2011 IL App (2d) 110182
No. 2-11-0182
Order filed November 18, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PRAIRIE LAKES INVESTMENT GROUP, INC.,	)	Appeal from the Circuit Court Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 10-MR-591
AMERICAN NATIONAL BANK OF DE KALB COUNTY,	)	Honorable Thomas E. Mueller,
Defendant-Appellee.	)	Judge, Presiding.

ORDER

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment and opinion.

Held: Trial court's finding in defendant's favor on plaintiff's conversion claim affirmed where, upon plaintiff's default under the loan, contractual terms permitted defendant to exercise its right of setoff in an amount more than the monthly interest payment due.

¶ 1 Plaintiff, Prairie Lakes Investment Group, Inc., a real estate development company, appeals the trial court's February 14, 2011, rejection of plaintiff's claim that defendant, American National Bank of De Kalb County, converted $200,000 from plaintiff's checking account. The trial court determined that various agreements between the parties permitted defendant to setoff $200,000 from

plaintiff's account against the principal on a loan that plaintiff held with defendant; therefore, the court ruled, no conversion occurred (count I of the complaint), and plaintiff was not entitled to injunctive relief (count II of the complaint). Plaintiff appeals, arguing that the court erred in determining that: (1) the loan documents permitted setoff prior to the loan's maturity; and (2) setoff was available for the entire principal balance of the loan, as opposed to the amount of interest due. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Underlying Agreements

¶ 4 Between March 2004 and April 2010, plaintiff and defendant entered into a series of agreements, four of which are at issue here. The first agreement relates to the checking account plaintiff maintained with defendant; the other three relate to a loan from defendant to plaintiff. The parties do not dispute that all four agreements are applicable to the issues on appeal. The relevant provisions of each agreement follow.

¶ 5 i. March 22, 2004, Checking Account Agreement

¶ 6 The checking account agreement dated March 22, 2004, contains a provision entitled "Setoff," which states:

> "[Defendant] may (without prior notice, and when permitted by law) set off the funds in this account against any due and payable debt you [plaintiff] owe us now or in the future ***. If the debt arises from a note, 'any due and payable debt' includes the total amount of which we are entitled to demand payment under the terms of the note at the time we set off, including any balance the due date for which we properly accelerate under the note."

¶ 7 ii. March 24, 2005, Promissory Note and Commercial Loan Agreement

¶ 8 On March 24, 2005, the parties executed two agreements, a promissory note and a commercial loan agreement. The promissory note provided that, by March 24, 2006, plaintiff would pay back defendant the $500,000 extended under the loan. Further, it contained a waiver provision providing, in part, that, "To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor." In addition, the provision added that, "to the extent permitted by law," plaintiff consented to defendant taking certain actions, including invoking its right of setoff, and that plaintiff generally waived defenses that might be otherwise be available against those actions.

¶ 9 The March 24, 2005, commercial loan agreement provided, regarding default, that, if defendant "reasonably believe[d]" it was insecure, plaintiff would be in default. Further, as to remedies, the commercial loan agreement stated, "After I [plaintiff] default, and after you [defendant] give any legally required notice and opportunity to cure the default, you may at your option do any one of the following," including:

> "Set-Off. You may use the right of set-off. This means you may set-off *any amount due and payable under the terms of the Loan* against any right I have to receive the money from you. *** 'Any amount due and payable under the terms of the Loan' means *the total amount to which you are entitled to demand payment* under the terms of the Loan *at the time you set-off*." (Emphases added.).

¶ 10 iii. April 22, 2010, Debt Modification Agreement

¶ 11 Plaintiff was unable to meet its obligations under the 2005 note, and a series of modification agreements between the parties followed. On April 22, 2010, the parties executed a final modification of their prior obligations. Specifically, the debt modification agreement explains that plaintiff's outstanding unpaid balance under the 2005 loan was $411,000, however, "conditions have

changed since the execution of the prior obligation instruments. In response, and for value received, you [plaintiff] and I [defendant] agree to modify the terms of the prior obligation, as provided for in this modification." The agreement further provided that the prior obligation's maturity and payment provisions were modified such that:

> "I agree to pay the Loan on demand, but if no demand is made, I agree to pay all accrued interest on the balance outstanding from time to time in regular payments beginning May 25, 2010, then on the same day of each month thereafter *** A final payment of the entire unpaid outstanding balance of principal and interest will be due April 25, 2011."

An interest reserve account was established to secure plaintiff's ability to pay the monthly interest payment under the agreement. The agreement concluded that, except as specifically modified, all terms of the prior obligation agreements remained in full force and effect.

¶ 12 B. Litigation

¶ 13 On December 13, 2010, plaintiff sued defendant for taking actions (described below) that it claimed violated the aforementioned agreements and, accordingly, constituted conversion, warranting damages (count I) and temporary and permanent injunctive relief (count II). On December 14, 2010, the trial court granted, in part, plaintiff's motion for a temporary restraining order, continuing the case "for trial on all pending matters." On January 12, 2011, trial commenced on plaintiff's "verified complaint for preliminary and permanent injunctive and other relief."

¶ 14 The evidence established that, on August 6, 2010, plaintiff's principal, Ken Blood, met with defendant's principal, Tim Beasley. Blood advised Beasley that he was considering filing for bankruptcy and might not be in a position to pay the principal under the loan. According to Beasley, as a result of this and other communications, defendant deemed itself insecure with respect to plaintiff's repayment of the loan. Therefore, that same day, defendant executed its first of two

setoffs; specifically, defendant withdrew approximately $12,000 from plaintiff's interest reserve account, applied it to the loan's principal, and closed the interest reserve account.

¶ 15 Approximately three months later, in November 2010, plaintiff entered into a settlement agreement with Valley Community Bank (in an effort to settle financial obligations totaling over $45 million) that required plaintiff to make to Valley a $200,000 cash payment. On November 29, 2010, plaintiff deposited $200,000 into its checking account with defendant, wrote the settlement check on the account, and tendered it to Valley. However, defendant notified plaintiff that, because the deposit exceeded $5,000, the funds available in plaintiff's account would be delayed until December 7, 2010. On December 6, 2010, defendant unilaterally, without demand or notice to plaintiff, "swept" $200,216.46 from plaintiff's checking account and closed the account. Defendant refused to return the funds, and plaintiff sued.

¶ 16 C. Court's Ruling

¶ 17 On January 12, 2011, after hearing closing argument, the court denied plaintiff's request for preliminary injunctive relief. It announced that it had *not* yet ruled on the merits of plaintiff's conversion claim and offered the parties an opportunity to submit post-trial arguments on that issue.

¶ 18 Thereafter, on February 14, 2011, the trial court issued a second order (a written memorandum order), ruling that injunctive relief was unavailable and, further, that "there was no unlawful conversion of funds herein by [defendant]." Specifically, the court found that the documents favored defendant, noting the "on demand" language of the debt modification agreement, the checking account agreement's provision granting defendant a right to setoff without notice, and the commercial loan agreement's definition of default (defined as where defendant "reasonably believe[d]" it was insecure). The court found, in light of the parties' August 6, 2010, meeting, defendant reasonably determined that plaintiff's tenuous financial situation rendered

defendant insecure as to the note and, therefore, that plaintiff was in default. Because plaintiff was in default, defendant's setoff was proper, did not constitute an act of conversion, and plaintiff had relinquished its rights to any notice prior to setoff . Finally, the court rejected plaintiff's argument that setoff was improper because the loan was not yet mature. Plaintiff appeals.

¶ 19 II. ANALYSIS

¶ 20 On appeal, plaintiff does not challenge the court's January 12, 2011, denial of injunctive relief. Rather, plaintiff challenges the court's February 14, 2011, decision on the merits that defendant's actions were proper under the agreements and did not constitute conversion. Generally, a judgment after a bench trial will not be set aside unless it is contrary to the manifest weight of the evidence. *Brynwood Co. v. Schweisberger*, 393 Ill. App. 3d 339, 351 (2009). A judgment is against the manifest weight of the evidence where the opposite conclusion is clearly evident. *Id.* However, we review *de novo* the court's decision to the extent that it involved contract interpretation. *Marx Transport, Inc. v. Air Express International Corp.*, 379 Ill. App. 3d 849, 854 (2008).

¶ 21 A. Setoff was Proper

¶ 22 Plaintiff first argues on appeal that the trial court erred in finding that defendant's setoff was proper because the: (1) agreements required, to make setoff permissible, that the debt be due and payable and, here, no debt was due or payable, *i.e.*, mature, at the time of setoff; and (2) agreements contemplated actions would be taken "to the extent permitted by law," and Illinois law prohibits setoffs of immature debts. Further, plaintiff argues that defendant's belief that it was insecure was unreasonable. Finally, plaintiff argues that the terms of the debt modification agreement provided a scheme for payments in the event that no demand to pay the loan was made and, therefore, the agreement was not, in and of itself, a demand instrument. In sum, plaintiff argues that the court's ruling suggests that, irrespective of whether any payments are due or whether any notice is given,

setoff is proper whenever a bank would like to use it. We disagree and conclude that, under the terms of the agreements here, setoff was proper.

¶ 23 Our conclusion that setoff was proper is based, like the trial court's, on the provisions contemplating that defendant was entitled to setoff without notice when it reasonably deemed itself insecure. The 2005 commercial loan agreement provided that, if defendant reasonably believed itself insecure, then plaintiff would be in default. Here, the trial court's finding that defendant reasonably believed itself insecure was not contrary to the manifest weight of the evidence. In August 2010, Blood advised Beasley that he might file for bankruptcy and be unable to pay the loan obligations. This conversation, coupled with plaintiff's inability to meet its obligations under the 2005 agreements (which ultimately led to the 2010 debt modification agreement) and Beasley's act, that same day, of setting-off the interest reserve account against the loan's principal, support the court's finding that defendant, in fact, believed that it was insecure and, further, that the belief was reasonable.

¶ 24 Further, plaintiff argues that defendant's belief of insecurity was unreasonable because plaintiff's monthly interest payment, the only amount due and owing, was secured by the interest reserve account. We reject plaintiff's argument because defendant's assessment of security was not limited to only the monthly interest payment. The setoff provision, which is triggered upon default, broadly speaks to setting off "any" amount due and payable under the "loan," which is defined by the agreement as including obligations and duties arising from "all" documents related to the loan transaction. As such, we disagree that the existence of an interest reserve account, which provided assurances regarding plaintiff's ability to make monthly interest payments, precluded defendant from reasonably concluding it was insecure as to "any" other payments or obligations payable under the loan, including the principal.

¶ 25 Thus, the court properly found that, because defendant reasonably concluded that it was insecure, plaintiff was in default. Although the commercial loan agreement provided that defendant could setoff after giving any legally required notice and opportunity to cure the default, here, no notice was required because: (1) in the March 2005 promissory note, plaintiff not only consented to defendant's ability to invoke its right to setoff, it waived notice and otherwise-available defenses to such action; and (2) the 2004 checking account agreement provided that funds in that account could be setoff without notice. In sum, the court's finding that defendant's belief of insecurity was reasonable was not contrary to the manifest weight of the evidence, and the court did not err in concluding that setoff without notice was permitted by the agreements.

¶ 26 B. Amount of Setoff was Proper

¶ 27 Plaintiff next argues that, even if setoff was proper, the court improperly found that the amount setoff was proper.[1] Plaintiff argues that the commercial loan agreement establishes that, when defendant effects a setoff because it reasonably deems itself insecure, the only amount it may setoff is the amount due or payable under the terms of the loan, which is defined as the "total amount to which you [defendant] are entitled to demand payment under the terms of the loan at the time you set off." Here, plaintiff argues, the only amount due and payable under the loan "at the time of set-off" (*i.e.*, December 6, 2010) was the $2,755.88 monthly interest payment, not the entire principal of the loan (due April 25, 2011). For two reasons, we disagree.

¶ 28 First, the total amount to which defendant was entitled to "demand" payment under the terms of the loan was affected by plaintiff's default because, at that point, the setoff provisions were

[1]We reject defendant's argument that plaintiff forfeited this argument, as plaintiff repeatedly argued below that only those amounts due and payable under the agreements were subject to setoff.

triggered.[2] While the agreements generally provided that (in the *absence* of a demand for the full amount) the only amounts regularly due were the monthly interest payments, once plaintiff defaulted defendant was permitted under the terms of the commercial loan agreement to set off "any amount" due and payable under the loan. Therefore, we cannot find unreasonable the trial court's finding that "any amount," as it relates to "the total amount to which [defendant] was entitled to demand payment under the terms of the loan at the time of set off" includes the *entire* remaining[3] indebtedness.

¶ 29 Second, although plaintiff argues that Illinois law generally provides that a loan must be mature before setoff is permissible, it is clear that parties may contract to determine other circumstances under which setoff is permissible. See *e.g.*, *Fisher v. State Bank of Annawan*, 163

[2]Also, the necessity of an actual written or other "demand" (which, incidentally, is not defined) was also affected by plaintiff's default (once defendant deemed itself insecure) because, and as previously described, once plaintiff was in default, defendant was authorized to setoff *without* any notice.

[3]We note that a reasonable interpretation of "the total amount to which defendant was entitled to demand payment under the terms of the loan at the time of set off" is that defendant may not setoff more than the amount remaining on the initial indebtedness. For example, if the original loan amount was $300,000, but the principal had been paid down to $200,000, the total amount to which a defendant would be entitled to demand payment under the terms of the loan would be no more than the remaining $200,000. In our view, reading the loan agreements as a whole (which, as the court noted, favors defendant), leads us to conclude that it is more reasonable to interpret the clause regarding the total amount to which defendant is entitled to demand payment as protecting and relating to the loan amount, not merely the monthly interest payment.

Ill. 2d 177, 181 (1994) (finding equitable setoff inquiry irrelevant where a contractual basis for setoff existed). Indeed, plaintiff concedes that parties may contract in a manner contrary to common-law setoff principles; it simply argues that it did not do so here because the agreements speak in terms of compliance with existing law. We disagree. Namely, the terms of the debt modification agreement explicitly modified the maturity and payment provisions to permit defendant to demand payment *at any time*; specifically, plaintiff agreed therein "to pay the loan on demand[.]" Contracting to permit defendant to demand the full amount of the loan at any time, irrespective of maturity, impacts the clause in the commercial loan agreement's setoff provision addressing the total amount to which defendant was entitled to demand payment "at the time of set-off" to necessarily include the *entire* loan amount. Therefore, the court's finding that defendant was entitled to setoff $200,000 (which was less than the remaining loan balance), as opposed to only the amount of the monthly interest payment, was proper.

¶ 30 III. CONCLUSION

¶ 31 For the following reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 32 Affirmed.