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2012 IL App (3d) 100774-U

Order filed March 12, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

HEARTLAND BANK AND TRUST)	Appeal from the Circuit Court
COMPANY, an Illinois state bank,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois.
Plaintiff-Appellee,)	
)	
v.)	Appeal No. 3-10-0774
)	Circuit No. 09-L-365
)	
ROSS ADVERTISING, INC.,)	Honorable
)	Stephen Kouri,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Wright and Carter concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly granted plaintiff bank's motion for summary judgment in support of its claim for confession of judgment against defendant for defaulting on a promissory note. Defendant failed to raise a genuine issue of material fact as to whether the bank caused defendant to default or whether the bank breached its duty of good faith and fair dealing. Defendant forfeited its arguments that the circuit court erred by failing to disclose its acquaintance with the bank's loan officer and by granting summary judgment before the defendant had the opportunity to present evidence and argument. Moreover, those arguments fail on the merits.

¶ 2 The plaintiff, Heartland Bank and Trust Company (Heartland), filed a complaint for confession of judgment claiming that defendant, Ross Advertising, Inc. (Ross), had defaulted on a promissory note (the Note) that Ross had executed with Heartland on April 1, 2009. Heartland obtained a confession judgment against Ross in the amount of \$731,166.33, which represented all of the outstanding principal and interest due under the Note. Ross filed a motion to vacate the confession judgment, which the circuit court granted. Heartland subsequently filed a motion for summary judgment on its complaint. The circuit court granted Heartland's motion.

¶ 3 Ross appeals the circuit court's grant of summary judgment in favor of Heartland. Ross argues that summary judgment was inappropriate because there are genuine issues of material fact as to whether Heartland's actions caused Ross's default under the Note and whether Heartland breached its contractual duties, thereby excusing Ross's default. Ross also argues that the circuit court erred by ruling on Heartland's motion for summary judgment before allowing Ross to present evidence and argument in opposition to the motion. In addition, Ross argues that the trial judge erred by failing to disclose that he had a prior relationship with the loan officer for Heartland who handled the loan with Ross.

¶ 4 **BACKGROUND**

¶ 5 In 2005, Heartland issued Ross a revolving line of credit in the amount of \$650,000. Heartland renewed the line of credit for the next several years. On April 1, 2009, after performing a full review of Ross's financial condition (which included a review of Ross's then-current financial statements), Heartland again renewed the loan, this time extending Ross a \$750,000 revolving line of credit for one year secured by a promissory note executed by Ross.

Heartland renewed the loan despite the fact that Ross's December 31, 2008, financial statement showed that the company had a negative \$4,000 net worth at the time. The Note provided that it was "secured by collateral described in a Commercial Security Agreement dated March 1, 2006."

¶ 6 The terms of the Note provided that Ross agreed to pay Heartland \$750,000, "or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance." Ross agreed to pay the loan "in one payment of all outstanding principal plus all accrued unpaid interest on April 1, 2010." The Note required Ross to make regular monthly payments off all accrued unpaid interest due as of each payment date on the first of each month, beginning on May 1, 2009. However, the Note did not require Ross to make any principal payments until April 1, 2010.

¶ 7 The Note provided that "[u]pon default, [Heartland] may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then [Ross] will pay that amount." The Note listed various events or conditions which "shall constitute an event of default" under the Note, including "[t]he dissolution or termination of [Ross's] existence as a going business" and "the insolvency of [Ross]." The Note also stated that Heartland "will have no obligation to advance funds under th[e] Note" if: (a) [Ross] or any guarantor is in default under the terms of this Note or any agreement that [Ross] or any guarantor has with [Heartland], including any agreement made in connection with the signing of this Note; or (b) [Ross] or any guarantor ceases doing business or is insolvent[.]"

¶ 8 The Note also provided that Heartland reserved a right of setoff in all of Ross's accounts with Heartland to the extent permitted by applicable law (including checking, savings, and any other accounts), and that Ross authorized Heartland to "charge or setoff all sums owing on the

debt against any and all such accounts, and, at [Heartland's] option, to administratively freeze all such accounts to allow [Heartland] to protect [its] charge and setoff rights provided in this paragraph." Similarly, the Note stated that Ross granted Heartland a contractual security interest in all of its deposit accounts with Heartland and that Ross authorized Heartland to "charge or setoff all sums owing on this Note against any and all such deposit accounts."

¶ 9 Moreover, the Note stated that Ross "and any other party that signs, guarantees, or endorses the Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor."

¶ 10 Don Shafer was the loan officer for Heartland who handled the loan with Ross. On July 27, 2009, Shafer met with David Goers, the president of Ross, and Mark Doolittle, a vice president of Ross. Goers testified in his deposition that the purpose of the July 27, 2009, meeting was to inform Mr. Shafer of changes that had recently taken place inside Ross, including the fact that two of Ross's shareholders had resigned that day. During the meeting, Goers gave Shafer a document detailing the measures Ross was taking to deal with the recessionary economy (such as cost reductions and other measures) and describing Ross's current business plan, including its plan for servicing existing clients and acquiring new clients. The document also included cash flow projections. At the conclusion of the meeting, Shafer asked Goers to provide him with Ross's updated balance sheet and income statement so he could review Ross's current financial position.

¶ 11 The next morning, Shafer sent Goers an e-mail stating that, in light of their discussion during the meeting on July 27, 2009, Shafer was "sure" that Heartland would be requiring Ross's owners to provide Heartland with additional collateral in the form of cash, real estate, or

securities. Shafer stated that the amount of additional collateral would depend upon Ross's current inventory, receivables, and equipment balances, but he guessed it would be approximately \$500,000. In addition, Shafer told Goers that Heartland might also require Ross's owners to provide a capital infusion of approximately \$100,000, but he wouldn't know for certain until he reviewed Ross's updated financial information.

¶ 12 During his deposition, Shafer testified that he sent this e-mail to Goers because Goers had told him during the July 27, 2009, meeting that Ross was suffering losses and that the decline in business had resulted in a drop in the company's receivables. Accordingly, Shafer was concerned that the outstanding balance on the line of credit was substantially higher than Ross's existing collateral for the loan (which consisted of Ross's receivables and inventory), and he wanted to get Ross back into a "positive position." However, Shafer admitted that Ross was current on its payments under the loan at the time and that Goers did not ask Heartland for more money or indicate that Ross would be unable to meet its obligations under the Note.

¶ 13 Later that day, Shafer received Ross's financial statement for the period ending June 30, 2009. The statement indicated that Ross's total capital was negative \$256,771.12. After reviewing this financial statement, Shafer told Goers that Heartland would require Ross to provide \$500,000 in additional collateral, plus a cash infusion of approximately \$300,000.

¶ 14 Shafer met with Goers and four other owners of Ross on July 29, 2009, to discuss these demands. Goers and three other shareholders who were present at the meeting testified that Shafer told them during the meeting that if Ross or the guarantors were not able to satisfy Shafer's demands for additional collateral and a cash infusion, Shafer would turn the loan over to Heartland's attorneys for collection against the guarantors. Shafer denied that he made this

statement during the meeting. At the time of the July 29, 2009 meeting, the outstanding principal balance on the note was \$690,000. After the meeting, Ross took an additional principal advance of \$33,000.

¶ 15 Goers and three other Ross shareholders testified that, on or about September 11, 2009, Ross's shareholders decided that Ross could not meet Shafer's demands and, as a result, would have to close the business. Ross's shareholders met with Shafer again on September 15, 2009, and told him that they were not able to meet his demands and that Ross would be closing the business on September 30, 2009. Later that day, Shafer terminated Ross's line of credit, placed a hold on Ross's checking account, and applied proceeds from Ross's checking account to pay the outstanding loan balance on the Note.

¶ 16 During his deposition, Shafer testified that, when he learned on July 28, 2009 that Ross had a "negative net worth" of approximately \$257,000, Heartland concluded that Ross was insolvent and that the bank considered this to be a "default situation" under the terms of the Note.

¶ 17 However, Thomas Sapp, the certified public accountant who prepared Ross's financial statements, testified by affidavit that, as of June 30, 2009, and July 31, 2009, Ross was a going business that was able to and did pay its debts in the ordinary course of business and was "not insolvent." Sapp noted that, as a service business, Ross had limited fixed assets and that the bulk of its assets consisted of cash, accounts receivable, work in progress, and "goodwill" (*i.e.*, Ross's reputation and client relationships). Sapp stated that goodwill was one of Ross's principal assets, but that goodwill assets were generally not included on the company's financial statements. Sapp noted that Ross's business, like the business of all advertisers, declined when the economy was in a recession, as it was in 2008 to 2009. However, Sapp stated that Ross was able to weather many

cycles of prosperity and recession due to the company's "longstanding good reputation and goodwill throughout its history." Sapp opined that Heartland's termination of the credit line and placement of a hold on Ross's bank account on or about September 15, 2009 "prevented Ross from conducting business in the usual and customary manner." However, Sapp opined that, before Heartland took these actions, Ross was a "going business" that was "able to and did pay its debts in the ordinary course of business," and that Ross was "not insolvent" from August 31, 2009, through September 15, 2009.

¶ 18 On October 22, 2009, Heartland sent Ross and the guarantors a notice of default due to insolvency and closure of the business and a demand for payment of the outstanding principal and interest under the Note. On December 3, 2009, Heartland filed a "Complaint and Confession of Judgment" (the Complaint) in the circuit court of Peoria County. The only default alleged in the Complaint was the closure of the business. Heartland obtained a judgment by confession against Ross in the amount of \$731,166.33. Pursuant to Illinois Supreme Court Rule 276, Ross filed a "Motion to Vacate Judgment by Confession," which the circuit court granted on March 19, 2010.

¶ 19 Heartland filed a motion for summary judgment. Ross filed a brief in opposition to Heartland's motion. In support of its opposition, Ross filed Sapp's affidavit and the affidavits of Goers and three other Ross shareholders. The circuit court granted Heartland's motion on September 7, 2010. The court's order states that "there are no issues of material fact" because "[d]efendant was in default, as alleged, when it ceased operations at the end of September, 2009," and "[a]ny actions taken by Plaintiff prior to that date, which defendant alleges caused the default, were authorized by the loan documents."

¶ 20 Ross filed a motion to reconsider, which the circuit court denied. In explaining its ruling, the court noted that it was undisputed that Ross went out of business, which was an event of default under the Note. Moreover, the court stated that it did not believe that Heartland did anything improper or illegal when it asked Ross to provide additional collateral. The court also noted that Ross could have simply refused to provide any additional collateral, but, instead, it voluntarily chose to go out of business, triggering Heartland's rights under the Note to demand payment and to freeze and setoff Ross's checking accounts. The court also found it significant that Ross had "pretty much tapped out" the line of credit by the time Shafer demanded additional collateral.

¶ 21 This appeal followed.

¶ 22 ANALYSIS

¶ 23 Summary judgment is proper if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2008). The purpose of summary judgment is not to try a question of a fact, but simply to determine whether a genuine issue of triable fact exists. *Watkins v. Schmitt*, 172 Ill. 2d 193, 203 (1996); *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). In determining whether a genuine issue of material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Watkins*, 172 Ill. 2d at 203; *Sameer*, 343 Ill. App. 3d at 85. However, if the movant presents evidence that would entitle it to a directed verdict, summary judgment will be entered in the movant's favor unless the opponent "present[s] a factual basis which would arguably entitle him to a judgment." *Allegro Services*,

Ltd. v. Metropolitan Pier & Exposition Authority, 172 Ill. 2d 243, 256 (1996); see also *Hussung v. Patel*, 369 Ill. App. 3d 924, 931 (2007); see also *Triple R Development, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 10-0956, ¶ 16. We review summary judgment rulings *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 24 Ross challenges the circuit court's order granting summary judgment for Heartland on several grounds. We discuss each of them in turn.

¶ 25 1. Impossibility

¶ 26 Ross argues that the circuit court erred in granting summary judgment for Heartland because there are genuine issues of material fact as to whether Heartland's demand for additional collateral and a cash infusion caused Ross to go out of business, thereby causing Ross to default and making it impossible for Ross to perform its obligations under the Note. We disagree.

¶ 27 Under general principles of contract law, "when a party prevents performance of a contract, that party cannot recover for non-performance by the other party." *Knowles v. Westbrook Builders, Ltd.*, 188 Ill. App. 3d 343, 346 (1989); see also *Barrows v. Maco, Inc.*, 94 Ill. App. 3d 959, 966 (1981). In addition, impossibility of performance is a valid affirmative defense in an action for breach of contract. See, e.g., *Radkiewicz v. Radkiewicz*, 353 Ill. App. 3d 251, 259-60 (2004).

¶ 28 It is not entirely clear whether the defense of impossibility is legally cognizable in an action to collect on a note.¹ However, even assuming that the defense is available, Ross failed to

¹ Heartland argues that the traditional contract defense of impossibility is not available in actions to collect under a note under Illinois' version of the UCC (810 ILCS 5/5-305, 308(b) (West 2010)). However, although traditional contract defenses are not available in actions to

create an issue of material fact as to this issue because Ross has failed to allege facts which arguably suggest that Heartland caused Ross to go out of business or made it impossible for Ross to continue performing its obligations under the Note. After reviewing Ross's June 30, 2009, financial statement on July 27, 2009, Shafer concluded that Ross was insolvent and therefore in default under the Note. Instead of immediately closing the line of credit and attempting to collect on the Note, however, Heartland left the line of credit open and demanded that Ross provide additional collateral and a capital infusion. In response to these demands, Ross voluntarily decided to go out of business. That decision was not forced upon Ross by any action taken by Heartland. At the time Shafer demanded additional cash and collateral, Heartland did not close the credit line or freeze Ross's bank accounts, and there is no evidence suggesting that Heartland's demands made it impossible for Ross to draw from the existing line of credit or use the cash deposited in its Heartland bank accounts. In fact, it is undisputed that Ross continued to

enforce payment on a note brought by a *holder in due course*, such defenses appear to be available in actions brought by the *original holder* (i.e., the bank which is a party to the initial note and loan agreement). See, e.g., *American National Bank v. Richoz*, 189 Ill. App. 3d 775, 779-81 (1989) (recognizing defenses of impossibility and commercial frustration in an action brought by a bank to collect amount due on note but holding that the defendants failed to allege facts that would establish those defenses). Moreover, our appellate court has held that other traditional contract defenses are available in such actions. See, e.g., *RBS Citizens, National Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 190-91 (2011) (defense of breach of duty of good faith and fair dealing); see also *First National Bank of Cicero v. Sylvester*, 196 Ill. App. 3d 902, 910-11 (1990).

draw from the line of credit after Shafer made his demands. Accordingly, Ross could have refused Heartland's demands, continued to stay in business, and continued to perform its obligations under the Note. Instead, Ross responded to Heartland's demand by voluntarily deciding to go out of business.²

¶ 29 In an attempt to create an issue of material fact, Ross points to the affidavits of Goers and three other Ross shareholders, which state that "[i]f Ross was not faced with Don Shafer's demands for capital and collateral, Ross would not only be operating and conducting business" as of the date of this affidavit" (August 16, 2010), "but it would also be satisfying its obligations of the loan agreement with Heartland." However, these statements do not necessarily suggest that Heartland's demand for additional cash and collateral made it *impossible* for Ross to stay in business and continue to meet its other obligations under the Note; at most, they merely suggest that Ross's shareholders *would not have decided* to go out of business were it not for Heartland's

² The parties dispute what the consequences would have been for Ross if Ross had refused Heartland's demands. Goers and three other shareholders testified that Shafer threatened to turn the loan over to Heartland's attorneys for collection against the guarantors. Shafer denied making this threat. However, even assuming that Shafer made such a threat, it would not have forced Ross to go out of business. Ross could have stayed in business, continued to meet its obligations under the Note, and defended itself against any lawsuit brought by Heartland to collect on the Note. Heartland could have prevailed in such a lawsuit only if it could show that Ross was in default due to insolvency. Ross could have disputed Heartland's claim that Ross was insolvent, as it does in this appeal. Instead, Ross chose to go out of business, thereby committing another event of default, one which Ross does not and cannot dispute.

demands. Even if true, that would not establish the defense of impossibility. Put another way, even assuming that Ross was unable to meet Heartland's new demands for additional cash and collateral, this does not establish that Ross was unable to meet its existing obligations under the Note (*i.e.*, to make monthly interest payments, stay in business, and avoid defaulting on the Note in any other respect). In fact, the affidavits of Goers and the other Ross shareholders suggests just the opposite.

¶ 30 Moreover, it is undisputed that Heartland did not terminate the line of credit or freeze and sweep any of Ross's bank accounts until *after* Ross decided to go out of business.³ Thus, Heartland's performance of those actions could not have caused Ross to go out of business. At the time Ross decided to go out of business, it was able to access the remaining funds in the credit line and all of its bank accounts. Accordingly, the undisputed evidence establishes that Heartland's demands for cash and collateral did not make it impossible for Ross to stay in business and perform its obligations under the Note.

³ The parties agree that Heartland took control of Ross's bank accounts and terminated the line of credit on September 15, 2009. However, Goers and the other three Ross shareholder affiants testified that Ross's shareholders decided to close the business on or about September 11, 2009, *four days before* Heartland took over Ross's bank accounts and terminated the line of credit.

¶ 31 2. Heartland's Alleged Breach of its Duty of Good Faith

¶ 32 Ross argues that the circuit court erred in granting summary judgment for Heartland because there were genuine issues of material fact as to whether Heartland breached its contractual duty to exercise its discretion under the Note in good faith, thereby excusing Ross's default. Every contract implies good faith and fair dealing between the parties. *Sylvester*, 196 Ill. App. 3d at 910. Thus, where a party to a contract is given broad discretion in performing its obligations under the contract, it must exercise that discretion "reasonably, and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *RBS Citizens*, 407 Ill. App. 3d at 190; *Sylvester*, 196 Ill. App. 3d at 910-11; *Carrico v. Delp*, 141 Ill. App. 3d 684, 690 (1986). This rule applies to an action by a bank to enforce payment on a promissory note. *RBS Citizens*, 407 Ill. App. 3d at 190; *Sylvester*, 196 Ill. App. 3d at 910-11. For example, a bank that has extended a line of credit may not terminate the line of credit arbitrarily or without just cause under the loan agreement. *Carrico*, 141 Ill. App. 3d 684, 690.

¶ 33 Ross argues that Heartland breached its duty of good faith and fair dealing by: (a) making an arbitrary demand for additional collateral and a cash infusion and threatening to terminate the line of credit and sue to collect on the Note if Ross did not comply with this demand, knowing that this demand would put Ross out of business; (b) terminating the line of credit arbitrarily and prematurely when Ross was not in default under the Note; and (c) terminating the line of credit without giving Ross prior notice. We address each of these arguments in turn.

¶ 34 a. Heartland's Demand for Additional Cash and Collateral

¶ 35 Contrary to Ross's argument, there is no evidence suggesting that Heartland's demand for additional cash and collateral was made arbitrarily or in bad faith. As noted above, Shafer

formally made this demand on behalf of Heartland after he reviewed Ross's June 30, 2009, financial statement which indicated that Ross's total capital was negative \$256,771.12. As noted above, the Note provided that Ross would be in default under the Note if Ross became insolvent. The Note does not define "insolvency" or prescribe any particular test for determining whether Ross was insolvent. However, as Heartland notes in its brief on appeal, the Illinois version of the Unified Commercial Code (UCC) defines "insolvent" to mean: "(A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute; (B) being unable to pay debts as they become due; or (C) *being insolvent within the meaning of federal bankruptcy law.*" (Emphasis added.) 810 ILCS 5/1-201(b)(23) (West 2008). Section 101(32) of the United States Bankruptcy Code employs a "balance sheet" test for determining insolvency. 11 U.S.C. § 101(32)(A) (West 2008). Under this test, an entity is insolvent when "the sum of [its] debts is greater than all of [its] property, at a fair valuation," excluding exempt and fraudulently-transferred assets. *Id.* Heartland argues that the federal bankruptcy "balance sheet" test applies and that Ross's June 30, 2009, financial statement—which was prepared by Ross's accountant, Thomas Sapp—established that Ross was insolvent under that test. Heartland maintains that it was therefore entitled to demand immediate payment of all unpaid principal and interest due under the Note as of June 30, 2009. Heartland contends that its offer to forbear from pursuing this drastic remedy in exchange for Ross's agreement to provide additional cash and collateral was not arbitrary or unreasonable.

¶ 36 In opposition to Heartland's motion for summary judgment, Ross presented an affidavit signed by Sapp, which stated that Ross was a going business that was paying its debts in the ordinary course of business and was "not insolvent" at the time that Heartland demanded the

additional cash and collateral. Sapp also stated that Ross's "goodwill" (*i.e.*, its reputation and client relationships) was one of Ross's "principal assets" and that goodwill assets were generally not included on the company's financial statements. However, these statements do not create a genuine issue of fact as to whether Ross was solvent. Sapp does not assign a value to Ross's goodwill or claim that Ross's assets exceeded its liabilities when the value of Ross's goodwill is taken into account. Thus, even if goodwill assets can be considered in determining whether an entity is solvent under the federal bankruptcy code's "balance sheet" test,⁴ Sapp's affidavit does

⁴ The federal courts are split on this question. See, *e.g.*, *In re Coated Sales, Inc.*, 144 B.R. 663, 672 (Bankr. S.D.N.Y. 1992) (refusing to consider alleged goodwill in determining the value of an entity's assets under the balance sheet test); *In re WRT Energy Corp.*, 282 B.R. 343, 369 (Bankr. W.D. La. 2001) (ruling that only assets capable of liquidation may be included in the valuation of assets under the balance sheet test); *In re Richmond Produce Co., Inc.*, 151 B.R. 1012, 1019 (Bankr. N.D. Cal. 1993) (ruling that intangible assets, such as goodwill, that are speculative and cannot separately be sold should be excluded from the value of a debtor's assets), *aff'd*, 195 B.R. 455 (N.D. Cal. 1996); but see *In re EBC I, Inc.*, 380 B.R. 348 (Bankr. D. Del. 2008) (ruling that in determining insolvency under the balance sheet test, it is appropriate to take into account intangible assets not carried on the debtor's balance sheet, including good will); *In re Winstar Communications, Inc.*, 348 B.R. 234, 274 (Bankr. D. Del. 2005) (indicating that the balance sheet test may take into account value not "used to prepare a typical balance sheet" because it is "based upon a fair valuation and not based on generally accepted accounting principles"); see also *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (3d Cir. 1991). However, even courts that embrace the latter view refuse to consider allegations of

not suggest that Ross was solvent under that test. Nor does Sapp's affidavit explain why some other standard for determining insolvency should apply, or why Ross's goodwill rendered it solvent under any such standard.

¶ 37 Moreover, Ross presents no evidence suggesting that it was unreasonable for Shafer to conclude that Ross was insolvent based upon Ross's June 30, 2009, financial statement. That financial statement, which was prepared by Sapp, showed that Ross's liabilities exceeded its assets by more than \$200,000. It did not list Ross's goodwill as an asset or suggest that goodwill needed to be taken into account in assessing Ross's solvency. Nor did it state or imply that Ross had any assets not reflected in the financial statement that could affect Ross's financial position. In short, the June 30, 2009, financial statement—which was the only relevant information that Heartland had at the time—suggested that Ross was insolvent, and thus in default. Ross was entitled to rely on the June 30, 2009, financial statement because it was provided by Ross and prepared by Ross's accountant.

¶ 38 Thus, after reviewing Ross's financial statement, Shafer could have reasonably concluded that Ross was insolvent and that Heartland was entitled to demand immediate payment of all unpaid principal and interest due under the Note. Accordingly, it would not be arbitrary or unreasonable for Heartland to offer to forego that remedy in exchange for Ross's agreement to provide additional cash and collateral as security for the loan.

goodwill that are supported by "nothing more than mere self-serving statements." *In re Roco Corp.*, 701 F.2d 978, 983-84 (1st Cir. 1983).

¶ 39

b. Heartland's Termination of the Line of Credit

¶ 40 Ross argues that Heartland breached its duty of good faith and fair dealing by terminating the line of credit arbitrarily and prematurely at a time when Ross was not in default under the Note. We disagree. The Note provides that Heartland "will have no obligation to advance funds under this Note if (A) [Ross] or any guarantor is in default under the terms of this Note *** (B) [Ross] or any guarantor ceases doing business or is insolvent, *** or (E) [Heartland] in good faith believes itself insecure." As noted above, Heartland terminated the line of credit only after Ross had given Heartland a financial statement which showed that Ross had become insolvent (an event of default under the Note), and after Ross informed Heartland that it had decided to go out of business (a second event of default). Although Ross could have reasonably believed that it had the right to terminate the line of credit and demand full payment under the Note immediately after it received Ross's June 30, 2009, financial statement, it left the line of credit open and allowed Ross to continue to draw down the line of credit until Ross informed Heartland that Ross was going out of business. Heartland's decision to close the line of credit at that point was expressly authorized by the Note and, under the circumstances presented here, it cannot be characterized as an arbitrary or unreasonable act that was taken in bad faith.

¶ 41

c. Heartland's Failure to Give Ross Prior Notice
Before Terminating the Line of Credit

¶ 42 Ross also argues that Heartland breached its duty of good faith and fair dealing by terminating the line of credit without giving Ross prior notice. This argument is foreclosed by the plain terms of the Note, which provides that Ross "and any other party that signs, guarantees, or endorses the Note, to the extent allowed by law, waive presentment, demand for payment, and

notice of dishonor." Although a duty of good faith and fair dealing is implied in every contract, "parties to a contract are entitled to enforce its terms to the letter, and an implied covenant of good faith cannot overrule or modify the express terms of a contract." *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1060 (1999); see also *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367 (1995) ("The obligation of good faith and fair dealing is essentially used to determine the intent of the parties where a contract is susceptible to two conflicting constructions," not to overrule or modify the express terms of an unambiguous contract). Accordingly, because Ross unambiguously and expressly waived the right to notice in the Note, Heartland's failure to provide notice before terminating the line of credit cannot be deemed a breach of Heartland's duty of good faith and fair dealing. Moreover, Heartland's duty of good faith merely required Heartland to exercise its discretion under the Note in a manner that was not "arbitrar[y]" or "inconsistent with the reasonable expectation of the parties." *RBS Citizens*, 407 Ill. App. 3d at 190. Given Ross's express waiver of notice in the Note, Heartland's failure to provide notice before terminating the credit line was not inconsistent with the parties' expectations.

¶ 43 3. Whether the Circuit Court Granted Summary Judgment Prematurely

¶ 44 Ross also argues that the circuit court erred by granting Heartland's motion for summary judgment before Ross had an opportunity to "present evidence and argument" in opposition to the motion. We disagree.

¶ 45 Heartland filed its motion for summary judgment on June 9, 2010. Two days later, Ross moved for a continuance so that Ross could conduct discovery. On July 6, 2010, the circuit court granted Ross's motion in part by giving Ross 30 days to depose Shafer and to complete any

written discovery that it had already been commenced. The court's order provided that this 30-day continuance could be extended for good cause "upon [the] request of either party," as long as the request for extension was "heard before the 30 day continuance expires." The order also provided that, if neither party sought a timely extension, "the Court *will rule* [on Heartland's motion for summary judgment] sometime following the 30 day extension granted herein, *based upon the pleadings* filed herein or subsequently filed" (emphasis added). Ross never filed a motion to extend the discovery deadline.⁵

¶ 46 On July 30, 2010, the parties entered into an agreed stipulation to extend the existing briefing deadlines. The stipulated order entered on August 2, 2010, permitted Ross to file a response to Heartland's motion for summary judgment on or before August 16, 2010, and Heartland to file a reply on or before August 26, 2010. The stipulated order did not extend the discovery deadline.

¶ 47 Ross filed its response on August 16, 2010, and Heartland filed its reply on August 25, 2010. The parties noticed oral argument on Heartland's motion for September 15, 2010. However, the circuit court issued its ruling on September 7, 2010, before the parties had an opportunity to present oral argument. Ross filed a motion to reconsider which presented many of the arguments Ross had raised in its response to Heartland's summary judgment motion. The circuit court heard oral argument on Ross's motion to reconsider and denied the motion.

¶ 48 Ross's argument that the court improperly granted Heartland's motion for summary judgment without giving Ross an opportunity to "present evidence and argument" fails for several reasons. First, Ross cites no authority which suggests that the procedure followed by the

⁵ Ross completed Shafer's deposition on July 22, 2010.

circuit court was improper in any way, much less grounds for reversal. Accordingly, Ross's argument on this issue is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (providing that an appellant's brief must contain citations to authority and that all points not argued are waived); *In re Marriage of Hendry*, 409 Ill. App. 3d 1012, 1019 (2011) (ruling that "[a]rguments that do not comply with [Supreme Court] Rule 341(h)(7) do not merit consideration on appeal and may be rejected *** for that reason alone," and holding that appellant forfeited an issue on appeal where she "failed to cite any relevant authority in support of her contention").

¶ 49 However, even if we were to address the merits of Ross's argument on this issue, we would reject it. The circuit court's July 6, 2010, order granting Ross's motion for continuance expressly stated that a further continuance could be obtained upon the request of either party for good cause shown. However, Ross never moved for an additional continuance or otherwise informed the court that it needed more time to obtain additional evidence through discovery. Accordingly, Ross may not now complain that it was not given a chance to present evidence in opposition to Heartland's motion. If Ross wanted to discover additional evidence that it was not able to include with its response brief, it should have moved for a continuance. Because it failed to do so, it has forfeited the issue on appeal. See, e.g., *Kleiber v. Freeport Farm and Fleet, Inc.*, 406 Ill. App. 3d 249, 260 (2010) (holding that party opposing summary judgment "forfeited any argument that the granting of the summary judgment was premature" because the party "did not request a continuance in the circuit court as to the summary judgment hearing and did not file a Supreme Court Rule 191(b) affidavit in the circuit court attesting that she needed to conduct additional discovery in order to respond to the motion for summary judgment."); see also Ill. S. Ct. R. 191(b) (eff. July 1, 2002); *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 225 (2002).

¶ 50 In addition, the court's July 6, 2010, order expressly stated that, absent a motion for a further extension by the parties, the court would rule based "on the pleadings filed herein or subsequently filed." This should have alerted Ross to the fact that the court was not planning to hear oral argument. Nevertheless, Ross never moved for permission to present oral argument.

¶ 51 Fourth, Ross does not point to any evidence that it could have presented that was not already filed with its response brief on August 16, 2010. When Ross was given the opportunity to argue its motion to reconsider the court's grant of summary judgment, it raised the same arguments it had already presented in opposition to Heartland's motion. Ross did not identify any additional evidence or raise any arguments that it had not previously presented to the circuit court. Nor has it done so on appeal.

¶ 52 4. The Judge's Failure to Disclose his Acquaintance with Shafer

¶ 53 Finally, Ross argues that the circuit judge erred by failing to disclose that he had a prior relationship with Shafer before ruling on Heartland's motion for summary judgment. During an April 15, 2011, hearing, after the circuit judge had granted Heartland's motion for summary judgment and ruled on other substantive issues in the case, the judge disclosed that he knew Shafer, that he "see[s] [Shafer] maybe once a year and say[s] hi to him," and that he has seen Shafer approximately once per year for the past five to ten years. The judge said that he and Shafer were "closer" maybe 10, 15 years ago" and that he and Shafer "took [their] kids to a big league ballgame back then." The judge stated that he did not feel the need to disclose the fact that he knew Shafer in the instant case because Shafer was not a party to the case. However, the judge felt it necessary to raise the issue in another case that Ross had brought against Heartland

and Shafer so that the parties' attorneys could discuss the matter with their clients. Nevertheless, the trial judge stated that "I don't think it's going to affect how I would rule or act on the case."

¶ 54 Ross does not cite any authority in support of its argument that the circuit judge should have disclosed his relationship with Shafer or recused himself before ruling on Heartland's motion for summary judgment. Nor does Ross cite authority suggesting that the judge's failure to do so is grounds for reversal. Accordingly, the issue is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Marriage of Hendry*, 409 Ill. App. 3d at 1019.

¶ 55 In any event, Ross's argument fails on the merits because the circuit judge's acquaintance with Shafer did not require recusal. Supreme Court Rule 63(C)(1)(a) imposes an ethical obligation on every judge to disqualify himself or herself in a proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where "the judge has a personal bias or prejudice concerning a party[.]" Ill. S. Ct. R. 63(C)(1), (C)(1)(a) (eff. April 16, 2007). Here, the trial judge's relationship with Shafer was minimal; they once took their children to a major league baseball game together, and they would say "hello" to each other approximately once per year thereafter. This is not the type of ongoing or close relationship that could suggest bias or call the judge's impartiality into question under Rule 63(C)(1)(a). See, e.g., *People v. Steidl*, 177 Ill. 2d 239, 264 (1997) (holding that allegations that the trial judge bought 2 houseboats from a detective in the case and that defendant's trial counsel had been the judge's law partner 15 years earlier "were insufficient to demonstrate bias," and ruling that "the mere fact that a judge has some kind of relationship with someone involved in the case, without more, is insufficient to establish judicial bias or to warrant a judge's removal from a case"); *Gluth Brothers Construction v. Union National Bank*, 192 Ill. App. 3d 649, 654 (1989)

(holding that disqualification was not required where there was no allegation of a present ongoing relationship between plaintiff's counsel and the judge and that plaintiff's counsel's service as the trial judge's campaign manager in an election held six years prior did not require recusal). Thus, the trial judge's failure to disclose his relationship with Shafer or to recuse himself before ruling on Heartland's motion was not reversible error.

¶ 56

CONCLUSION

¶ 57 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County granting Heartland's motion for summary judgment.

¶ 58 Affirmed.