2016 IL App (2d) 150179-U
No. 2-15-0179
Order filed January 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AMERICAN ENTERPRISE BANK, Plaintiff/Counter-Defendant-Appellant, and Cross-Appellee, v. JANICE BECKER (as Administrator of the Estate of Arnold Becker), and DAVID SCHROEDER, Defendants/Counter-Plaintiffs-Appellees, and Cross and Third-Party Plaintiffs-Appellants, (Gerald Forsythe, Lawrence Lagowski, Michelle Fawcett, Rockney Howard, Daniel LaPetina, Gary Reitz, Bradley Gordon, and Akash Brahmbhatt, and Keith Comtois, Third-Party Defendants)	)	Appeal from the Circuit Court of Lake County. No. 11-L-0476 Honorable Christopher C. Starck, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it granted defendants' joint motion *in limine* based on judicial estoppel; the trial court's judgment was not against the manifest weight of the evidence with respect to the Bank's amended complaint for breach of fiduciary duties. We reverse and remand for consideration of defendants' indemnification claims.

¶ 2 Following a bench trial, the trial court determined that plaintiff American Enterprise Bank failed to prove that its former chairman, Arnold Becker (represented here by his estate's administrator), and the Bank's former president and chief executive officer, David Schroeder, breached their fiduciary duties of care and loyalty. The Bank appeals the judgment and the trial court's pretrial rulings. Becker and Schroeder cross-appeal the denial of their indemnity claims against the Bank. We affirm the trial court's judgment and remand for a proper determination on Becker's and Schroder's indemnity claims.

¶ 3 I. BACKGROUND

¶ 4 Before discussing the present litigation, we offer a brief recitation of prior events taken from the evidence presented at trial, as well as the trial court's findings. The Bank was established in 1995 by defendants Becker and Schroeder and third-party defendant, Gerald Forsythe. The Bank consisted of departments and operations, including a lending department. The lending department financed loans for small businesses, which loans were to be backed by the United States government's Small Business Administration (SBA). The SBA is merely a guarantor of loans, but the loans must comply with SBA requirements and regulations, including its Standard Operating Procedures (also called SOP). Each SBA loan the Bank processed was reviewed and approved by the Bank's loan committee and the Bank's Board of Directors (the Board). Each SBA loan the Bank processed was closed by an attorney, who issued an opinion letter representing that the loan complied with the SBA requirements, regulations, and SOPs.

¶ 5 The Bank hired Jeffrey Scott in 2002 to establish the Bank's SBA lending department. Scott reported directly to third-party defendant, Daniel LaPetina. Scott obtained copies of the SBA's SOPs and gave a copy to LaPetina. Over the next three years, Scott hired other individuals for the SBA lending department, including third-party defendant, Akash Brahmbhatt,

as a business development officer and Rahul Barot as a credit analyst. In 2004, the Bank applied to become a preferred lender under the SBA's "Preferred Lender Program" (PLP); the SBA approved the Bank's application. As a PLP lender, the Bank was authorized to approve and fund an SBA loan without prior SBA approval of that loan. The Bank was recertified as a preferred lender in September 2006.

¶ 6 In June 2006, Scott recommended to LaPetina that the Bank hire Brahmbhatt as an SBA loan officer, which the Bank did. Brahmbhatt was energetic and dynamic, and Scott believed that with his oversight, Brahmbhatt's energy could be focused into developing good credit risks and building business for the bank. Brahmbhatt did not have any supervisory responsibilities while Scott ran the SBA division. In his first six months at the Bank, Brahmbhatt closed more than $19 million in SBA loans with no problems. Beginning in 2007, every SBA loan report and loan package had to be presented to and approved by the Board. In August 2007, Scott left the Bank's employ and Brahmbhatt and Barot joined him at another financial institution. Approximately one month later, Brahmbhatt met with LaPetina and inquired about returning to the Bank's employ. LaPetina contacted Becker and Schroeder and recommended rehiring Brahmbhatt to run the Bank's SBA department. On September 4, 2007, the Board executed a written consent electing Brahmbhatt to the position of "Market President—SBA Division" with him reporting to LaPetina. Under LaPetina's supervision, Brahmbhatt staffed the SBA department. LaPetina met with Lynn Soto of Berger, Newmark & Fenchel, P.C., and discussed Berger's ability to close SBA loans and ensure their compliance.

¶ 7 In December 2007, the SBA conducted an audit of 25 of the Bank's 106 SBA files and issued a report in January 2008. With the exception of four instances of a lack of documentation, three instances of late payment, and four other exceptions that did not warrant a finding, the

balance of the Bank's SBA operation was in compliance with the SBA regulations and procedures. The last of the five loans at issue in the present case closed and was funded on January 31, 2008.

¶ 8 On June 4, 2008, the SBA issued a notice of suspension of the Bank's preferred lender status and a report. On June 24, 2008, the Bank sent Brahmbhatt and another employee, Giovanni DeLisi, to meet with SBA officials to discuss the report and the Bank's responses. The Bank processed 12 more SBA loans after June 4, 2008, and DeLisi was not aware of any problems with the loans. In late October 2008, the first of the SBA loans at issue in the present case defaulted; the remaining loans at issue defaulted in 2009 and 2010. In January 2009, the SBA issued another report to the Bank. Beginning in June 2009, the Bank began submitting "Requests to Honor SBA 7(a) Loan Guaranty" to the SBA. On each request, a Bank officer certified under oath that the Bank had materially complied with the SBA loan program requirements. In 2011 and 2012, the SBA issued recommendations for a full denial of liability on the SBA guaranties for the loans at issue. The Bank also submitted requests to honor guaranties for three SBA loans that had been made when Scott managed the Bank's SBA department, but the SBA revoked the guaranties on the three loans.

¶ 9 On March 12, 2009, Brahmbhatt voluntarily resigned from the Bank. On October 2013, he and three other individuals were indicted for bank fraud against the SBA and the Bank. The trial court's findings reflect that Brahmbhatt was convicted and is presently incarcerated. In November 2010, the Bank filed a proof of loss under oath with its insurer based upon the losses that it had suffered as a result of Brahmbhatt's fraud. The Bank identified 43 SBA loans, including the five at issue in the present case. The Bank averred that its losses resulted from Brahmbhatt's fraudulent and intentional deviation from the Bank's established procedures.

¶ 10 In 2010, the Bank sued the law firm of Berger, Newmark, and Fenchel, P.C., who had issued the opinion letters. See *American Enterprise Bank v. Berger Newmark Fenchel, P.C.*, No. 2010-L-4169 (Cook County). In its verified complaint, the Bank alleged that it had hired the Berger law firm specifically to obtain an attorney opinion letter confirming that its loans complied with the SBA's SOPs. The Bank further alleged that it and the Berger law firm had agreed that the law firm would be responsible to ensure that all SBA loans conformed to the SOP. The Bank alleged that the Berger law firm committed malpractice by failing to ensure compliance with the SBA. The Bank alleged that the Berger law firm had failed to perform its duties, including that it had allowed the Bank to fail to comply with the SBA's rules and regulations. The Bank alleged that the Berger law firm made false representations in its opinion letters. The Bank alleged that, "[b]ut for Berger's material breaches of the Agreement" and "but for the professional negligence of Berger, [the Bank] would not have closed or funded" the SBA loans. Over the course of the litigation, the Bank and the law firm had conducted discovery, made statements under oath, and on May 29, 2012, the Bank obtained a $3.8 million dollar settlement from the Berger law firm (the *Berger* lawsuit).

¶ 11 In June 2011, the Bank filed a three-count complaint against defendants Becker and Schroeder, alleging that they had breached their fiduciary duties of care to plaintiff and its shareholders; breached their fiduciary duties of loyalty to plaintiff and its shareholders; and breached their duty to exercise ordinary care and diligence. The Bank later amended its complaint, withdrawing the negligence claim and proceeding on the two breach-of-fiduciary-duty claims.

¶ 12 As amended, the Bank alleged that defendants were responsible for instituting adequate procedures and controls for the SBA loan department and ensuring they were followed. The

Bank alleged that defendants breached their fiduciary duties to the bank by failing to implement and enforce safeguards, to follow bank procedures, and to detect deficiencies in the Bank's processes, as well as disregarding instructions from regulators. The Bank alleged that it suffered damages when, as a result of defendants' breaches, it failed to collect adequate credit and collateral information and failed to identify problem loans; further, the Bank issued loans that were unduly risky, and it failed to detect potentially fraudulent activity in the SBA and real estate loan portfolios.

¶ 13 On October 13, 2011, Becker filed a counterclaim against the Bank, seeking indemnification from the Bank for "all judgments, amounts paid in settlement, expenses, attorneys' fees and costs" he would incur in connection with the present lawsuit. In April 2012, the Bank filed its answer and affirmative defenses to Becker's counterclaim. As part of its affirmative defenses, the Bank alleged that Becker was only entitled to indemnification under the Business Corporation Act of 1983 (the Act) (805 ILCS 5/1.01 *et seq.* (West 2012)) as incorporated in the 1995 by-laws if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interest of the corporation. In May 2012, Becker filed his answer to the Bank's affirmative defenses.

¶ 14 On May 16, 2012, Becker filed his answer and affirmative defenses to the Bank's amended complaint. For his first affirmative defense, Becker raised the business judgment rule. Becker alleged that the entire Board of Directors or the entire loan committee had full, actual or constructive, knowledge of all of the information that he had before each of the transactions about which the Bank was complaining in the instant case. Becker further alleged that all of his actions were done in good faith and designed to promote the best interests of the Bank. Becker's other affirmative defenses included ratification, estoppel, consent, and acquiescence.

¶ 15 Also on May 16, 2012, Becker filed a third-party complaint against third-party defendants, Gerald Forsythe, Lawrence Lagowski, Michelle Fawcett, Daniel LaPetina, Gary Reitz, Rockney Howard, Bradley Gordon, Akash Brahmbhatt, and Keith Comtois. Count I alleged that the third-party defendants breached their fiduciary duty of due care; count II alleged that they breached their fiduciary duty of loyalty; count III alleged negligence. Becker sought contribution, pursuant to the Illinois Contribution Act (740 ILCS 100/0.01 *et seq.* (West 2012)), from the third-party defendants in the event he was found liable in any manner for damages or losses claimed by the Bank. On July 31, 2012, Becker filed an amended third-party complaint for contribution against the third-party defendants. On November 2, 2012, the third-party defendants (with the exception of Brahmbhatt) filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) and a motion to strike count III of the amended third-party complaint. On November 6, 2012, the trial court entered a default judgment against Brahmbhatt with respect to the relief sought in Becker's third-party complaint against him.

¶ 16 On November 28, 2012, defendant Schroeder filed his answer and affirmative defenses to the Bank's amended complaint. Schroeder's affirmative defenses included the business judgment rule; ratification; estoppel; consent; and acquiescence. Schroeder also filed a counterclaim against the Bank, seeking indemnification from the Bank for all judgments, amounts paid in settlement, expenses, attorney fees and costs incurred in connection with the present case.

¶ 17 On December 19, 2012, the trial court conducted a hearing on the third-party defendants' motion to dismiss and strike, which it denied. The trial court, however, dismissed third-party defendant Comtois from counts I and II because he was never a bank board member. On January 18, 2013, the third-party defendants (again, with the exception of Brahmbhatt) filed their answer

to Becker's third-party complaint. The third-party defendants also raised the affirmative defenses of failure to state a claim; no present injury to plaintiff; unclean hands; performance excused or prevented; and mitigation of damages.

¶ 18 On February 5, 2013, defendant Schroeder filed his third-party complaint against Forsythe, Lagowski, Fawcett, LaPetina, Reitz, Howard, Gordon, Brahmbhatt, and Comtois, seeking contribution from them pursuant to the Illinois Contribution Act (740 ILCS 100/0.01 *et seq.* (West 2012)). Schroeder's third-party complaint was substantively similar to Becker's third-party complaint. On March 6, 2013, the third-party defendants (with the exception of Brahmbhatt) filed their answer to Schroeder's third-party complaint, which was substantively similar to the answer they had filed with respect to Becker's third-party complaint. The third-party defendants also raised the affirmative defenses of failure to state a claim; no present injury to plaintiff; unclean hands; performance excused or prevented; and mitigation of damages.

¶ 19 The parties engaged in discovery, and fully briefed the issues, including the business judgment rule and the other affirmative defenses that were raised. The parties were also ordered to file any motions *in limine*, trial briefs, and any agreed-upon deposition transcripts by May 7, 2014.

¶ 20 Thereafter, on May 7, 2014, defendants Becker and Schroeder filed joint motions *in limine*, one of which was directed at the Bank and based upon judicial estoppel. Defendants argued that in the *Berger* lawsuit (*American Enterprise Bank v. Berger Newmark Fenchel, P.C.*, No. 2010-L-4169 (Cook County)), the Bank swore under oath that it had no responsibility to ensure compliance with the SBA standard operating procedures and the SBA loan authorization; instead, according to the Bank, the Berger law firm was responsible for ensuring full compliance with the SBA's SOPs and the SBA loan authorizations. According to defendants, the Bank

secured a $3.8 million settlement from Berger based on these claims in the *Berger* lawsuit. Defendants argued that, in the present case, the Bank was now seeking to introduce evidence that Berger law firm had no responsibility to ensure compliance with the SBA's SOPs and that it was the Bank's, and thus defendants', responsibility to ensure compliance. The Bank was seeking to offer the evidence deposition of Lynn Soto, an attorney at the Berger law firm, who purported to deny the sworn statements that the Bank submitted in the Berger lawsuit.

¶ 21 Defendants argued that, because the Bank took two directly contradictory positions, the Bank should be judicially estopped. Defendants sought an order *in limine* (1) barring the Bank from making any argument or introducing evidence at trial including, but not limited to, any testimony of Lisa Preston or Soto that would contradict any of the Bank's sworn statements in the *Berger* lawsuit; (2) barring any argument for testimony that the Bank itself, rather than the Berger law firm, had the responsibility to ensure that the bank loans closed by the Berger firm complied in all respects with the SBA standard operating procedures; (3) barring any argument or testimony that would deny or otherwise call into question that the Berger law firm represented and warranted to the Bank that (a) the Bank's closing procedures fully complied with the SBA's standard operating procedures and each SBA loan authorization; (b) the Berger firm had the experience and ability to ensure compliance with the SBA requirements, including the SBA standard operating procedures; and (c) the Berger firm would ensure compliance with the SBA requirements, including the SBA standard operating procedures in each SBA loan authorization.

¶ 22 In May 2014, the third-party defendants (with the exception of Brahmbhatt and Comtois) filed a motion for summary judgment and a memorandum of law in support of their motion. The third-party defendants also sought to add an affirmative defense of reasonable reliance pursuant to the Illinois Banking Act (205 ILCS 5/16 (West 2012)).

¶ 23 On May 15, 2014, the Bank filed its trial brief; three motions *in limine*; evidence deposition transcript and exhibits of Monika Hoefling, Lynn Soto, and Jeffrey L. Scott. The Bank's third motion *in limine* asked the trial court to bar any evidence relating to the federal criminal indictment or any criminal charges alleged against Brahmbhatt, who was alleged to have been part of a scheme with three other individuals to defraud in excess of $10 million from the Bank through the Bank's SBA loan program.

¶ 24 On May 16, 2014, the Bank filed a motion for leave to file a response to defendants' joint motion *in limine*. On May 19, 2014, the trial court conducted a hearing on both the Bank's and defendants' motions *in limine* and on the third-party defendants' motions for summary judgment. Following argument, with respect to the joint motion *in limine* concerning judicial estoppel, the trial court ruled that, "for these loans, I'm going to bar testimony about anybody who was a – that is part of [the Bank], was working for [the Bank], is part of the board, is part of the management group, anything that is contrary to what [the Bank] denied in the Cook County [*Berger*] lawsuit." The trial court explained that, "[f]or whatever reason, these denials seem to be a blanket denial. Because the denial is that [the Bank] and – at the time of the loans, [the Bank] included the corporation, included the employees, included the board of directors. And so the denial said that [the Bank] basically did nothing. [That the Bank] could not physically do anything itself. [That the Bank] did [not do] anything with respect to the loans that caused any problems." The trial court allowed, however, the Bank to present evidence that it was defendants' responsibility as the Bank's senior management to make sure the Bank complied with the SBA standard operating procedures for any loans not addressed in the *Berger* lawsuit. The trial court further determined that the trial would be bifurcated and that the Bank's claims would be heard first followed by a separate hearing on Becker's and Schroeder's counterclaims.

¶ 25 In June 2014, the trial court entered a written order on the parties' motions *in limine* including defendants' joint motion *in limine*. The trial court granted defendants' joint motion *in limine* based upon judicial estoppel. The order reflects that neither the Bank nor any of the Bank's former or current employees, officers, directors, attorneys, consultants, representatives, or agents, nor anyone testifying at trial on behalf of the Bank or any of the third-party defendants, could present evidence regarding any of the 16 loans at issue in the *Berger* lawsuit; that the Bank was responsible for ensuring compliance with the SBA requirements for the SBA standard operating procedures identified in the request to admit that the bank denied in the *Berger* lawsuit. The trial court listed a series of 12 separate steps that should be taken to ensure compliance with SBA requirements including the standard operating procedures.

¶ 26 On June 2, 2014, the Bank filed a motion to reconsider the trial court order's regarding the joint motion *in limine* based upon judicial estoppel. Following oral argument of the parties, the trial court denied the Bank's motion to reconsider.

¶ 27 The trial court conducted a bench trial beginning June 16, 2014. Prior to the trial, the court dismissed all counts relating to matters addressed in the *Berger* lawsuit, leaving five counts, or five loans, at issue in this instant litigation. The dismissal removed the only remaining count against Comtois, and he was dismissed as a third-party defendant from the case. In addition, the court granted summary judgment in favor of third-party defendants Howard and Fawcett, who were not board members at the time of the five loans, removing them from the case as well.

¶ 28 At trial, the testimony and evidence reflected that from November 15, 1995, until October 29, 2009, defendant Becker was the chairman of the bank and a member of its Board of Directors. As chairman, Becker was responsible for the overall direction, coordination, and a

valuation of the Bank; evaluating the performance of executives for compliance with established policies and objectives of the Bank; and carving out supervisory responsibilities in accordance with the Bank's policies and applicable laws. Becker's responsibilities included overseeing the SBA department. He was also responsible for reviewing Bank policies, confirming their adequacy, and ensuring that Bank executives followed its policies and procedures.

¶ 29 From November 15, 1995, until October 29, 2009, defendant Schroeder was the CEO and president of the bank and a member of its Board of Directors. As CEO and president, Schroeder was responsible for, among other things, the supervision and performance of the Bank's holding company, divisions, and subsidiary companies; he was responsible for the supervision of the most senior officers and their annual performance reviews, and indirectly responsible for the supervision of the junior officers.

¶ 30 Becker first recommended to the Board that the Bank engage in SBA lending; before that, the Bank did not have an SBA department. Around 2002, the Bank hired Jeffrey Scott as a vice president, SBA division manager to establish an SBA department at the bank. Scott was an experienced SBA lender and had previously established and managed fully integrated SBA loan operations for three other area banks. Scott reported directly to LaPetina, and indirectly to Becker and Schroeder. According to Scott, Becker was a strong presence within the Bank. When Scott joined the Bank, it did not have any written SBA policies and procedures. Scott was not responsible for drafting SBA policies and procedures. He relied on the SBA's published SOPs or would call the SBA's Chicago district office or Sacramento loan processing center if he had questions.

¶ 31 Monica Hoefling, an administrative assistant to the Bank's SBA department, testified that she and Scott were responsible for processing, closing, and servicing all SBA loans in

compliance with the SBA loan authorization as well as the requirements approved by the Bank's SBA loan committee. Hoefling was responsible for ensuring that the Bank had the proper documentation before a loan closed, including making sure that the bank had copies of necessary documents.

¶ 32 Schroeder never spoke to Brahmbhatt prior to recommending that he be rehired as the Bank's market president of the SBA division. Shortly after he was rehired, Brahmbhatt told SBA examiners that he intended to book $100 million in new SBA loans during 2008, an increase of more than 400% from what the Bank had booked in 2006.

¶ 33 Becker testified that, on September 5, 2007, the day after Brahmbhatt was rehired, Becker called a meeting of the SBA loan committee. Twelve SBA loans were presented and approved; Brahmbhatt originated and underwrote all 12 loans prior to being rehired by the Bank, but he did not attend the September 5 meeting. Becker saw the loan packages for the 12 loans for the first time at the September 5 meeting before he moved for their approval. The SBA ultimately denied the guarantees for three of the loans approved at the September 5 meeting (after they defaulted) because they did not meet SBA's lending requirements.

¶ 34 Becker testified that the Bank had three primary procedures in place to ensure that SBA loans were documented and closed properly; (1) review by the loan officer who originated the loan; (2) review by a senior officer pursuant to the Bank's lending policies; and (3) review by attorneys who closed all SBA loans. Defendants' expert witness agreed it was imprudent for the originating loan officer to also oversee loan operations and compliance.

¶ 35 LaPetina was the senior officer who usually reviewed and approved Brahmbhatt's loans before closing. LaPetina reviewed loans to determine credit worthiness and relied on others to make determinations regarding SBA requirements. Keith Comtois, the Bank's senior lending

officer at the time, testified that Schroeder told him it was the lender's responsibility to have the loan documents crafted, and he did not need to review the underlying documents for compliance with the Bank's lending policies or procedures. LaPetina also did not review the closing checklist to ensure compliance with the SOPs.

¶ 36 With respect to one of the loans, Schroeder never reviewed the applicant's environmental report, which indicated that the property securing the loan had known contamination issues. The SBA denied the guaranty of that loan as a result of that contamination.

¶ 37 Neither of the firms that closed SBA loans for the Bank understood that the Bank expected them to opine on whether the loans complied with SBA requirements. One attorney testified she would not have accepted the assignment if she knew that was what the Bank expected, and the other attorney said that, due to liability concerns, he would have to charge the bank nearly 10 times what he did if he was expected to provide such an opinion. Neither Becker nor Schroeder reviewed any of their opinion letters to determine what opinions or services the lawyers would provide.

¶ 38 Defendants and their expert witnesses admitted that they were responsible for implementing and enforcing policies and procedures to ensure that the Bank complied with the SBA rules and regulations. They also admitted they were to ensure that the Bank had enough adequately trained staff to handle the volume of loans the Bank issued. Exhibit 367 reflected that, for the loans that were not precluded by the defendants' joint motion *in limine*, the Bank suffered losses of approximately $3.1 million.

¶ 39 On December 11, 2009, the FDIC issued its 2009 report of examination. In the report, the FDIC found the Bank's condition was unsatisfactory, and that notwithstanding a $13 million investment by the Bank's owner, Forsythe, inadequate capital threatened the Bank's viability.

Since 2009, Forsythe has contributed more than $55 million in capital to keep the Bank operating.

¶ 40 Defendants presented the expert witness testimony of David Enquist, a financial officer who had processed SBA loans for more than 25 years. He testified that he did not have written procedures other than the SBA's SOP. Enquist also testified that the Bank's policies and procedures were adequate and consistent with the standard in the industry at the time. Scott's testimony was substantively similar to Enquist's in this respect.

¶ 41 Enquist testified that he had processed, packaged, and brokered in excess of 500 SBA loans, including making eligibility determinations, for 25 to 30 banks. Enquist testified that it would be impossible for the members of the Bank's SBA loan committee, the Board, the Chair, and the President to have any in-depth knowledge of the requirements of the SOP. He opined that it was reasonable for Schroeder and Becker to rely upon internal employees and outside consultants to ensure compliance with the SOP and eligibility requirements. Enquist testified that LaPetina and Brahmbhatt were responsible to ensure compliance with the terms and conditions of each SBA loan report. Enquist also testified that it was reasonable and prudent for the Bank to rely upon an attorney to close each SBA loan and issue an opinion letter that the loan conformed to the requirements of the SOP.

¶ 42 At the close of evidence, the parties each submitted posttrial memoranda. On January 27, 2015, the trial court entered a "Final Judgment Order," which granted judgment in favor of defendants on the Bank's amended complaint, and granted judgment in favor of third-party defendants on the claims for contribution. With respect to defendants' counterclaim for indemnification, the trial court concluded only that, because the filing of the Bank's complaint was a reasonable action, no party would be required to pay the other's legal fees and expenses.

¶ 43 In its final judgment order, the trial court noted that the policies and procedures utilized at the Bank for SBA lending were virtually nonexistent. No legitimate argument could be made that the Bank had sound SBA lending practices or policies in existence at the time of the loans at issue. The trial court found that defendants were charged with using their best efforts to ensure the Bank's vitality and to put the Bank's interests ahead of their own. The trial court noted that the defendants' fiduciary relationship required that they use their very best efforts in steering the Bank on a safe and successful course. The trial court, though, noted that defendants were also directly responsible to the Board, and that the Board also had a fiduciary responsibility to care for the Bank, and the Board was required to use its best efforts to supervise and manage the officers of the Bank.

¶ 44 The trial court continued, reflecting that the PLP status put the Bank in jeopardy because no organization was double checking to be sure that the Bank had complied with all of the SBA requirements to ensure guarantees on loans. The trial court learned from asking the attorneys at trial that no directors and officers liability policy had been purchased by the Bank prior to the loss, which the court stated, "may be the most glaring area of incompetence on both the part of the defendants and the board." The court noted that the Board should have scrutinized the actions of defendants to verify that defendants were competent in their roles as officers of the Bank. The trial court found the Bank incurred extraordinary losses that left "a vast amount of blame to be spread around."

¶ 45 The trial court next discussed the duty of loyalty and the law applicable to the business judgment rule. With respect to defendant Schroeder, the trial court ruled: "where there was clear separation between Mr. Schroeder and the compensation decisions (in the form of the independent Compensation Committee), the entire Board of Directors voted to approve the

recommendations of that Committee and every Bank officer and employee who testified at trial denied that they believed Mr. Schroeder was ever motivated by self-interest, there can be no other conclusion than that Mr. Schroeder is entitled to judgment on the claim of breach of his fiduciary duty of loyalty."

¶ 46 The trial court turned to the Bank's case against Becker. The court found that the Bank "presented no evidence that Becker displayed a conscious indifference to the risks or that he did not have an honest belief that the decisions made by the entire [Board] were in [the Bank's] best interests. The court recognized that "[n]ot one witness testified that he knew of any facts indicating that Becker ever failed to exercise his independent business judgment in good faith for the betterment of [the Bank], and not one witness testified that he was aware of any action by Becker which was in his own self-interest and not in the best interest of [the Bank]. Indeed, they testified to the contrary, including [the Bank's financier,] Gerald Forsythe."

¶ 47 The trial court reviewed four court decisions concerning the business judgment rule: *F.D.I.C. v. Giannoulias*, 918 F. Supp. 2d 768 (N.D. Ill. 2013); *F.D.I.C. ex rel. Wheatland Bank v. Spangler*, 836 F. Supp. 2d 778 (N.D. Ill. 2011); *Schirmer v. Bear*, 271 Ill. App. 3d 778 (1995); and *Kumpf v. Steinhaus*, 779 F. 2d 1323 (7th Cir. 1985). The trial court noted, "[a]bsent improper motive, courts have deferred to rule upon the decisions of corporate officers since judges lack the information required to make business arrangements." The court continued, "[a] stupid or careless mistake in business judgment does not subject the officer to civil liability."

¶ 48 The trial court characterized defendants' claim that the harm was not foreseeable as "ludicrous," but noted that the element of foreseeability also extended to the Board and was "another example of how this financial disaster was the fault of everyone within the

organization, the board, the officers and the entire control group." The court reiterated, "[b]ut bad judgment does not equal civil liability in this matter." It concluded as follows:

> "While the Court believes that the defendants were incompetent and careless in their roles as officers of [the Bank], the Court finds no Breach of Fiduciary Duty of Care and Loyalty on the part of either defendant. WHEREFORE, judgment is for the Defendants on the complaint and for the Third Party Defendants on the Counter-complaint. The Court also finds that the filing of the complaint was a reasonable action by [the Bank] and that any legal expenses and fees are properly to be paid by each party."

¶ 49 Becker and Schroeder filed a motion for summary determination on their counterclaims for indemnification and posttrial motions to modify or amend the final judgment order with respect to their claim for fees.

¶ 50 The parties appeared before the court on February 25, 2015, and Becker and Schroeder asked the court to resolve the pending motions for summary judgment on the issue of indemnification. The court clarified that its January 27, 2015, order was intended to resolve all claims, and that it believed that no party should receive a monetary award. The trial court expressed its concern about the amount of fees, stating: "I mentioned so many times to the parties during the trial, this is costing you, like $30,000 a day to hear this case." The trial court further stated, "[a]nd part of my thought process was perhaps entering a judgment for the plaintiff, and then entering a judgment for you [defendants] on your counterclaim, and so then, therefore, you wouldn't get anything for your fees because they won. At the end, nobody gets anything." The court added, "I think *** that's probably what should happen in the case, but -- I can clean up the order that way so it's abundantly clear to the appellate court."

¶ 51 The Bank filed a timely notice of appeal. Becker and Schroeder filed a timely notice of cross-appeal. None of the third-party defendants filed a brief in this case, although three of them did file a motion, which we address below.

¶ 52 II. ANALYSIS

¶ 53 As noted, during briefing, three of the third-party defendants (Fawcett, Howard, and Comtois) filed a motion asking us to clarify our "jurisdiction" over them. These third-party defendants contended that Becker and Schroeder, in their notice of cross-appeal, had failed to identify the combination of summary judgment and dismissal orders in the third-party defendants favor, and were precluded from challenging those orders in this appeal. Defendants objected and we took the motion and the objections with the case. With briefing now complete, we observe that neither Becker nor Schroeder has raised any argument challenging the judgments in favor of these three third-party defendants. Therefore, we deny the motion to clarify as moot and proceed on to the merits.

¶ 54 On appeal, the Bank contends that the trial court's ruling on the defendants' joint motion *in limine* regarding judicial estoppel should be reversed; the trial court's judgment was against the manifest weight of the evidence; and the Bank requests on remand that it be allowed to pursue the full extent of its damages. For their cross-appeal, defendants Becker and Schroeder contend that the trial court erred when it denied their claim for indemnification.

¶ 55 Concerning the pretrial motion, a trial court's ruling on a motion *in limine* regarding the admission or exclusion of evidence is reviewed under the abuse-of-discretion standard. *Illinois Department of Transportation ex rel. People v. Raphael*, 2014 IL App (2d) 130029, ¶¶ 16-20 (citing *Maggi v. RAS Development, Inc.*, 2011 IL App (1st) 091955, ¶ 61). As it pertains to judicial estoppel, though, both parties discuss differing standards of review in their respective

briefs. However, the Illinois Supreme Court's recent opinion, *Seymour v. Collins*, 2015 IL 118432, clarifies that we are to apply the abuse-of-discretion standard. *Id*. ¶ 48.

¶ 56 In *Seymour*, our supreme court set out the following procedural and analytical sequence for judicial estoppel:

> "First, the trial court must determine whether the prerequisites for application of judicial estoppel are met. In this respect, the party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it. [Citations.] We note, even if all factors are found, intent to deceive or mislead is not necessarily present, as inadvertence or mistake may account for positions taken and facts asserted. Second, if all prerequisites have been established, the trial court must determine whether to apply judicial estoppel—an action requiring the exercise of discretion. Multiple factors may inform the court's decision, among them the significance or impact of the party's action in the first proceeding, and, as noted, whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake." *Seymour*, 2015 IL 118432, ¶ 47.

¶ 57 With the proper standard in mind, the record reflects that the trial court conducted a hearing on May 19, 2014, and determined that the prerequisites for the application of judicial estoppel were met. The trial court heard arguments from the parties and reviewed each statement at issue, which included allegations made under oath, statements made pursuant to requests to admit, and answers to interrogatories. The trial court heard arguments from the parties regarding whether the motion *in limine* was more like a motion for summary judgment or whether it was an

evidentiary issue that would limit the evidence presented at trial. The trial court determined that the prerequisites were met, and it determined that it would use its discretion and apply judicial estoppel to the statements.

¶ 58 "[I]t logically follows that we review a trial court's exercise of discretion for abuse of discretion." See *Seymour*, 2015 IL 118432, ¶ 48. Here, having reviewed the record, including the report of proceedings from the May 19 hearing, we find no abuse of the trial court's discretion occurred. The statements involved were made during the course of high-stakes litigation; they were not a product of inadvertence. Because we find no abuse of the trial court's discretion in applying judicial estoppel, it therefore follows that we find no abuse of the trial court's discretion in granting defendants' joint motion *in limine* to exclude some of the Bank's evidence based on judicial estoppel. See *Illinois Department of Transportation ex rel. People v. Raphael*, 2014 IL App (2d) 130029, ¶¶16-20.

¶ 59 The Bank next contends that the trial court's judgment was against the manifest weight of the evidence. Specifically, the Bank argues that the trial court misapplied the business judgment rule and that the evidence established that defendants (1) failed to exercise due care and prudence in the management and oversight of the Bank's SBA lending department and (2) failed to exercise loyalty by hindering the Bank's ability to continue in its business and failed to act in the face of a known duty.

¶ 60 We review a challenge to the trial court's rulings after a bench trial using the manifest-weight-of-the-evidence standard of review. "In a bench trial, it is the function of the trial judge, as the trier of fact, to weigh the evidence and make factual determinations." *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 55 "A reviewing court will not reverse a trial court's decision merely because different conclusions can be drawn; an opposite conclusion must

be clearly evident." *Walker v. Ridgeview Construction Co.*, 316 Ill. App. 3d 592, 595 (2000). " 'A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Limited USA*, 384 Ill. App. 3d 849, 859 (2008) (quoting *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001)). "When contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859. In other words, "[a] trial court's judgment following a bench trial will be upheld if there is any evidence supporting it." *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010).

¶ 61 In the present case, the Bank contends that the trial court erred in its application of the business judgment rule. The business judgment rule precludes second-guessing of a corporate director's or officer's business decisions, unless those decisions are the product of (1) a failure to exercise due care, or (2) bad faith, fraud, illegality, or (3) gross overreaching. *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 1015-16, (1993); see also *Selcke v. Bove*, 258 Ill. App. 3d 932, 935-36 (1994) (business judgment rule applies to officers as well as directors). The mere fact that a director or officer has made a mistake in judgment is insufficient to overcome the business judgment rule. *Stamp*, 263 Ill. App. 3d at 1015. It is the complaining party's burden to allege facts showing that the business judgment rule does not apply. See, *e.g.*, *id.* at 1017 (affirming dismissal of complaint where shareholder failed to allege that directors "did not make informed judgments" or engaged in "fraud, illegality, conflict of interest or bad faith").

¶ 62 In its amended complaint, the Bank alleged that Becker and Schroeder breached their fiduciary duties to the Bank by failing to implement and enforce additional safeguards, to follow

bank procedures, and to detect deficiencies in the Bank's processes, as well as disregarding instructions from regulators. The type of conduct alleged in the Bank's complaint is precisely the type of conduct protected by the business judgment rule. See *Stamp*, 263 Ill. App. 3d at 1016-17 (noting that a plaintiff cannot defeat the business judgment rule when the plaintiff admits that the defendants had some "procedures and controls although, in plaintiff's opinion, they were inadequate"). The reviewing court in *Stamp* recognized as much when it concluded that the "plaintiff's complaint questions those decisions which defendant made" was "exactly the type of second-guessing which the business judgment rule was designed to preclude." Although the Bank takes issue with the trial court's application of the business judgment rule, a review of the record, including the trial court's final judgment order, clearly establishes the trial court understood and properly applied the rule. We decline to find otherwise.

¶ 63 Moreover, as it pertains to the manifest weight of the evidence, the record sufficiently supports the trial court's judgment. To prevail on a claim for breach of fiduciary duty, the Bank was required to prove the existence of a fiduciary duty, a breach of that duty by Schroeder and Becker, and damages proximately caused by the breach. See *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). The trial court's ruling was unambiguous that Schroeder and Becker did not breach their duty as fiduciaries and were not the proximate cause of the Bank's losses. Rather, the trial court determined that a number of factors placed the Bank in jeopardy, first and foremost, Brahmbhatt, whom the court described as "the true villain in this disaster." The court also cited the economy, "in an attempt to be fair to all," because the events at issue took place while the real estate market was experiencing "historic fluctuations." The court further attributed the Bank's losses to its PLP status, because that status allowed the processing of loans to go unchecked for SBA compliance. The trial court reflected on the lack of liability insurance for

officers and directors to protect the Bank from malfeasance or misfeasance of an officer or director. Although Schroeder and Becker made bad decisions and poorly managed the Bank, the trial court noted that the Board did not properly supervise the actions of Schroeder and Becker. The court repeatedly stated that there was ample culpability to spread throughout the organization. The trial court specifically mentioned the Bank's failure to present any evidence that Becker displayed a conscious indifference to the risks or that he did not have an honest belief that the decisions made by the Board were in the Bank's best interests. With respect to Schroeder, the trial court highlighted the trial testimony by every Bank officer and employee, who all denied that they believed Schroeder was ever motivated by self-interest.

¶ 64 We note that the trial court's judgment was supported by still other evidence. The record indicates that there were no real "red flags" with the SBA lending department until the SBA suspended the Bank's PLP status on June 4, 2008. The earlier SBA audits in September 2007 and January 2008 presented no cause for concern. And prior to the suspension, the Bank maintained a favorable FDIC rating. Furthermore, both experts Scott and Enquist testified the Bank's SBA policies were, prior to the fraud, consistent with industry standards. Therefore, the trial court's judgment in favor of defendants on the Bank's claims was not contrary to the manifest weight of the evidence.

¶ 65 To the extent that the Bank focuses its arguments on isolated comments from the trial court's final judgment order, those arguments are unavailing. They amount to the larger contention that the trial court gave too much weight to the business judgment rule, but did not give sufficient weight to Schroeder's and Becker's disregard of their duties. We reject the Bank's characterization of the trial court's judgment. The record demonstrates that the trial court carefully applied the law and thoroughly considered the evidence at trial. The court was clear

that there was more than enough blame to be spread throughout the organization. The court's order detailed a number of missteps and mistakes taken by those involved. The court by no means held Schroeder and Becker blameless; it merely found that their share of the blame failed to rise to the level of a fiduciary-duty breach—that is, a failure to exercise due care, or a firm showing of bad faith, fraud, illegality, or overreaching.

¶ 66 Accordingly, we affirm the judgment of the trial court with respect to the trial on the Bank's complaint. In light of our holding, we need not address the Bank's claim regarding a reconsideration of damages upon a reversal.

¶ 67 For their cross-appeals, Becker and Schroeder contend that the trial court erred when it denied their claims for indemnification. Becker and Schroeder argue that they have a contractual right to indemnification by way of a provision in the Bank's 1995 bylaws, and alternatively by section 8.75 of the Act (805 ILCS 5/8.75 (West 2012)).

¶ 68 We determine that we cannot resolve this issue on the merits. In its pretrial case management discussion, the trial court stated that the trial would be bifurcated and the indemnification claims would be heard separately. After trial on the Bank's claims, however, the court, in its final judgment order, denied the Bank's claims on the merits and *sua sponte* denied Becker's and Schroeder's indemnification claims without hearing evidence on the bylaws or on the application of section 8.75 of the Act. The order created additional confusion when, postjudgment, Becker and Schroeder moved for summary judgment on the counterclaims. The Bank did not file a response to either motion, likely because it thought it did not have to; it had already won on indemnification.

¶ 69 Postjudgment confusion aside, the counterclaims simply never got their day in court. Becker, Schroeder, and the Bank were all denied the opportunity to present evidence and

argument in support of their positions on the indemnification claims. Whether the bylaws were an enforceable indemnification agreement, as well as the applicability of the Act and the validity of any of the Bank's defenses, should have been conclusively determined by the trial court in the first instance. See *Bahuriak v. Bill Kay Chrysler Plymouth*, 337 Ill. App. 3d 714, 719 (2003). Then, assuming indemnification was warranted, a determination on the reasonableness of attorney fees should have also been made.

¶ 70 To the extent the trial court denied the counterclaims, its order is reversed as against the manifest weight of the evidence, since it was "not based on the evidence presented" (*Best v. Best*, 223 Ill. 2d 342, 350 (2006)), and we remand for a complete determination on Becker's and Schroeder's indemnification claims.

¶ 71 III. CONCLUSION

¶ 72 For the reasons stated, on the Bank's appeal we affirm the judgment of the circuit court of Lake County. On Becker's and Schroeder's cross-appeal, we reverse the portion of the judgment denying the counterclaims and remand to the circuit court for further proceedings consistent with this order.

¶ 73 Affirmed in part; reversed in part, remanded with directions.