2015 IL App (5th) 130338-U

NO. 5-13-0338

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DAN STEVENS and NEIL R. THOMPSON, Plaintiffs,	)	Appeal from the Circuit Court of Jackson County.
v.	)	
ROBERT L. NEWMAN, TRUSTEE NG LAND TRUST #1, TERRY NEWMAN and ROBERT L. NEWMAN, Individually, Defendants/Third-Party Plaintiffs/ Third-Party Counterdefendants- Appellees,	)	
v.	)	No. 02-LM-436
THE PEOPLES NATIONAL BANK OF McLEANSBORO, Third-Party Defendant/ Third-Party Counterclaimant/ Third-Party Plaintiff-Appellant,	)	
v.	)	
ROBIN M. NEWMAN and BRANDI S. NEWMAN, Third-Party Defendants-Appellees.	)	Honorable Christy W. Solverson, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court properly granted the defendant-appellees' motion for judgment on the pleadings and properly granted summary judgment to the third-party defendant-appellees, we affirm the decision of the circuit court on the pleadings.

¶ 2 This appeal arises from litigation commencing in 2002, when the plaintiffs, Dan Stevens and Neil Thompson, sued the defendants-appellees, NG Land Trust #1, Terry Newman, and Robert Newman (Newmans or Newman husbands), to recover back rent on a commercial lease. The Newmans filed a third-party complaint against the appellant, The Peoples National Bank of McLeansboro (PNB), seeking indemnity for the back rent based on a holdback provision in an agreement between the parties which provided that PNB, to assure payment of the rent owed to the plaintiffs, was to hold back $81,000 of a irrevocable letter of credit for which both the Newmans and PNB were listed as beneficiaries. By answer and with an assertion of affirmative defenses, PNB denied liability under the holdback provision. PNB countersued the Newmans and filed a third-party complaint against the third-party appellees, Robin Newman and Brandi Newman (Newman wives), for their liability as guarantors of the Newmans' company, New Group, Inc.

¶ 3 We are asked to review two separate judgments that were entered against PNB in the circuit court of Jackson County. The first summary judgment order regarding the Newman wives' liability as guarantors was entered on May 18, 2012. PNB filed a motion to reconsider on June 18, 2012, but it was denied by the trial court on August 10, 2013. On September 4, 2012, PNB filed a motion for a finding under Illinois Supreme Court

Rule 304 (eff. Feb. 26, 2010), which was granted, and PNB subsequently filed a notice of appeal. On November 18, 2013, the court entered an order regarding the holdback provision; this order granted the Newmans' motion to reconsider the trial court's June 19, 2013, denial of the August 18, 2004, motion for partial judgment on the pleadings. In December 2013, the court granted PNB's motion for a Rule 304 finding and PNB filed a notice of appeal. A February 24, 2014, order by this court consolidated the two appeals. As the issues presented here are raised on the pleadings, we will set forth only the facts that are relevant to resolving this appeal.

¶ 4 In September of 1998, the plaintiffs and the Newmans entered into a commercial lease agreement for an Anna, Illinois, location in which the Newmans were to operate a Taco John's franchise. After beginning operations at this location, the Newmans formed New Group, Inc., an Illinois corporation, which operated all of their Taco John's franchises. To finance their operations, the Newmans borrowed funds from PNB through both conventional and U.S. Small Business Administration (SBA) loans.[1] While New

[1]The U.S. Small Business Administration (SBA) operates a guaranty loan program that assists small businesses in obtaining financing when money is unavailable from other sources. See 15 U.S.C. § 631 *et seq*. (1994). Participating banks enter into a guaranty agreement with the SBA; when a qualified borrower applies to a bank for an SBA-guaranteed loan, the bank must obtain authorization from the SBA to proceed. After receiving approval, the bank lends its own funds to the borrower and services the loan pursuant to the SBA's guaranty agreement. If the borrower defaults, the bank may

Group was the principal borrower, the Newmans and the Newman wives signed personal commercial guaranties for the payment of all New Group's obligations to PNB. Approximately two months after the guaranties were signed, New Group executed an SBA promissory note, payable to PNB in the amount of $230,330 (SBA loan).

¶ 5 In September of 2001, the Newmans sold their interest in New Group to Amigo Food Services, LLC (Amigos), and PNB provided financing to Amigos for the purchase. As a part of the consideration for the purchase, Amigos provided a one-year irrevocable letter of credit in the amount of $150,000, which named both PNB and the Newmans as beneficiaries. In a three-party assumption agreement dated September 24, 2001, Amigos assumed the debts and obligations of New Group to PNB, including the SBA loan.

¶ 6 In October of 2001, the Newmans and PNB began negotiating an agreement to resolve outstanding issues. On October 17, 2001, the Newmans negotiated a debt-retirement agreement with PNB for the benefit of themselves and the Newman wives. Paragraph C of that agreement stated that $81,000 of the $150,000 Amigos' letter of credit was to be held back to assure repayment of the lease between the Newmans and the plaintiffs for the Anna location. Upon each lease payment by Amigos, the secured amount would be reduced; the remainder of the letter of credit was to be held by PNB as

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demand that the SBA purchase its share of the outstanding balance. *United States v. First National Bank of Cicero*, 957 F.2d 1362, 1364 (7th Cir. 1992). The SBA may, in its sole discretion, undertake the servicing, liquidation, and/or litigation of any 7(a) or 504 loan. 13 C.F.R. 120.535(d) (2008).

the sole beneficiary and to be used to secure New Group's obligation. The remainder of the agreement released the Newmans and their wives of all liability; however, paragraph F stated that the release from liability "shall not include a release for [the SBA loan] in the amount of $230,330."

¶ 7 On January 8, 2002, Amigos and PNB entered into an agreement providing for a change in the terms of repayment of the SBA loan; this agreement extended the due date of the note, altered the interest rate, reduced the payments amount due per month, converted the note from an installment note to a demand note, and changed the borrower from New Group, Inc., to Amigo Food Systems, LLC, f/k/a New Group, Inc. On April 30, 2002, PNB and Amigos again agreed to a change in the terms of Amigos' repayment. This agreement accelerated the due date of the note, reduced the monthly installment payments, altered the interest rate, changed the final payment to an estimated balloon payment, and changed the identity of the borrower to Amigo Food Systems, LLC. Neither the Newmans nor the Newman wives were made a party to this agreement or notified by PNB prior to its execution.

¶ 8 The one-year period for the letter of credit was set to expire in March of 2002. In order to obtain the proceeds of the irrevocable letter of credit, PNB sent a document notifying AmSouth Bank, the issuer of the letter of credit on Amigos' behalf, that Amigos had defaulted on its obligations to the beneficiaries (PNB and the Newmans). The Newmans' signatures appear at the bottom of the document. AmSouth Bank thereafter released the required $150,000 to PNB.

¶ 9 In September, 2002, Amigos defaulted on the SBA loan and discontinued rent payments to the plaintiffs. The plaintiffs notified the Newmans of Amigos' failure to pay pursuant to the lease agreement. The Newmans subsequently notified PNB, demanding that, pursuant to the debt-retirement agreement, PNB use the $81,000 set aside from the $150,000 to pay the outstanding lease obligations. However, on multiple instances ranging from April 30, 2002, to December 12, 2002, PNB instead allocated the funds to various other Amigo outstanding balances; all but one of these accounts (which received a $1,354.92 interest payment) were obligations for which the Newmans were not personally liable. PNB admitted that it paid itself interest and principal on these loans with the proceeds of the letter of credit, but claimed that the Newmans verbally agreed to PNB's course of action. These events ignited the present litigation.

¶ 10 As previously noted, PNB requests our review of two orders by the circuit court. The circuit court's first order granted the Newmans' motion for summary judgment, holding that the Newman wives' guaranties could not be enforced with respect to the SBA loan because PNB impermissibly modified the loan and substituted Amigos in place of New Group, when the wives had originally agreed to guaranty New Group's debt. Further, the court found that PNB had violated its duty of good faith and fair dealing to the Newman wives. On appeal, PNB seeks to reverse the trial court's order.

¶ 11 The Newmans, however, allege that this issue is moot. Specifically, the Newmans argue that no controversy remains because the loan at issue in this appeal, filed by PNB in July of 2013, was purchased by the SBA from PNB in 2006; also, a termination agreement that exists between the current owner of the loan (the SBA) and Newmans

releases them from any liability on the loan. In support of this contention, the Newmans reference their motion requesting that this court take judicial notice of a termination agreement and the purchase of the loan.[2] Attached to the motion is a "termination of guarantees and release of liability agreement" signed on September 2, 2014, by the Newman husbands, the Newman wives, and U.S. SBA supervisory attorney John Bancroft. The agreement releases all the Newmans from any liability arising out of the SBA loan at issue. Also attached to the motion is an affidavit by John Bancroft, stating that to his knowledge and belief, the U.S. SBA purchased the loan at issue from PNB on August 18, 2006. Based on the foregoing, the Newmans assert that the appeal should be dismissed because PNB may not collect on a loan that it does not own, and the SBA released both the Newman husbands and the Newman wives from any and all obligations in connection to the guaranties regarding the loan.

¶ 12 We turn our attention to this motion and the activity that followed, as the information contained therein is potentially dispositive of PNB's first issue on appeal. PNB's November 18, 2014, response to this motion requests that the motion be denied because the documents are inappropriate for judicial notice. Specifically, PNB asserts that the documents comprise critical evidentiary material that was not presented to the court below; additionally, the documents are not capable of immediate and accurate

[2]This November 10, 2014, motion was filed three days before the appellee brief, and thus the appellee brief's appendix includes a copy of this motion and exhibits.

demonstration. On November 25, 2014, this court entered an order taking the motion for judicial notice and PNB's response with the case.

¶ 13 On February 2, 2015, the Newmans filed a motion for leave to file a reply to PNB's response. The motion asserts that PNB's argument—that the court may not take judicial notice of these facts because they constitute a critical evidentiary issue—would render the mootness doctrine inapplicable in all appellate proceedings, as no appellate court could dismiss a matter as moot based on events after the filing of the notice of appeal because all such facts would be "critical evidentiary matters" incapable of being noticed. The motion also notes that PNB's response did not deny that the SBA purchased the loan or the existence of a termination agreement. On February 9, 2015, PNB filed a response, stating that the Newmans' reply simply reiterates their argument in the original motion and should be denied. This court ordered both the motion for leave to file a reply and PNB's response to also be taken with the case.[3] For the following reasons, we deny both the Newmans' motion for judicial notice and the motion for leave to file a reply.[4]

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[3]Initially, this court granted the Newmans' February 2, 2015, motion for leave to file a reply, as PNB filed no objection or response following the parties' oral argument on February 4, 2015. However, on February 9, 2015, PNB filed a response to the motion. We subsequently vacated our February 4, 2015, order and instead ordered both motions to be taken with the case.

[4]As we have denied the Newmans' motion for leave to file a reply, we decline to discuss the contents of their reply to PNB's response to the motion for judicial notice.

¶ 14 A case can become moot when, pending the decision on appeal, events occur which render it impossible for the reviewing court to grant effectual relief to either party. *La Salle National Bank v. City of Chicago*, 3 Ill. 2d 375, 379-80 (1954). A reviewing court can take judicial notice of such events or facts which, while not appearing in the record, disclose that an actual controversy no longer exists between the adverse parties. *Bluthardt v. Breslin*, 74 Ill. 2d 246, 250 (1979). Thus, if judicial notice of the termination agreement and attached affidavit were indeed appropriate, we agree that this new information would likely render PNB's appeal moot, as PNB may not collect on a loan it does not own and for which the opposing party is not liable. However, because we find that judicial notice of these documents would be improper, we deny the Newmans' motions and must exercise our jurisdiction to review this appeal.

¶ 15 Judicial notice may be taken of factual evidence where the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy. *Kennedy v. Edgar*, 199 Ill. App. 3d 138, 143 (1990). However, in this case, the documents that require our notice are not derived from the requisite sources of "indisputable accuracy." While facts which affect a finding of mootness may be proved by extrinsic evidence, such as a motion and supporting affidavit (see *Slaughter v. Thornton*, 34 Ill. App. 3d 422, 424 (1975)), such facts must still be derived from *indisputably* accurate sources. The facts presented for our notice−the SBA's purchase of this loan in honor of its guaranty (and its subsequent ability to release the Newmans from liability from said loan)−is a fact capable of being denied; indeed, while PNB's responses to the Newmans' motions make no direct allusion to the veracity of the documents, the

SBA's ownership of the loan was firmly contested by PNB at the parties' oral argument before this court. Thus, even in the face of highly persuasive evidence, "a reviewing court will not take judicial notice of critical evidentiary material not presented in the court below, especially where the evidence may be significant in the proper determination of issues between the parties." *Kennedy*, 199 Ill. App. 3d at 143. We may not properly take judicial notice of such facts when the opposing party directly challenges their veracity. We therefore deny the Newmans' motions and proceed to our review of the trial court's dismissal on the merits.

¶ 16 In the alternative to their argument that the issue was moot, the Newmans argue that summary judgment was proper because the wives' guaranties are unenforceable, as PNB impermissibly modified the guaranties without the consent of the Newman wives. The Newmans also assert that summary judgment was proper because PNB violated the implied duty of good faith and fair dealing implicit in the guaranty agreements.

¶ 17 A motion for summary judgment should be granted where the pleadings, depositions, and affidavits reveal that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 31 (1992). When reviewing a motion for summary judgment, the appellate court must take the facts in the light most favorable to the nonmoving party and apply *de novo* review. *Id.*

¶ 18 Upon our own review of the record, we agree that summary judgment was appropriate, as the sale of New Group to Amigos and a change in the terms of the SBA note discharged the Newman wives as guarantors of the SBA loan.

¶ 19 A guaranty is a third party's promise to answer for payment of an obligation if the person primarily liable fails to make payment or perform the obligation. *McCracken v. Olson Cos.*, 149 Ill. App. 3d 104, 112 (1986). The rules of construction applicable to contracts generally also apply to contracts of guaranty. *Du Quoin State Bank v. Daulby*, 115 Ill. App. 3d 183, 185-86 (1983). Contractual terms are given their plain and ordinary meaning, and construing the language is a question of law appropriate for summary judgment unless the contract is ambiguous. *Reaver v. Rubloff-Sterling, L.P.*, 303 Ill. App. 3d 578, 581 (1999). However, this court strictly construes guaranty agreements in favor of the guarantor, especially when the creditor prepared the guaranty agreement (*Farmers State Bank v. Doering*, 80 Ill. App. 3d 959, 961 (1980)), and the guarantor is not liable for anything to which she did not agree. *Claude Southern Corp. v. Henry's Drive-In, Inc.*, 51 Ill. App. 2d 289, 299-300 (1964).

¶ 20 A strict reading of the guaranty agreement reveals that the Newman wives cannot be held liable on the guaranty agreement. PNB admits that when Amigos purchased New Group, they also assumed New Group's debt, including the SBA note at issue. The guaranty agreement defines "borrower" as "New Group, Inc., and all other persons and entities signing the Note in whatever capacity." As the agreement makes no reference to Amigos and the only signatures that appear on the note are that of the Newman husbands, it stands to reason that the Newman wives' guaranty on the SBA note extended only to New Group's obligations under the Newman husbands, as they are the only named borrowers within the guaranty agreement itself.

¶ 21 However, PNB asserts that because the "Miscellaneous Provisions" section states

that because "[t]he words 'Guarantor,' 'Borrower,' and 'Lender' include the heirs, successors, assigns, and transferees of each of them," the sale did not release the wives as guarantors. Further, PNB points to provisions in the guaranty agreement authorizing modification of the terms of "all indebtedness incurred by Borrower," and a provision that explicitly waives any defense to liability other than payment. Thus, PNB argues, the Newman wives' guarantee of New Groups' debt continued after the debt was assumed by Amigos despite the modifications made without their consent.

¶ 22 There are, indeed, a litany of broadly worded authorizations contained in the guaranty, and PNB correctly points out that even a broadly worded guarantee, so long as it is unambiguous, remains enforceable. However, even if this court were to undertake an expansive reading of the guaranty agreement in conjunction with the SBA note, we nevertheless determine that the Newman wives cannot be liable under the guaranty agreement due to the material change in the terms of the SBA loan, which was undertaken by PNB and Amigos in an agreement made without the knowledge or consent of the guarantors.

¶ 23 Illinois case law provides that if the creditor and principal debtor have entered into an agreement materially different from that contemplated by the instrument of guaranty, the guarantor will be released. *Cohen v. Continental Illinois National Bank & Trust Co. of Chicago*, 248 Ill. App. 3d 188, 192-93 (1993). A change in the entity whose debts are guaranteed that significantly alters the nature of the guarantor's undertaking, resulting in increased risk to the guarantor, may constitute a material change so as to release the guarantor from liability (*Alton Banking & Trust Co. v. Sweeney*, 135 Ill. App. 3d 96, 101

(1985)), but for a change to be "material," it must expose the guarantor to a substantial increase in the risk assumed. *Roels v. Drew Industries, Inc.*, 240 Ill. App. 3d 578, 581-82 (1992).

¶ 24 The Newman wives' signatures do not appear on the SBA note, and neither the Newman wives nor the Newman husbands authorized the numerous changes to the terms of the loan after the debt was assumed by Amigos and it became the principal borrower. We find that even if the wives remained the guarantors of the SBA loan upon Amigos' assumption of the debt, the substantial increase in the risk imposed by the changes agreed to by Amigos and PNB, without the Newman wives' consent or even notification, releases them as guarantors as a matter of law. In the agreements between PNB and Amigo following Amigos' assumption of the SBA note, PNB changed not only the name of the borrower, an entity with which the Newman wives had no contact or control, but also material terms regarding the time, rate, and method of repayment. The Newman wives cannot be held liable for what amounts to a fundamentally different obligation than the one with which they initially agreed.

¶ 25 Further, a guarantor's waiver of defenses does not waive defenses based upon a lender's breach of its duty to act in good faith absent an express disavowal. *Chemical Bank v. Paul*, 244 Ill. App. 3d 772, 782 (1993). A creditor has a good-faith obligation to inform the guarantor of facts known to the creditor that materially increase the guarantor's risk beyond that which the creditor has reason to believe the guarantor intended to assume, and which the creditor may reasonably believe are unknown to the guarantor. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App

(1st) 121111, ¶¶ 47-48. Changing a borrower from a guarantor's family member to an unknown third party, along with altering material obligations without the consent or knowledge of the guarantors, may certainly be considered an act inconsistent with the reasonable expectations of the Newman wives. For the foregoing reasons, we affirm the trial court's summary judgment order on this issue.

¶ 26 The second order from which PNB appeals concerns its liability for failure to allocate $81,000 of the letter of credit to secure payments of the lease. On May 18, 2012, the trial court granted the Newmans' motion to strike PNB's affirmative defenses, finding that on March 16, 2004, it had entered an order striking the same or similar affirmative defenses. In the present order, the court held that, again in this instance, PNB did not set forth a factual basis to state a cause of action for an estoppel or waiver defense. As to PNB's second and third affirmative defenses, which asserted that the Newmans failed to state a cause of action for breach of fiduciary duty and for conversion, respectively, the court again found that the allegations must be stricken as they were not grounds for an affirmative defense.

¶ 27 On appeal, PNB argues that the court improperly struck its affirmative defenses; had those defenses been allowed, material issues of fact would have been apparent and thereby prevented the court from granting summary judgment. Like summary judgment, a judgment on the pleadings can only be granted if there is no genuine issue of material fact. *Pekin Insurance Co. v. Richard Marker Associates, Inc.*, 289 Ill. App. 3d 819, 821 (1997). We review the trial court's decision to strike an affirmative defense under the *de*

novo standard of review. *Zook v. Norfolk & Western Ry. Co.*, 268 Ill. App. 3d 157, 169 (1994).

¶ 28 PNB's first alleged affirmative defense of waiver or estoppel alleged that around the time that the letter of credit was drawn, the Newman husbands told a PNB representative that they wanted the bank to have the money, rather than the owners of the Anna store. Thus, PNB asserts, the oral modification of their written agreement waived their rights to specific allocation of the funds, and the Newmans are properly stopped from reneging on the oral modification, as PNB relied on it to its detriment.

¶ 29 The meaning to be given to the plain words of a written contract is a question of law, and if the language of the contract unambiguously answers the question at issue, the inquiry is over. *Much v. Pacific Mutual Life Insurance Co.*, 266 F.3d 637, 643 (7th Cir. 2001) (citing to maxims of Illinois contract law). By its own terms, the contract signed by the parties specifically prohibits oral modifications, as it contains a provision stating that the agreement "may not be modified except by written instrument executed by all parties hereto." PNB cites *Tadros v. Kuzmak*, 277 Ill. App. 3d 301 (1995), in support of its contention that the terms of a written contract can be modified by a subsequent oral agreement even though the contract precludes oral modifications. *Id.* at 312. However, in *Kuzmak*, the parties agreed that an oral modification to their written contract had indeed occurred; the issue upon which they disagreed was whether or not an escrow account was intended by the parties to be a joint account. *Id*. Thus, *Kuzmak* is distinguishable from the instant case, as the record before us is devoid of any insinuation of an agreement to orally modify the contract after it was signed.

¶ 30 PNB notes that striking of an affirmative defense is improper where the well-pleaded facts and inferences drawn therefrom raise a possibility that the party asserting the defense will prevail. *Raprager v. Allstate Insurance Co*., 183 Ill. App. 3d 847, 854 (1989). However, based on the record before us, we find that the trial court's striking of this affirmative defense was proper because PNB could not prevail as a matter of law.[5]

¶ 31 As to its second and third affirmative defenses, PNB argues that failure to state a cause of action is a valid affirmative defense. However, we concur with the trial court's multiple rulings that disagree with this contention, finding that PNB's assertion is untimely and inappropriate as this "affirmative defense" should properly be brought in a motion pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)).

¶ 32 Section 2-615 of the Code provides that "[a]ll objections to pleadings shall be raised by motion." 735 ILCS 5/2-615(a) (West 2012). Thus, if a party wishes to challenge the legal sufficiency of a complaint, section 2-615 provides the appropriate avenue for relief, while section 2-612(c) of the Code provides that "[a]ll defects in pleadings, either in form or substance, not objected to in the trial court are waived," that is to say, forfeited. 735 ILCS 5/2-612(c) (West 2012). Thus, by filing an answer to the Newmans' complaint, PNB forfeited any contention that it was legally insufficient.

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[5]As this court may affirm on any grounds supported by the record, we decline to address the parties' arguments regarding the Illinois Credit Agreements Act. See *Avanti Medical Group, LLC v. BMO Harris Bank, N.A.*, 2014 IL App (2d) 140401, ¶ 21.

¶ 33 PNB insists that it did not forfeit its opportunity, as a party may raise a claim that no cause of action was stated at any time. See *Adcock v. Brakegate, Ltd*., 164 Ill. 2d 54, 61 (1994). It is true that there is an exception to this rule of forfeiture: a party may at any time raise the contention that a complaint *totally* fails to state a cause of action. *Id.* This exception is applicable, however, only if it is impossible to descry a cause of action in the complaint. *Id*. Notably, the exception does not apply "where the complaint states a recognized cause of action, but contains an incomplete or otherwise insufficient statement of that cause of action." *Id*. at 61-62.

¶ 34 Thus, we ask *de novo* whether the Newmans' complaint *totally* fails to state a cause of action, bearing in mind that "[i]f a complaint states a cause of action, no matter how defectively or imperfectly alleged, and it is not challenged in the trial court, then such defectively stated cause of action is cured by judgment or verdict and cannot be attacked on appeal." *Fox v. Heimann*, 375 Ill. App. 3d 35, 41 (2007). As such, we find that neither of the Newmans' complaint for breach of fiduciary duty nor the complaint regarding conversion failed so totally that we would allow PNB's defense as an exception to the forfeiture rule.

¶ 35 In regards to a complaint of breach of fiduciary duty, a plaintiff states a claim where he alleges the existence of a fiduciary duty, the breach of that duty, and damages proximately caused therefrom. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). Here, the Newmans' count alleges (1) that the Newmans and PNB were equal beneficiaries of the letter of credit; (2) that PNB received $150,000 in proceeds from the letter of credit; (3) that the Newmans did not relinquish their rights to the proceeds; (4) that PNB possessed a

fiduciary duty to ensure that the proceeds were applied for the benefit of all the beneficiaries; (5) that PNB violated this duty by taking the proceeds without notice to or consent of the Newmans and unilaterally applying them to other loans owed by Amigos which only benefited PNB; and, (6) that the Newmans have been damaged in the amount of the letter of credit as a result of PNB's misappropriation of the funds. On its face, we find that the complaint does not totally fail to state a cause of action.

¶ 36 In the same manner, we find that the Newmans' complaint regarding conversion did not totally fail to state a cause of action for conversion. The elements of conversion are (1) the unauthorized and wrongful assumption of control or ownership by one person over the personalty of another; (2) the other person's right in the property; (3) the right to immediate possession of the property; and (4) a demand for possession. *Scheduling Corp. of America v. Massello,* 119 Ill. App. 3d 355 (1983). Here, the Newmans alleged (1) that they were the beneficiaries of the letter of credit; (2) that PNB entered into an agreement with them that required that $81,000 be used to secure the lease payment owed by the Newmans to the plaintiff; (3) that the remaining amount was to be used to secure the debt of New Group; (4) that the $230,330 loan was the sole remaining debt of the Newmans/New Group; (5) that PNB received $150,000 in proceeds from the letter of credit; (6) that PNB took the proceeds to pay itself interest and principal on loans for which the Newmans were not liable; and, (7) that PNB refused to pay obligations arising out of the lease as required by the agreement, causing the Newmans to incur additional costs and fees. Again, on its face, we find that these allegations do not utterly fail to state a cause of action.

¶ 37 As all of PNB's affirmative defenses were properly stricken by the trial court, we find that no genuine issue of fact remained and the Newmans were entitled to judgment on the pleadings as a matter of law. Based on the foregoing, we affirm both orders presented for our review in this appeal.

¶ 38 Affirmed.