside when they are against the manifest weight of the evidence." *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 62 (2009). A judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13.

¶ 37 In asserting the Bank as the principal for Rally as its agent, Jacobs contends that Perna "orchestrated the liquidation of Dwyer and made all consequential decisions related to it. Despite their titles, Samuels and Rally were merely tools to execute her plan." He bases this argument on his own testimony, emails written by Perna, and the transcript for the auction in which Perna participated on behalf of the Bank. Significantly, Perna was not called to testify by either party at trial.

¶ 38 We find Jacobs's assertion of agency is not supported by the manifest weight of the evidence. As previously discussed, in this case, Jacobs and the shareholders for Dwyer retained Samuels as the assignee in the ABC and Samuels brought Rally on to manage Dwyer. Jacobs

admitted at trial that he voluntarily entered into the ABC. He stated that he had "really no other option," but agreed that he could have filed for bankruptcy and the ABC was his "only practical option." Jacobs has failed to offer any evidence showing either an actual or apparent agency existed. He knowingly entered into the ABC, of which the Bank was not a party. No evidence was presented to establish that Samuels and Rally were acting as either actual or apparent agents for the Bank. Accordingly, we reject Jacobs's claim of agency, either actual or apparent.

¶ 39 Even if the Bank was required to prove that the sale of Dwyer's assets by Samuels and Rally was commercially reasonable, section 9-627(c)(4) provides that a sale approved by an assignee for the benefit of creditors, Howard Samuels in this case, is commercially reasonably. "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 2014). Under the ICC, "commercially reasonable" means that the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. 810 ILCS 5/9-627(b) (West 2014). Whether a sale is commercially reasonable is a question of fact. *Boender v. Chicago North Clubhouse Association*, 240 Ill. App. 3d 622, 631 (1992).

¶ 40 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. Section 9-627(c) provides:

> "(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 2014).

¶ 41 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). One of the "safe-harbor" provisions is for an assignment for the benefit of creditors. 810 ILCS 5/9-627(c)(4) (West 2014).

¶ 42 We have previously recognized that the Dwyer shareholders, including Jacobs as director and shareholder, entered into the ABC and assigned all property and assets of Dwyer to Samuels as assignee to be "expeditiously sold or liquidated." The undisputed evidence reveals that Samuels, not the Bank, disposed of Dwyer's assets. Since the disposition of Dwyer's collateral was approved by Samuels, 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. Accordingly, the trial court did not misapply the law regarding commercial reasonableness because the threshold question of commercial reasonableness was established as a matter of law pursuant to section 9-627(c)(4).

¶ 43 Jacobs fails to address the applicability of section 9-627 aside from a single reference in his reply brief in which he asserts that the statute does not apply because Samuels was not acting as an assignee, but as an agent of the Bank under Perna's instructions. Since we have already

rejected Jacobs's agency defense, we also find this contention regarding the inapplicability of section 9-627 to be unpersuasive.

¶ 44 Moreover, even if we were to reach the question of commercially reasonableness as to Rally, which is not a relevant issue for the Bank's complaint, the evidence at trial established that the sale of Dwyer's assets conducted by Howard Samuels and Rally was commercially reasonable. Jeffrey Samuels testified that the sale of Dwyer's assets was done in accordance with the industry standard. Howard Samuels notified related businesses of the sale, and an advertisement was placed in the Chicago Tribune Sunday edition on two dates preceding the auction, December 23 and December 30. Two interested parties participated in the auction over several rounds. Jeffrey Samuels further testified that the auction was conducted quickly because the "asset values were depleting rapidly" and the sale was conducted "to maximize the value of the assets and to further preserve the customer base." While he could not describe how the assets were depleting in this case, he explained that the depletion of assets typically occurred based on his 15 years in the business when sales are not timely conducted.

¶ 45 Jacobs focuses on the date the auction was conducted, January 3, 2013, and the sale price as proof that the sale was commercially unreasonable. The only testimony presented about price was Jacobs's own estimated value of between $2 and 5 million, which included account receivables and future contracts. We note that account receivables were expressly excluded from the sale of Dwyer's assets and testimony at trial indicated that future contracts were canceled during the liquidation. Additionally, the question of whether a different time or method has been considered under the ICC. Section 9-627(a) of the ICC states:

> "The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different

> time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner." 810 ILCS 5/9-627(a) (West 2014).

¶ 46 Further, we point out that section 9-627(b) does not require that all subsections are satisfied to find commercial reasonableness. Rather, the statute is written in the alternative, using "or" as the conjunction. Thus, the sale of Dwyer's assets was commercially reasonable if one of the following was established: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. 810 ILCS 5/9-627(b) (West 2014). Jeffrey Samuels's testimony satisfied the first subsection and supports an additional basis for commercial reasonableness in addition to section 9-627(c)(4). Based on the evidence at trial, the trial court properly concluded that all of the evidence points to a commercially reasonable sale.

¶ 47 Next, Jacobs asserts that the trial court erred in determining the amount due under the deficiency judgment. According to Jacobs, the trial court erred in its calculation of damages because he offered evidence that certain accounts receivable payments were not applied to his account while ineligible expenses were charged to the account, and the itemized list included inaccuracies. The Bank responds that it was Rally's responsibility to collect the accounts receivable to remit the funds to the Bank. The Bank properly applied the funds it received from Rally. The Bank maintains that the trial court properly found that any claims related to the accounts receivable payments should be directed to Rally, not the Bank. "Where an award of

damages is made after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence." *1472 N. Milwaukee, Ltd.*, 2013 IL App (1st) 121191, ¶ 13. As pointed out above, a judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. *Id*. "[I]n overturning a damage award, a reviewing court must find that the trial judge either ignored the evidence or that its measure of damages was erroneous as a matter of law." *Id*. "An award of damages is not against the manifest weight or manifestly erroneous if there is an adequate basis in the record to support the trial court's determination of damages." *Id*.

¶ 48 According to Jacobs, the trial court's calculation of damages erred in three instances: (1) failure to apply a payment of $8,516 from CNI Millington account; (2) failure to interpret the answer to an interrogatory as an admission of amounts received from listed accounts; and (3) failure to remove the $59,632 payment to DPCAC from the outstanding balance.

¶ 49 Jacobs's first claimed error is that the trial court failed to credit a payment of $8,516 from CNI Millington. The payment at issue was referenced in an email from an employee of the Bank to Jeffrey Samuels, dated October 6, 2014, which stated in relevant part, "We received and [*sic*] ACH into the Dwyer Creditors Trust Account this morning. $8,516 from CNI Millington." Jacobs compares this email with an email from Jeffrey Samuels to Jacobs in which Jeffrey Samuels stated that a partial payment had been received from Andron Construction Corporation and attached a spreadsheet of accounts receivable showing payments. The trial court found the Andron payment to be substantiated. No citation to the record is given for where the trial court found the CNI Millington payment to be unsubstantiated, though the Bank does not dispute that the claimed payment was not credited to the account. The Bank contends that no evidence was

presented to show that Rally received the payment and the payment was then remitted to the Bank for application to the balance. The Bank further asserts that if the payment was collected by Rally and should have been sent to the Bank, then Jacobs's remedy is against Samuels and Rally.

¶ 50 We cannot say that the trial court's decision was against the manifest weight of the evidence. The email regarding the payment indicates that the money was received into the trust account, but no further evidence was presented to show that the money was sent from the trust account to the Bank for payment on the debt.

¶ 51 Jacobs's next claimed miscalculation is based on the Bank's answer to an interrogatory. He argues that the trial court erred in finding the interrogatory response to be vague and not responsive, and held that the answer was not evidence that the amounts listed had been paid. The interrogatory stated as follows.

> "6. State whether Plaintiff recovered all of the monies due from the invoices billed to:
>
> g) The Stellar Group;
>
> h) Distel Construction, Inc.;
>
> i) Innovax-Pillar, Inc.;
>
> j) Department of Veteran Affairs ('DVA');
>
> k) Dormitory Authority of the State of New York d/b/a Medgar Evers College;
>
> l) Korte Company
>
> If not all monies were collected, how much was not collected and why were the funds not collected?

ANSWER: Objection. Interrogatory 6 does not state the relevant time period in which the invoices were billed. Subject to and without waiving said objections, Plaintiff responds as follows: The below is in response only to those amounts *receivable* on or after November 16, 2012. Plaintiff further objects to the portion of the interrogatory relating to why such parties did not pay. That information is known to the relevant parties listed in (a)-(f) only, and any response from Plaintiff would require speculation.

g) Stellar Group: $253,890.00

h) Distel Construction, Inc.: $32,135.38

i) Innovax-Pillar, Inc.: $4,507.28

j) DVA: $4,507.28

k) Medgar Evers College $9,859.00

l) Korte Company: $132,000.00" (Emphasis added.)

¶ 52 Jacobs's position was that the amounts listed in the answer to the interrogatory had been paid, but not all of the accounts were listed on Rally's accounting. We agree with the trial court that the answer is not responsive and does not support proof of payments made from the listed accounts. We specifically point out that the Bank's answer referred to the listed accounts as "amounts receivable on or after November 16, 2012. "Receivable" is defined as "That which is due and owing a person or company (*e.g.* account receivable). In bookkeeping, the name of an account which reflects a debt due." Black's Law Dictionary 1268 (6th ed. 1990). The Bank's use of the term "receivable" implies that the amounts remained due and owing, in accordance with the definition of the term. Jacobs has failed to provide any additional evidence to substantiate

that any of the contested payments were made. Accordingly, the trial court's decision to disregard the answer to the interrogatory was not against the manifest weight of the evidence.

¶ 53 Jacobs's third claimed error in the calculation is a payment to DPCAC by Rally of $59,632. DPCAC, as an affiliate of Millenia, operated Dwyer during the liquidation process. During the auction, Millenia waived its fee, but a payment to DPCAC was listed on the accounting. Jacobs contends that the payment was the waived fee and was improperly paid and should be deducted from the total award. At trial, Jeffrey Samuels initially testified that the payment represented a management fee or an "AR fee," but later at the conclusion of his testimony, he stated that he "wanted to correct a statement that [he] made earlier incorrectly." He then testified as follows.

> "After thinking about it after I made the statement, the $59,632 that is listed on the assignment accounting as due to DPCAC would have been for checks that were received by Rally that were due to the purchaser on receivables that they were entitled to. It was not a management fee or an AR fee."

¶ 54 When defense counsel asked, "How do we know that?" Jeffrey Samuels responded that he has records of the checks, but admitted it does not state that on the accounting. He maintained "that's what that is for." Counsel then asked, "How can we prove or disprove that?" The trial court then responded,

> "See, in a court of law, a person's testimony is proof. That is evidence[].

> Now, how can we prove it? He can testify to it. You can test his testimony by asking him if he's got any documents or other things; but don't argue with him, please. This is what he said."

Jeffrey Samuels admitted that he did not bring documentation to support his testimony.

¶ 55 At the posttrial hearing calculating damages, the parties discussed the DPCAC payment with the trial court. The court stated, "there were some accounts receivable that money came into Rally, they belong to DPCAC, so they wrote a check to them." The court also expressed frustration in the accounting of the accounts receivable, noting that it was "such an enormous mess" and "we should be able to say what every single penny of that $481,000 is for ***." Ultimately, the court denied Jacobs's request to deduct the amount. As the trial court heard the testimony and considered the arguments of both parties, we cannot say that the trial court's denial was against the manifest weight of the evidence.

¶ 56 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 57 Affirmed.