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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PNC BANK, N.A.,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
)	
v.)	No. 11-L-913
)	
CAMILLE O. HOFFMANN,)	Honorable
)	Dorothy French Mallen,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting summary judgment for PNC on Hoffmann's amended affirmative defense because the implied covenant of good faith and fair dealing did not override the contracts' express provisions requiring payment on the loan on the note's maturity date. Based on this resolution, we did not address Hoffmann's second argument that the trial court abused its discretion by not allowing her discovery of documents pertaining to the loan since its inception. Therefore, we affirmed.

¶ 2 Plaintiff, PNC Bank, N.A. (PNC), brought suit against defendant, Camille O. Hoffmann, as guarantor of a multimillion dollar loan. Hoffmann asserted an affirmative defense that PNC breached its duty of good faith and fair dealing by pretending to negotiate a loan extension even after it had decided to file suit. The trial court granted summary judgment in PNC's favor on this

issue, reasoning that the duty of good faith and fair dealing did not apply because the loan guaranty's language did not require PNC to exercise discretion in connection with renewing the loan. On appeal, Hoffmann argues that the trial court's reasoning was flawed. She also argues that the trial court abused its discretion by denying her discovery of relevant documents generated over the loan's life. We affirm.

¶ 3

I. BACKGROUND

¶ 4 OHCMC Oswego, LLC (Oswego) was formed to develop and sell residential real estate in and around Oswego. In September 2005, Oswego took out a loan from PNC for \$12,350,000 and signed a note and mortgage. Oswego used the money to purchase land, its only asset. The maturity date of the loan was April 15, 2007. Oswego and PNC subsequently agreed to several loan extensions. Specifically, on April 15, 2007, PNC and Oswego signed a loan modification extending the maturity date for the note to June 15, 2007. Around that date, they executed a second loan modification extending the maturity date to January 5, 2008. The loan reached maturity, and about two months later, around March 13, 2008, and effective retroactive to January 5, 2008, PNC and Oswego entered into a third loan modification extending the maturity date to June 30, 2008. According to Hoffmann, the plan was to use money generated from the development of the property to repay the loan, so while the loan was outstanding and the development project was not yet complete, PNC and Oswego agreed to loan extensions.

¶ 5 Around June 30, 2008, PNC and Oswego entered into a fourth loan modification that extended the maturity date to June 30, 2009. It additionally replaced the initial guarantors with Hoffmann as the guarantor, amended the note's interest rate, and required Oswego to pay principal reduction payments of \$100,000 per month beginning July 28, 2008.

¶ 6 The guaranty agreement with Hoffmann stated, in relevant part:

*“The liability hereunder shall in nowise be affected or impaired by any of the following, any or all of which may be done or omitted by the Bank in its sole discretion without notice to anyone and irrespective of whether the Guaranteed Debt shall be increased or decreased thereby (and Bank is hereby expressly authorized at its sole discretion to make from time to time, without notice to anyone): any sale, pledge, surrender, compromise, settlement, exchange, release, renewal, extension, modification, election with respect to any collateral *** or other disposition of or with respect to any of said Guaranteed Debt or any security or collateral therefor [sic], and such liability shall in nowise be affected or impaired by any acceptance by the Bank of any security for, or other Guarantor or obligors of any of the Guaranteed Debt, or by any forbearance or indulgence by the Bank in the collection of, or any failure, neglect or omission on its part to enforce any claims against any person or persons primarily or secondarily liable thereon, or upon any collateral or security therefor [sic], or to enforce any lien upon or right of appropriation of any moneys, credits or property of the Borrower in the possession or control of the Bank, or by any application of payments or credits on the Guaranteed Debt.”* (Emphases added.)

¶ 7 On about February 10, 2010, effective retroactively to June 30, 2009, PNC, Oswego, and Hoffmann executed a fifth loan modification that extended the maturity date to November 1, 2010, and made certain changes to the interest rate and payment terms. The fifth loan modification reaffirmed the previous guaranty agreement.

¶ 8 On November 1, 2010, PNC notified Oswego and Hoffmann of their default under the note, and PNC demanded payment. Oswego did not pay the balance due, and on January 14, 2011, PNC filed a complaint against Oswego and Hoffmann in federal court. On June 20, 2011,

that court dismissed PNC's complaint against Hoffmann on the basis that the guaranty agreement required that the lawsuit be brought in Du Page County. On June 4, 2012, PNC obtained a judgment in federal court against Oswego for \$11,548,313.24. This total consisted of the remaining loan amount, interest, late fees, and attorney fees.

¶ 9 Meanwhile, on August 10, 2011, PNC filed a separate action against Hoffmann in Du Page County to enforce the guaranty. Hoffmann filed an answer and affirmative defense alleging that PNC's breach of contract action failed because PNC had breached its implied contractual duty of good faith and fair dealing. In support, Hoffmann cited provisions in the mortgage note and facts relating to PNC's actions. She also filed a third-party complaint against Robert Schulz, an executive at the company managing Oswego, alleging that he breached his fiduciary duty to her and engaged in fraudulent misrepresentation by misleading her into unknowingly and unintentionally signing the guaranty.

¶ 10 PNC moved to strike Hoffmann's affirmative defense. On March 6, 2012, the trial court granted PNC's motion to strike on the basis that the language Hoffmann cited was directed at the borrower's obligations, not PNC's obligations, and there was no express provision giving PNC contractual discretion to extend the mortgage or note. However, the trial court gave Hoffmann leave to file an amended affirmative defense asserting a different theory.

¶ 11 Hoffmann filed an amended affirmative defense on April 2, 2012. She argued that the guaranty agreement between her and PNC gave it discretion in extending or modifying the loan, such that PNC had an implied duty to exercise that discretion in good faith. She alleged as follows. PNC was aware at the time it made the loan that Oswego was using the funds to acquire and develop residential real estate. During PNC's relationship with Oswego, the parties would agree to extend the maturity date of the underlying note while the loan was still outstanding and

the project was not yet complete. Each time the loan agreement came to maturity, the Bank negotiated with Oswego and extended the loan, with some of the negotiations and extensions taking place even after the note's maturity date had passed. Consistent with what occurred with the prior five extensions, PNC and Oswego negotiated for a sixth extension of the loan both before and after the November 1, 2010, maturity date. David Ruisch, a vice president in PNC's "work-out group," e-mailed Oswego (through Rick Robinson) to request that Oswego continue to make its monthly interest payments on the loan after the November 1, 2010, maturity date. Ruisch stated that Oswego's continued monthly interest payments would "help" the "process" of extending the loan. Ruisch and Robinson communicated about a sixth loan extension in numerous e-mail exchanges and telephone calls. In his deposition, Ruisch testified that PNC had no written rules regarding whether to extend a loan or what criteria must be met, but rather the determination was made on a case-by-case basis.

¶ 12 Hoffmann further alleged as follows. She and Oswego reasonably relied upon PNC's implied duty to engage in the renewal process in good faith, so Oswego made monthly interest payments of \$57,608 on November 3, 2010; \$55,750 on December 1, 2010; and \$67,008 on January 10, 2011. Unbeknownst to Oswego and Hoffmann, however, PNC filed a complaint against them in federal court on January 14, 2011. PNC did not inform Oswego and Hoffmann of the federal suit but rather continued corresponding about the loan extension, reminded Oswego to continue making its monthly interest payments, and asked for confidential information. In reliance on PNC's implied duty to exercise its discretion in the extension and renewal process in good faith, Oswego and Hoffmann offered PNC a deed in lieu of foreclosure on the property and also offered additional collateral from Hoffmann personally that covered almost the full value of the loan. Oswego made a \$67,131.39 interest payment on February 3,

2011, and a \$51,602 interest payment on March 10, 2011. PNC did not inform Oswego and Hoffmann of its federal suit against them until Ruisch e-mailed Robinson on March 24, 2011, to inform him that Hoffmann had been served the previous day.

¶ 13 Hoffmann argued that PNC breached its duty of good faith and fair dealing by concealing the fact that it had already decided not to extend the loan and instead had decided to sue, while at the same time and for months afterwards pretending to negotiate the loan extension in good faith, and continuing to request and accept confidential information and monthly interest payments. Hoffmann argued that PNC's conduct of pretending to negotiate in good faith impaired the opportunity for Oswego and Hoffmann to secure alternative financing or make other arrangements to protect themselves.

¶ 14 On February 14, 2013, PNC moved for summary judgment on Hoffmann's amended affirmative defense. The trial court granted the motion on August 22, 2013. The trial court stated as follows. Contrary to arguments raised by PNC, *res judicata* did not apply because Oswego could not have raised any affirmative defenses in the federal court based on the guaranty, whereas Hoffmann had standing to raise the amended affirmative defense because she was a party to the guaranty. The issue before it was purely one of interpreting contractual documents, which was a matter of law. It was accepting as true for purposes of the motion that PNC was stringing Oswego and Hoffman along when it knew that it would not extend the loan for a sixth time. However, the language at issue in the guaranty was not requiring PNC to do anything, but rather saying that PNC could do anything it wanted and Hoffmann's obligation to pay remained the same. The guaranty's language did not create a requirement "to exercise its discretion in good faith and fair dealing [*sic*] if it [*chose*] to extend the loan," because if such an obligation existed, it would have to arise out of documents between the borrower and the lender,

not the lender and guarantor. The implied covenant of good faith and fair dealing attached only to promises made within the contract, and it did not override express obligations of a written contract. Therefore, since the guaranty did not require PNC to exercise discretion in renewing the loan, the implied covenant of good faith and fair dealing did not attach. The trial court stated:

“bottom line is that the affirmative defense is not a proper affirmative defense in that the guaranty, and in particular the paragraph that is cited by the defendant, does not create an obligation on the part of PNC to do anything; does not create an obligation on the part of PNC to exercise its discretion if it decided to engage in negotiations to extend the loan; that it does not create a violation of the [sic] good faith and fair dealing regardless of what *** facts are pled. And because there is no dispute that the [sic] PNC made out a *prima face* case, there is no defense to the *prima facie* case, and, therefore, the Court is granting summary judgment in favor of PNC and against Camille Hoffman[n].”

¶ 15 On December 11, 2013, the trial court entered judgment in favor of PNC and against Hoffmann for \$10,613,320.14. The trial court’s order contained a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason to enforcement or appeal of the ruling.¹ Hoffmann timely appealed.

¶ 16

II. ANALYSIS

¶ 17 On appeal, Hoffmann first argues that the trial court erred in granting PNC’s motion for summary judgment on her amended affirmative defense. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and

¹ Hoffman’s third-party complaint against Schulz remained pending at the time.

that the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). We review *de novo* a grant of summary judgment. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶ 17. Similarly, the interpretation of a contract presents a question of law, which we review *de novo*. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011).

¶ 18 Hoffmann alleged in her affirmative defense that PNC breached its duty of good faith and fair dealing because, even after making the decision that it was going to collect on the loan, it pretended to negotiate a loan extension and continued to request and receive confidential financial information and monthly interest payments.

¶ 19 Every contract has an implied covenant of good faith and fair dealing. *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 112 (1993). Under this doctrine, a party with contractual discretion must exercise the discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner that is inconsistent with the parties' reasonable expectations. *Id.* Problems involving this obligation typically arise where one party to a contract has broad contractual discretion. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367 (1995). However, the obligation of good faith and fair dealing "is essentially used as a construction aid in determining the intent of the parties where an instrument is susceptible of two conflicting constructions." *Holtzman*, 248 Ill. App. 3d at 112. Parties are entitled to enforce their contracts, and as the duty of good faith and fair dealing is an implied covenant, it cannot be used to overrule or modify a contract's express provisions. *Holtzman*, 248 Ill. App. 3d at 113. Thus, "[a] guarantor may not rely on the covenant of good faith and fair dealing to read into a contract an obligation that does not exist." *J.P. Morgan Chase Bank, N.A. v. East-West Logistics, LLC*, 2014 IL App (1st) 121111, ¶ 48.

¶ 20 Hoffmann argues as follows. The guaranty’s language expressly vested discretion in PNC in renewing and extending the loan to Oswego. Specifically, PNC was “expressly authorized,” in its “sole discretion,” to take various actions regarding the loan, including “renewal, extension, [and] modification.” The evidence further showed that PNC had no particular policies or rules regarding whether a loan could be extended, but rather, such decisions were made on a “deal-by-deal” basis, subject only to PNC’s discretion. PNC was therefore required to exercise this discretion reasonably.

¶ 21 Hoffmann analogizes this case to *United Central Bank v. Kanan Fashions*, No. 10-C-331 (N.D. Ill. May 13, 2011). In that case, a bank sued borrowers for breach of contract. One borrower brought a counterclaim alleging that the bank had breached the loan agreement by unreasonably and in bad faith exercising its discretion to terminate the agreement, without a valid business reason, and without giving the borrower reasonable time to obtain a replacement line of credit. *Id.* *1. The bank argued that the counterclaim was barred by the Credit Agreements Act (Act) (815 ILCS 160/0.01 *et seq.* (West 2010)) because the alleged breach was based on failing to follow an internal bank memorandum that recommended extending the loan for another year. The court stated that if the bank’s premise were correct, the Act would apply because the memorandum was not signed by the parties, as required under the Act. The court stated that, however, the premise was wrong because the borrower cited the memo as evidence that it was not in default under the signed loan agreement, and therefore the bank lacked a valid business reason for terminating the agreement. *Id.* *2. The court therefore denied the bank’s request for judgment on the pleadings.

¶ 22 Hoffmann cites additional cases, all from other jurisdictions, which she argues show that abrupt termination of a lending relationship, where the lender led the borrower to believe the

relationship would continue and then did not provide reasonable notice and an opportunity to find alternate credit, violates the implied duty of good faith and fair dealing. See *Duffield v. First Interstate Bank of Denver, N.A.*, 13 F.3d 1403, 1406 (10th Cir. 1994); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 759 (6th Cir. 1985); *Components Direct, Inc. v. European American Bank & Trust Co.*, 175 A.D. 2d 227 (N.Y. App. 1991); *Reid v. Key Bank of S. Maine, Inc.*, 821 F.2d 9, 15-16 (1st Cir. 1987).

¶ 23 Citing Illinois Supreme Court Rule 23(e)(1) (eff. July 1, 2011), PNC argues that Hoffmann may not rely on *Kanan Fashions* because it is an unpublished order. We note that Rule 23 pertains to dispositions in the Illinois appellate court, so it is not directly on point. It is true that the appellate court has frequently declined to consider unpublished federal decisions (*Bovay v. Sears, Roebuck & Co.*, 2013 IL App (1st) 120789, ¶ 42), and such decisions are clearly not binding (*Horwitz v. Sonnenschein Nath & Rosenthal LLP*, 399 Ill. App. 3d 965, 976 (2010)). In any event, *Kanan Fashions* is distinguishable because the borrower there alleged that it was not in default under the loan agreement, whereas here the note has a specific maturity date that was known to the parties. In this manner, this case is likewise distinguishable from the other cases Hoffmann cites, almost all of which involve lines of credit. As PNC points out, unlike cases involving lines of credit, Oswego and Hoffman knew all along the date on which the loan was set to mature and had ample time to seek financing to pay off PNC at the note's maturity. *Duffield* did not involve a line of credit but is also distinguishable because there the bank declared the borrower in default before the loan had reached maturity, unlike in this case. *Duffield*, 13 F.3d at 1404-05.

¶ 24 Hoffmann further argues that the trial court erred in focusing on whether the guaranty required PNC to take particular actions. Hoffmann argues that the trial court should have instead

considered whether the contract vested discretion in PNC. Hoffman maintains that PNC in fact exercised its discretion with respect to renewing the loan five times before, including one time after she signed the guaranty. She argues that, therefore, there can be no reasonable dispute that the guaranty and related documents vested total freedom in PNC to decide on a course of action with respect to renewal and extension of the loan.

¶ 25 Hoffmann also argues that the trial court's decision cannot be reconciled with the appellate court's decision in *Hentze v. Unverfehrt*, 237 Ill. App. 3d 606 (1992). The issue in that case was whether the implied obligation of good faith and fair dealing applied to a dealership contract that was terminable at will. *Id.* at 610. The appellate court determined that the obligation did apply. It stated that in reaching this conclusion, it was not requiring that at-will termination be only for good cause, but rather that the termination could not be based on bad faith, opportunistic advantage-taking, or lack of cooperation depriving the other party of his reasonable expectations. *Id.* at 611. The court stated that the dealer's actions of telling customers not to deal with the plaintiff, forcing the plaintiff to raise prices, and sending several contradictory communications to the plaintiff about the plaintiff's status with the company showed bad faith. *Id.* Hoffmann relatedly cites *Wilson v. Career Educational Corp.*, 729 F.3d 665, 674 (7th Cir. 2013) (under Illinois law, implied covenant of good faith applied even where employment contract allowed at-will termination).

¶ 26 PNC argues that the above cases are not analogous because it did not terminate an open-ended at-will contract. We agree. By its terms, the note matured on November 1, 2010, and therefore cannot be compared to scenarios where there was no specific termination date contemplated.

¶ 27 PNC cites *Holtzman*. There, the lender sought to foreclose on a mortgage and obtain a judgment against the guarantor for any deficiency. *Holtzman*, 248 Ill. App. 3d at 108. The defendants filed affirmative defenses, including the allegation that the lender breached a paragraph of the mortgage document which authorized the lender “at its option and without giving notice, to extend payment or reduce payments, release any person as to any indebtedness, accept renewal notes, modify the terms of payment from time to time, take on additional security, or release any part of the encumbered property from the lien of the mortgage.” *Id.* at 108-09. The appellate court stated that while the paragraph provided “the lender with a series of options which at its sole discretion it may wish to exercise,” “nothing in the mortgage documents requires a lender to soften its position or its heart.” *Id.* at 112. The appellate court stated that the doctrine of good faith and fair dealing would not override the contract’s express terms. *Id.* at 112-13. PNC argues that, likewise, in this case there was no provision in the guaranty or note requiring it to extend the note’s maturity date, so the defense of good faith and fair dealing is not implicated.

¶ 28 PNC additionally cites *Continental Bank, N.A. v. Modansky*, 997 F.2d 309, 312 (7th Cir. 1993), and *Bank of America v. 108 N. State Retail, LLC*, 401 Ill. App. 3d 158, 172-73 (2010). In *Modansky*, the lender sued the borrower and guarantors after previously increasing and extending the loan. *Modansky*, 997 F.2d at 311. The defendants argued that the bank violated its duty of good faith and fair dealing by not again extending the loan. *Id.* at 312. The Seventh Circuit disagreed, stating that the expiration date was an express contract term, and if the borrowers wanted a longer term, they should have negotiated a later expiration date. *Id.* In *108 N. State Retail, LLC*, the bank entered into at least 23 separate letter agreements where it agreed to continue to disburse funds in the loan agreement despite circumstances which constituted

defaults. *108 N. State Retail*, 401 Ill. App. 3d at 161. The parties also had ongoing negotiations before the bank filed suit. The reviewing court stated that, despite the parties' ongoing discussions, the loan agreement did not require the lender to modify the loan, and oral discussions between the parties could not be the basis for an argument that the lender failed to abide by a duty of good faith and fair dealing. *Id.* at 173.

¶ 29 Hoffmann argues that PNC's reliance on *Holtzman* is misplaced. Hoffmann argues that while the *Holtzman* court stated that the contracts did not repose in the plaintiff the kind of discretion described in prior cases (see *Holtzman*, 248 Ill. App. 3d at 113), it did not explain why and did not set forth the language at issue. Hoffmann argues that here, in contrast, there is no doubt that the guaranty vested PNC with discretion for decisions regarding the renewal, extension, and modification of the loan. Hoffmann argues that *Holtzman* is also inapposite because it does not involve circumstances like those present here, where a lender secretly filed a lawsuit against the borrower and guarantors while simultaneously purporting to negotiate an extension and encouraging the submission of confidential information and the payment of hundreds of thousands of dollars in interest. Hoffmann argues that *Modansky* and *108 N. State Retail* are similarly distinguishable. Hoffmann maintains that the latter case also involved no discussion of contractual discretion whatsoever, but rather was based on alleged oral modifications. Hoffmann argues that while she does not dispute that PNC was entitled to call in the loan once it reached its maturity date, once PNC exercised its discretion to negotiate a loan modification or renewal, it was obligated to conduct those negotiations in good faith and consistent with the parties' reasonable expectations.

¶ 30 We conclude that the trial court correctly granted summary judgment for PNC on Hoffmann's amended affirmative defense. The language on which Hoffmann relies is couched

in a paragraph stating that *her liability* to PNC will not be affected regardless of whether PNC chose to take certain actions towards the loan, such as a renewal or modification. This consideration, along with the note's specific maturity date, distinguishes this situation from the cases Hoffmann relies on, which involve more opened-ended relationships with lines of credit or at-will termination. That is, Oswego and Hoffmann knew (or should have known) that the remaining balance of the loan was due on November 1, 2010, and that PNC could demand complete repayment on or after that date. Thus, long before the note became due, Oswego and Hoffmann could have sought alternative or backup financing to repay the loan.

¶ 31 We agree with PNC that *Holtzman* is most similar to this case. While Hoffmann criticizes the comparison because *Holtzman* did not quote the contract language that vested the lender with discretion, Hoffmann does not acknowledge that the *Holtzman* court summarized the relevant language by stating that the mortgage document authorized the lender “at its option and without giving notice, to extend payment or reduce payments, release any person as to any indebtedness, accept renewal notes, modify the terms of payment from time to time, take on additional security, or release any part of the encumbered property from the lien of the mortgage.” *Holtzman*, 248 Ill. App. 3d at 108-09. The *Holtzman* court indicated that this type of discretion was not the broad discretion in performance that gives rise to the implied duty of good faith and fair dealing, especially considering that the contract's express terms trumped any implied covenants. *Id.* at 113. Here, in addition to the discretion being couched in terms of not limiting Hoffmann's liability, the note had a specific maturity date known at all times to the parties, so the implied duty of good faith and fair dealing would not overrule the express contractual terms. See *id.* at 113. Finally, as the *Holtzman* court noted, the implied obligation of good faith and fair dealing is essentially used as a construction aid in determining the parties'

intent where a contract has language that may be interpreted in two conflicting ways (*id.* at 112), whereas here Hoffmann points to no such ambiguity. See also *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434, 444 (2011) (duty of good faith and fair dealing is not an independent source of duties to a contract's parties but is rather used as a construction aid in determining the parties' intent where an instrument is susceptible to two conflicting constructions). Accordingly, we affirm the trial court's grant of summary judgment for PNC.

¶ 32 Based on our determination that the trial court correctly granted summary judgment for PNC for the aforementioned reasons, we do not address PNC's alternative arguments that summary judgment was also appropriate because Hoffmann lacked standing to bring the amended affirmative defense and because the defense was barred by *res judicata*. We also need not address Hoffmann's second argument on appeal, that the trial court abused its discretion by denying her discovery of relevant documents generated over the loan's life.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 35 Affirmed.