2019 IL App (1st) 173188-U

SIXTH DIVISION
October 4, 2019

No. 1-17-3188

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIVE MILE CAPITAL WESTIN NORTH SHORE SPE LLC, as successor in interest to FIVE MILE CAPITAL SPE B, LLC and FIVE MILE CAPITAL SPE BB, LLC,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	
BERKADIA COMMERCIAL MORTGAGE, LLC, INLAND AMERICAN WHEELING LOAN INVESTMENT, LLC, and U.S. BANK NATIONAL ASSOCIATION, as trustee for the benefit of the holders of J.P. Morgan Chase Commercial Mortgage Securities Corporation, commercial mortgage pass-through certificates, series 2007-FLI,	)	No. 12 CH 10805
Defendants	)	
(Berkadia Commercial Mortgage, LLC, Defendant-Appellant).	)	Honorable Patrick J. Sherlock, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Previous appeal was not law of the case; circuit court properly found that plaintiff did not prove it was damaged; affirmed.

¶ 2 After a bench trial, the circuit court found that defendant, Berkadia Commercial Mortgage, LLC (Berkadia), violated a contractual obligation it had with plaintiff, Five Mile Capital Westin North Shore SPE LLC (Five Mile), but that Five Mile failed to prove it was damaged as a result. On appeal, Five Mile contends that: (1) the circuit court improperly disregarded this court's mandate and the law of the case from a previous appeal; (2) the circuit court incorrectly determined that Five Mile did not prove damages; and (3) the circuit court improperly denied Five Mile's request for certain discovery materials. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 This case involves an investment related to the Westin North Shore, a hotel located in Wheeling, Illinois. The hotel served as collateral for an $86 million loan taken out in 2007 by the owner of the building. JPMorgan Chase Bank, N.A., provided the funds for the loan and received a mortgage on the property to secure the note, which had an initial maturity date of June 9, 2010. JPMorgan Chase sold off partial interests in the note to other investors. There were three levels of participation, each with different amounts of risk. The senior "A" interest, in the principal amount of $37.1 million, was owned by a securitized trust. The junior "B" interest, in the principal amount of $24.9 million, was owned by Inland American Wheeling Investment, LLC. The junior "C" interest, in the principal amount of $24 million, was owned by Five Mile. The "A" and "B" participants are not part of this appeal. While the loan was performing, the loan was serviced by a master servicer. The loan eventually went into default, whereupon Berkadia took over as special servicer. Berkadia initiated foreclosure proceedings in May 2010 and the circuit court entered a judgment of foreclosure and sale in mid-2011. Berkadia took title to the property in a July 2011 foreclosure sale on a credit bid. When a lender takes title to property through foreclosure or other means, the property becomes real estate owned, or REO.

¶ 5 The rights and obligations of the various parties were governed by a participation agreement and a pooling and service agreement. Five Mile was a third-party beneficiary of both agreements. The participation agreement provided a waterfall distribution of loan proceeds, in which the proceeds would be paid first to the "A" participant, then the "B" participant, and lastly to Five Mile. The property had been valued at about $110 million in 2007. After acquiring the hotel at the foreclosure sale, Berkadia marketed it and found a potential buyer who offered to purchase the hotel for $56.5 million. Five Mile believed that the price was too low. At that price, Five Mile would lose its entire investment.

¶ 6 Five Mile filed a lawsuit and *lis pendens* against the property, which the circuit court treated as a motion for a preliminary injunction against the sale of the hotel. The circuit court denied the request for injunctive relief and this court affirmed on appeal. See *Five Mile Capital Westin North Shore SPE, LLC v. Berkadia Commercial Mortgage, LLC,* 2012 IL App (1st) 122812 (*Five Mile I*). In that appeal, Five Mile asserted that if the sale went forward, it would be difficult to calculate the proper amount of monetary damages. *Id*. ¶ 17. Thus, the issue was whether Five Mile had an adequate remedy at law. *Id*. The court found that because Five Mile's own allegations demonstrated that any potential damages from a sale could be calculated with a reasonable amount of specificity, Five Mile had a sufficient remedy at law and an injunction was unnecessary. *Id*. ¶ 19.

¶ 7 The hotel was ultimately sold in August 2013 for $56.5 million. As the "C" participant, Five Mile did not receive any proceeds from the sale. Five Mile filed its second amended verified complaint in February 2014, requesting a declaratory judgment (which Five Mile later withdrew) and alleging breach of contract. Five Mile asserted that Berkadia violated its obligations under the participation agreement and pooling and service agreement when it sold the property. Five Mile further stated that it was damaged as a result and lost the entire amount of its participation interest.

¶ 8 Over the course of a 16-day bench trial, much testimony was presented about Berkadia's policies and procedures and whether Berkadia breached the participation agreement and pooling and service agreement. Whether Berkadia breached the agreements is not at issue on appeal, so for our purposes we accept the trial court's finding that Berkadia indeed breached the agreements because it did not take a required step before selling the hotel. Specifically, Berkadia should have performed a calculation known as a net present value (NPV) analysis, which would have compared the outcome of an immediate sale to holding the hotel until a later date. Five Mile's theory was that the NPV analysis would have revealed that Berkadia should have waited to sell the hotel, which in turn would have yielded a recovery for Five Mile. The trial court disagreed, finding that Five Mile did not prove that it was damaged by Berkadia's failure to conduct the NPV analysis. We note that the court also found that the hotel would have had to sell for more than $63.7 million before Five Mile could recover, a figure that Five Mile does not contest. On appeal, Five Mile only challenges the finding that it did not prove it was damaged, and so below we summarize just the testimony relating to damages.

¶ 9 As a last note of context, the hotel was part of a Real Estate Mortgage Investment Conduit (REMIC). A REMIC is entitled to federal tax benefits as long as certain requirements are met. One such requirement is that a REMIC can hold foreclosure property, which is property acquired upon default of an underlying mortgage loan, for three years. To hold a property for longer than that, the REMIC must be granted an extension by the IRS.

¶ 10 Kenneth Cusick testified as an expert for Five Mile on NPV, or discounted cash flow analysis, among other topics. Cusick explained that the purpose of the NPV analysis was to determine "did it make sense to sell [the hotel] immediately or did it make more sense to hold on to the asset." One component of a NPV analysis is a discount rate. For his discount rate, Cusick used the note rate of 1.8% because the pooling and service agreement provided for that rate. Further, most pooling and service agreements Cusick had read "do exactly [that]. Everything is discounted at the note rate." Cusick also recalled that a Berkadia employee used the note rate as the discount rate in a foreclosure-related document that was done before the hotel became REO. Cusick added that using the note rate as the discount rate provides consistency, and "[i]f you just let everyone decide what discount rate they wanted to use, then you would get 50 million different values within the trust."

¶ 11 Cusick performed a NPV analysis for October 2011, when Berkadia decided to list the hotel for sale. Cusick assumed a three-year hold, which meant holding the hotel until the end of the first REMIC grace period in 2014. Cusick concluded that the NPV of holding the hotel for three years as of October 2011 was approximately $83.2 million. Thus, a hold was a better financial choice as compared to an immediate sale. Cusick also performed a NPV analysis for July 2012, when Berkadia recommended the sale of the hotel to a particular buyer. This time, he arrived at a NPV of approximately $86 million if the hotel were held for three years, again making a hold the better financial choice.

¶ 12 Still, Cusick believed that a special servicer should have actually sold the hotel in 2017, which would have allowed more time for the market to recover and adequate time to sell. As for the REMIC implications of holding the hotel that long, Cusick noted that another asset in the same trust had applied for an extension from the IRS. That asset, which consisted of two casinos in Mississippi, had been in a "very similar" situation as the hotel and the extension request stated that the asset was in a depressed market and needed time to develop an operating history. Further, Cusick had not seen evidence that the IRS had ever rejected a properly-filed extension.

¶ 13 Ronald Greenspan, another expert for Five Mile, testified that, among other topics, he was retained to render opinions about: (1) the dates that marketing and selling the hotel would have led to the highest NPV for the participants as a whole and (2) the anticipated sale price for the hotel and Five Mile's proceeds if the hotel had been sold at a later date. According to Greenspan, marketing and selling the hotel in 2017 would have maximized the NPV for all participants. Turning to the matter of the sale price and proceeds, Greenspan stated that he accounted for a $6 million property improvement plan required by the Westin brand. So, each of his sale prices was reduced by $6 million. Greenspan explained that Five Mile's damages were composed of sale proceeds and what Five Mile would have received from cash buildup, or the property's earnings while it was held. Per Greenspan's analysis, if the property had been sold in December 2014, the net sale proceeds would have been $64.2 million and there would have been $12.1 million in cash on hand. That cash would have run through the waterfall distribution, wherein the "A" and "B" participants would be paid before Five Mile. Ultimately, Five Mile would have received $9.8 million from a December 2014 sale. However, if there were no cash on hand, Five Mile would not have recovered in December 2014 solely from the sale of the hotel. Greenspan further stated that Five Mile's recovery would have been $18.5 million in 2015, $24.2 million in 2016, and $25 million in 2017.

¶ 14 Patrick Craig testified as an expert for Berkadia and stated that he was retained to rebut Cusick's and Greenspan's opinions. According to Craig, Cusick used "cherry-picked high outlier forecasts" from two high appraisals. Further, Cusick's use of a 1.8% discount rate was "completely unreasonable." Craig had never seen a rate that low used as a discount rate and choosing such a low rate results in an excessively high value. Craig stated that the discount rate should have been 11 to 11.5%. Without changing anything else, using those discount rates resulted in NPVs of $65 million and $64.18 million, respectively, for October 2011. After adjusting other figures that Cusick used, Craig arrived at a final NPV of approximately $56.25 million for October 2011. For July 2012, just increasing the discount rate yielded a NPV of approximately $67.8 million. After adjusting other figures that Cusick used, Craig arrived at a NPV of approximately $57.2 million for July 2012. Craig believed that Berkadia made a very reasonable decision to sell the hotel when it did and holding the hotel would not have resulted in a higher selling price.

¶ 15 Turning to Greenspan's opinions, Craig testified that his assumptions and other inputs were aggressive. Craig recast Greenspan's analysis with different numbers and concluded that Five Mile would not have recovered in 2014, 2015, or 2017. Five Mile would have recovered approximately $270,000 in 2016. Craig agreed that Greenspan had deducted $6 million for the required property improvement plan and stated that he applied the same deduction.

¶ 16 Tom Lyden, who previously served for 12 years in the IRS chief counsel's office, testified as an expert for Five Mile on REMIC issues. Lyden explained that REMICs are special purpose tax vehicles for the securitization of mortgages and there is generally no tax at the REMIC level. Lyden recalled that the hotel was foreclosed on and taken as REO property, which was a permitted asset under REMIC rules. Lyden noted that a hotel would generate income that would be treated as net income from foreclosure property, which would be taxed at the highest corporate rates. Lyden also stated that REO property is treated as a permitted asset for only three years after the property is acquired, whereupon the grace period expires. A REMIC can obtain an extension if the trust demonstrates that, due to a depressed real estate market, it could not sell the property before the end of the grace period except at a distressed price. Lyden stated that if Five Mile's assertions were true, a good case could be made for an extension. Lyden admitted that before his role in this case, he had never seen a letter requesting an extension of the grace period and had never filed a request for an extension. None of his opinions were based on actual experience with the IRS relating to the grace period.

¶ 17 Olga Loy, a tax attorney, also served as an expert for Five Mile on REMIC issues. To form her opinions, Loy called the IRS chief counsel's office, which was a generally accepted practice in her field, and spoke with an attorney who provides advice to taxpayers on interpreting the REMIC provisions. After Loy explained the facts of the case, the IRS attorney stated that the extension is automatic and the IRS liberally interprets the applicable provisions. In her testimony, Loy cited the IRS provision that a trust does not have to try to sell a property in a distressed market. However, Loy did not offer any opinions about whether the hotel sold for a distressed price or was sold in a depressed market. Loy also acknowledged that the automatic grace period extension can be revoked if the IRS reviews the request and determines that it should not be granted. Loy had never drafted or reviewed a grace period extension letter.

¶ 18 Thomas Biafore testified about REMIC issues as an expert for Berkadia. An attorney, Biafore had previously provided advice for approximately 300 grace period extension letters. He acknowledged that of those 300 requests, only two were denied. As background, Biafore explained that REMICs generate income in the form of interest payments from borrowers. That income is not subject to tax. Biafore noted two situations where REMICs could be taxed: via net income from foreclosure property or if the REMIC engages in activity that is too similar to other types of commercial activity. Although rents from real property are considered passive income and not subject to tax, a trust must be passive to qualify as a REMIC and "it is more difficult to be passive when you take title and begin to operate and own a property."

¶ 19 Turning to the extension of the three-year grace period, Biafore stated that a trust can apply for and receive an extension if the trust shows that an extension is necessary for the disposition of the foreclosure property. The trust must show that "it is necessary, not desirable, not would be nice, [but] that [the extension] is necessary for the orderly liquidation of that property." Biafore further stated that the request must be filed 60 days before the current grace period expires and the IRS would dismiss the request out of hand if the trust prospectively stated that it would not undertake any sales efforts. According to Biafore, the IRS focuses on what efforts have been made to sell the property. The possibilities that the market may improve or the property's value may increase do not show the need for an extension. Extension requests are reserved for situations where the trust has spent almost three years trying to diligently sell the asset and is not able to sell it, "whether *** because of some exogenous factor or you tried to sell it and the seller backed out." However, a trust could obtain an extension if the trust tried to sell the property, but was not getting appropriate offers. Biafore recalled that the marketing efforts for the hotel brought forward a very sophisticated group of potential buyers. Biafore did not believe that any extension request would be approved in this case and he would not recommend that a trust seek an extension based on these facts. Biafore added that he puts "no comfort" in what the IRS says about REMIC issues generally and prefers to rely on specific matters that have been backed up with actual documentation.

¶ 20 Biafore also testified about the consequences of a denial. Biafore stated that a request is deemed accepted unless and until the IRS says otherwise. If the request is denied, the trust has to dispose of the property within 30 days or the property will no longer be qualified foreclosure property and the entire REMIC trust can be disqualified from receiving tax benefits.

¶ 21 Brian Olasov testified as an expert for Berkadia on pooling and service agreements and NPV analyses, among other topics. After investigating Berkadia's experience with REMIC extensions, Olasov learned that of the 327 REO assets held from 2008 to 2013, Berkadia sought and received four extensions. Olasov further testified that Cusick's use of a 1.8% discount rate in his NPV analysis was inappropriate because a loan rate should not be applied to an REO property. Rather, "an equity-like return" should apply to REO property sales.

¶ 22 Following the close of testimony, the parties presented closing arguments and submitted post-trial briefs to the court. In a written order dated November 28, 2017, the court entered judgment in favor of Berkadia and against Five Mile. As a brief review, the court found that Berkadia breached its contractual obligation to perform a NPV sale/hold analysis. However, Five Mile failed to prove that it was damaged as a result. Again, the court found that the hotel would have had to sell for more than $63.7 million for Five Mile to recover. Five Mile had to prove that if Berkadia had performed the required analysis, Berkadia would have concluded: (1) it was a bad decision to sell the hotel, and (2) Berkadia should hold the hotel throughout the three-year REMIC period and even ask for an extension before the hotel was sold.

¶ 23 The court turned to Cusick's testimony, noting that Cusick performed the analysis that Berkadia did not. The court stated that Cusick's calculated NPV was "simply not credible." Cusick's discount rate of 1.8% was "artificially and unreasonably low." The court reasoned in part that a rate that low was not used by any other entity in generating an opinion of value, no buyer would have used a discount rate that low in reaching an opinion of the hotel's value, and the pooling and service agreement did not support using that rate. The court also found that Cusick used very aggressive assumptions in his calculations. The court contrasted Cusick's testimony with that of Berkadia's expert, Craig. According to the court, Craig followed Cusick's methodology in "a fairer way," using a more appropriate discount rate and "a greater variety of information available from other appraisers." The court recalled that Craig concluded that the value of the hotel was closer to $56 to $57 million, and even if a slightly lower discount rate were used, it would not have caused Berkadia to recommend holding the hotel for several years. As for Greenspan, the court found his analysis problematic because it did not account for the $6 million property improvement plan. Five Mile subsequently appealed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, Five Mile first contends that the circuit court improperly disregarded this court's mandate and the law of the case as set out in *Five Mile I*, 2012 IL App (1st) 122812. Five Mile asserts that in the previous appeal, the court found that if Five Mile proved a breach of contract, it would be entitled to money damages.

¶ 26 The law-of-the-case doctrine prohibits the reconsideration of issues that were decided by a reviewing court in a prior appeal. *In re Christopher K.*, 217 Ill. 2d 348, 363 (2005). The doctrine applies to both issues of law and issues of fact. *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). The law of the case is not binding on the trial court in a subsequent stage of litigation when (1) there are different issues involved, (2) there are different parties involved, or (3) the underlying facts change. *Scheffel & Co. v. Fessler*, 356 Ill. App. 3d 308, 312 (2005).

¶ 27 *Five Mile I* did not relieve Five Mile of its burden to prove damages at trial. In *Five Mile I*, the dispositive issue was whether Five Mile had an adequate remedy at law for the purpose of a preliminary injunction. *Five Mile I*, 2012 IL App (1st) 122812, ¶¶ 14, 17. Five Mile contended that if the sale of the hotel went forward, it would be difficult to calculate the proper amount of money damages. *Id*. ¶ 17. The court found that Five Mile's own allegations demonstrated that any potential damages could be calculated with reasonable specificity, which meant that Five Mile had an adequate remedy at law. *Id*. ¶ 19. The court further stated that if Five Mile proved its alleged facts, "then it should have no trouble proving its damages, and if it cannot prove its allegations, then it has no claim." *Id*. ¶ 21. The court did not conclude that if Five Mile proved a breach, it was automatically entitled to damages. All the court found was that it was possible for Five Mile to prove its damages. *Id*. ¶ 19.

¶ 28 Further, the procedural posture of *Five Mile I* is significant. The court noted that on appeal from a denial of a preliminary injunction, " 'a reviewing court examines only whether the party seeking the injunction has demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed.' " *Id*. ¶ 16 (quoting *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill. 2d 356, 366 (2001)). At trial, Five Mile had to actually prove all of the elements of a breach of contract claim, including that it was indeed damaged by a breach. See *Mannion v. Stallings & Co.*, 204 Ill. App. 3d 179, 186 (1990) (to meet its burden in a breach of contract action, the plaintiff must establish damages resulted from the breach). Different questions were posed than those presented by a request for injunctive relief, and so the law-of-the-case doctrine does not apply. See *Grundhoefer v. Sorin*, 2018 IL App (1st) 171068, ¶ 11 (law-of-the-case doctrine did not apply where the first appeal involved a motion to dismiss and the second appeal involved a grant of summary judgment); *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 825 n.1 (1980) (law-of-the-case doctrine did not apply where the first appeal involved a preliminary injunction based solely on the plaintiff's case-in-chief and the second appeal included the defendant's evidence and the plaintiff's rebuttal, "all of which was evaluated as an adjudication on the merits"). *Five Mile I* did not dictate the trial court's conclusion about damages.

¶ 29 Five Mile next contends that the circuit court incorrectly determined that selling the hotel was a better financial option than holding the hotel. Five Mile argues that the court should have credited the testimony of its expert, Kenneth Cusick, because he simply followed the parties' contracts and performed the analysis that Berkadia was contractually obligated to perform. Five Mile asserts that Cusick used the contractually-required discount rate and appropriately relied on appraisals. Five Mile also states that Berkadia's expert, Patrick Craig, did not testify that the NPV of a sale would have been better than a hold.

¶ 30 At trial, Five Mile was required to prove the following elements for its breach of contract claim: 1) the existence of a contract, 2) Five Mile's performance under the contract, 3) Berkadia's breach of its contractual obligations, and 4) damages resulting from the breach. *Canzona v. Atanasio*, 989 N.Y.S.2d 44, 47 (N.Y. App. Div. 2014).[1] The amount of recoverable damages is a question of fact for the factfinder and is reviewed under the manifest weight of the evidence standard. *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 60. A decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or when the findings are unreasonable, arbitrary, or not based on the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). Meanwhile, the measure of damages on which the factfinder's computation is based is a question of law that is reviewed *de novo*. *Koehler*, 2016 IL App (1st) 142767, ¶ 60.

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[1] New York law applies to both the participation agreement and the pooling and service agreement.

¶ 31 Whether Five Mile was damaged depends on whether, per the required NPV analysis, Berkadia would have decided to hold the hotel instead of sell it. Five Mile's expert, Cusick, concluded that the NPV of a hold ranged from $83.2 to $86 million, which would have made a hold the better financial choice. A key point of contention was the discount rate that Cusick used in his analysis, which was the note, or loan, rate of 1.8%. Five Mile argues that the parties' contracts require the use of the loan rate as the discount rate and notes that a Berkadia employee used the loan rate when performing a NPV analysis for the foreclosure of the hotel. Berkadia's experts heavily criticized Cusick's use of the loan rate.

¶ 32 Whether the parties' contracts require that the discount rate equal the loan rate is a matter of contract interpretation, which we review *de novo*. *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 57. Contracts "are generally construed in accord with the parties' intent [citation], and the best evidence of the parties' intent is what they say in their writing." (Internal quotation marks omitted). *Osprey Partners, LLC v. Bank of New York Mellon Corp.*, 982 N.Y.S.2d 119, 120 (N.Y. App. Div. 2014). A contract must be read as a whole to give effect and meaning to every term. *Maven Technologies, LLC v. Vasile*, 46 N.Y.S.3d 720, 722 (N.Y. App. Div. 2017). The court's role is limited to interpreting and enforcing the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms that the parties did not insert. *Maser Consulting, P.A. v. Viola Park Realty, LLC*, 936 N.Y.S.2d 693, 694 (N.Y. App. Div. 2012).

¶ 33 Two sections of the pooling and service agreement—sections 3.09 and 3.28—refer to discounting at the loan rate. Section 3.09, titled "Enforcement of Due-On-Sale Clauses; Assumption Agreements," states in part that a servicer is not required to enforce a due-on-sale clause if "such enforcement *** would not be likely to result in a greater recovery to

Certificateholders and the related Participant, if any, as a collective whole, on a net present value basis (discounting at the related Loan Rate ***) than would a waiver of such clause ***." Section 3.28, which is titled "Modification, Waiver, Amendment and Consents," mentions the loan rate twice. Section 3.28(b)(i) states in part that a servicer may agree to a modification, waiver, or amendment of a term of the mortgage loan if the modification, waiver, or amendment "is reasonably likely to produce a greater recovery to the related Certificateholders *** and the related Participants, as a collective whole, on a net present value basis (the relevant discounting of anticipated collections that will be distributable to be done at the related Loan Rate), than would liquidation." Section 3.28(c) states that a servicer may extend the maturity date of a mortgage loan if, in part, the extension "is likely to result in a recovery which would be greater to Certificateholders and the related Participants on a net present value basis (discounting at the related Loan Rate ***) than the recovery that would result from a foreclosure."

¶ 34 Sections 3.09 and 3.28 apply to situations that arise before a foreclosure and do not govern the analysis that Berkadia should have done here. The court found that before selling REO property, the pooling and service agreement requires the special servicer to prepare an asset status report that contains information set out in section 3.26(b). We accept that finding for the purposes of this appeal.[2] Section 3.26 is titled, "Transfer of Servicing Between Servicer and Special Servicer." Per subsection (b)(vii), the asset status report must include "a summary of proposed actions and an analysis of whether or not taking such action is reasonably likely to produce a greater recovery on a present value basis than not taking such action, setting forth the basis on which the Special Servicer made such determination." Section 3.26(b)(vii) uses the phrase "present value basis," but unlike the other sections that mention a NPV analysis—sections

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[2] In its brief, Berkadia disputes that it was required to perform a NPV analysis at all. It is not necessary to address this argument because we affirm the court's judgment based on the damages issue.

3.09 and 3.28—section 3.26 does not mention discounting at the loan rate. Two other sections of the pooling and service agreement relate to selling REO property: section 3.17 ("Title and Management of REO Properties and REO Account Properties") and section 3.18 ("Sale of Specially Serviced Mortgage Loans and REO Properties"). Those sections do not mention the loan rate either. Given that the pooling and service agreement explicitly requires the loan rate elsewhere, the failure to mention the loan rate in section 3.26 or the REO sections indicates that Berkadia was not required to use it here. If the parties had intended that the special servicer use the loan rate in the NPV analysis before selling the property, the agreement would have said so. Notably, the Berkadia employee who used the loan rate in an NPV analysis was doing so for a foreclosure case analysis and not before selling REO property. We will not imply a term that the parties did not insert themselves. *Aivaliotis v. Continental Broker-Dealer Corp.*, 817 N.Y.S.2d 365, 366 (N.Y. App. Div. 2006). The pooling and service agreement did not require Berkadia to use the loan rate in its NPV analysis.

¶ 35 Cusick presented other reasons for using the loan rate, including that the loan rate provides consistency and that most pooling and service agreements he had read call for discounting at the loan rate. However, other expert testimony at trial criticized Cusick's use of the loan rate. The trial judge, as the trier of fact, was in the best position to determine the witnesses' credibility and the weight to be given to their testimony. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 21. The trial court found that Berkadia's experts were more credible on the loan rate issue and that their testimony deserved more weight than Cusick's. We defer to that determination. See *People v. Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 509 (2005) (reviewing court defers to trial court's credibility determinations).

¶ 36 Five Mile urges this court to rely on other aspects of Cusick's analysis, such as the appraisals he used. Yet, the court found Berkadia's expert, Craig, more credible. Craig used inputs that he found more reasonable to perform the same analysis as Cusick, and concluded that a hold would not have been a better choice in 2011 and 2012. To find that the trial court should have credited Cusick over Craig would require this court to reweigh the evidence, which we may not do. See *Eychaner*, 202 Ill. 2d at 251 (in a bench trial, the trial court weighs the evidence and makes finding of fact). The trial court's finding that Berkadia would have still decided to sell the hotel even if it performed the NPV analysis was not unreasonable or arbitrary and was based on the evidence presented. The trial court properly concluded that a sale would have been the better financial decision.

¶ 37 Next, Five Mile contends that the circuit court incorrectly found that Five Mile would not have recovered even if Berkadia held the hotel. Five Mile argues that the court rejected testimony that established that Five Mile would have received cash from the hotel's operations if Berkadia had held the hotel for a later sale. Five Mile seeks damages through 2017, which requires this court to address whether Berkadia could have held the hotel for that long.

¶ 38 The hotel was part of a REMIC. Under the Internal Revenue Code, a REMIC trust may hold foreclosure property for three years (26 U.S.C. § 856(e)(2) (2012)). Since Berkadia took title to the hotel in 2011, the trust thus had to dispose of the property or apply for a three-year extension by the end of 2014. To obtain an extension, a REMIC trust must establish that the extension "is necessary for the orderly liquidation of the trusts's interests in such property." 26 U.S.C. § 856(e)(3) (2012). If the extension is denied, the trust has 30 days to dispose of the property. 26 C.F.R. § 1.856-6(g)(5). Here, if the trust would not have received an extension, then Five Mile could not recover damages after 2014, since recovery is not allowed if the damages are the result of other intervening causes, rather than the defendant's breach. *Kenford Co., v. Erie County*, 493 N.E.2d 234, 235 (N.Y. 1986).

¶ 39 Under New York law, a plaintiff must prove that a defendant's breach directly and proximately caused its damages. *Diesel Props S.r.l. v. Greystone Business Credit II LLC*, 631 F.3d 42, 53 (2d Cir. 2011); *Weiss v. TD Waterhouse*, 847 N.Y.S.2d 94, 95 (N.Y. App. Div. 2007). At trial, Five Mile did not establish that Berkadia's actions caused damages after 2014. The statutes and regulations pertaining to REMICs would have likely limited Berkadia's ability to hold the hotel past 2014. Five Mile presented two experts on the REMIC issue: Tom Lyden and Olga Loy. Lyden testified that if Five Mile's assertions were true, a good case could be made for an extension. However, before his role in the case, Lyden had never seen a letter requesting an extension or filed a request for an extension. None of his opinions were based on actual experience with the IRS relating to the grace period. Loy formed her opinions by calling the IRS chief counsel's office, who informed her that an extension is automatic and the IRS liberally interprets the relevant provisions. Loy had never drafted or reviewed an extension letter.

¶ 40 In contrast, Berkadia's expert, Thomas Biafore, had provided advice for around 300 extension requests. Biafore did not believe that an extension would be approved in this case and would not recommend that a REMIC apply for an extension based on the facts presented. According to Biafore, the possibilities that the market may improve or a property may increase in value were not valid reasons for an extension.

¶ 41 The testimony of Five Mile's experts was based on conjecture, while Berkadia's expert had direct experience applying for REMIC extensions. In its brief, Five Mile ignores Biafore's testimony and makes no effort to reconcile the competing views about whether an extension would have been granted. We acknowledge that there was testimony that Berkadia sought and received extensions for four assets between 2008 and 2013. And, Cusick generally referred to two casinos that had been in a "very similar" situation and applied for extensions. Without more details, we cannot extrapolate that the hotel here would have received an extension based on the mere fact that other assets applied for or received extensions. Five Mile did not prove that any damages after 2014 were caused by Berkadia's failure to hold the property. Any damages after 2014 were most likely the result of the applicable REMIC statutes and regulations.

¶ 42 Thus, we focus on 2014. Five Mile's expert, Ronald Greenspan, testified that if the property sold in 2014, Five Mile would have received $9.8 million, but all of that would have come from cash buildup. The circuit court rejected Greenspan's testimony because it found that he did not account for a $6 million property improvement plan that was required by the Westin brand. However, Greenspan testified that his projected sales prices indeed took into account $6 million for the property improvement plan. Even Berkadia's expert, Craig, agreed that Greenspan deducted $6 million for the property improvement plan. The circuit court incorrectly recalled Greenspan's testimony.

¶ 43 Nonetheless, we may affirm the trial court's judgment after a bench trial on any basis in the record, regardless of whether the trial court relied on that basis. *Horwitz v. Sonnenschein Nath & Rosenthal*, 2018 IL App (1st) 161909, ¶ 25. Even though Greenspan's testimony was rejected for the wrong reason, Five Mile still could not recover the cash buildup that Greenspan projected. The cash buildup was cash that would have accrued while Berkadia operated the hotel until it was sold. According to Five Mile, this cash is general damages that arise directly from Berkadia's breach. Five Mile asserts that had Berkadia performed the NPV analysis and then held the hotel, additional cash would have accumulated. Five Mile further states that the cash would be consequential damages only if it resulted from Five Mile's collateral business relationship with a third party.

¶ 44 Five Mile misconstrues the difference between general and consequential damages. In breach of contract actions, a plaintiff can recover general damages that are the natural and probable consequence of the breach. *Bi-Economy Market, Inc. v. Harleysville Insurance Co. of New York*, 10 N.Y.3d 187, 192 (N.Y. 2008). Further, a plaintiff seeks general damages when it only seeks to recover money that the breaching party agreed to pay under the contract. *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89, 109 (2d Cir. 2007). Special or consequential damages, "do not so directly flow from the breach." (Internal quotation marks omitted.) *Bi-Economy Market, Inc.*, 10 N.Y.3d at 192. Consequential damages are recoverable if they were foreseeable and within the parties' contemplation when the contract was made. *American List Corp. v. U.S. News & World Report*, 75 N.Y.2d 38, 43 (N.Y. 1989). To determine if consequential damages were reasonably contemplated by the parties, a court looks to "the nature, purpose and particular circumstances of the contract known by the parties," as well as "what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made." (Internal quotation marks omitted.) *Bi-Economy Market, Inc.*, 10 N.Y.3d at 193. Whether damages are general or consequential depends on the specific case at hand. *Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 22 N.Y.3d 799, 808 (N.Y. 2014) ("case-specific approach" has been used to distinguish general damages from consequential damages).

¶ 45 The parties' agreements indicate that neither Five Mile nor Berkadia reasonably expected that cash buildup from operating the hotel would be part of a potential damages claim. Per the participation agreement, Five Mile "agreed to purchase *** a subordinate participation" in a mortgage loan. The loan was made in 2007 and was to initially mature in 2010. Five Mile could not have reasonably expected to receive cash that the hotel would accrue four years after the loan was supposed to mature. Further, the participation agreement states that the loan was to be administered to comply with the REMIC provisions, which constrained what Berkadia could do with the hotel. Berkadia's expert, Biafore, testified that a trust must be passive to qualify as a REMIC and "it is more difficult to be passive when you take title and begin to operate and own a property." The record includes testimony about the tax consequences that could result from operating the hotel. Further, the pooling and service agreement indicates that Berkadia was to promptly sell the hotel. Section 3.17(a) of the pooling and service agreement states that Berkadia "shall manage, conserve, protect and operate each REO property *** solely for the purpose of its prompt disposition and sale in a manner which does not cause such REO property to fail to qualify as 'foreclosure property.' " Section 3.18(h) of the pooling and service agreement states that subject to certain conditions, Berkadia was to "use its reasonable best efforts to sell any REO property *** as soon as practicable[.]" Berkadia's charge was to sell the hotel. It would not have expected that it would be responsible for distributing cash from operating the hotel well beyond the expected life of the loan. And, Five Mile could not have reasonably expected that Berkadia would operate the hotel for a period of time, and risk running afoul of REMIC provisions, so that Five Mile—which merely bought an interest in a mortgage—could recover the cash that accumulated. But see *Biotronik A.G.*, 22 N.Y.3d at 808 (where contract used a resale price as a benchmark, the contract clearly contemplated that the plaintiff would resell the items, and so lost profits were the "very essence of the contract" and thus general damages).

¶ 46 As a final point about the cash buildup, Five Mile cites Greenspan's testimony to claim that when the hotel actually sold in 2013, there was $7.4 million in cash that was distributable to the loan participants. Five Mile neglects to include Greenspan's subsequent testimony that he did not have firsthand knowledge about whether that money came from operating the property. Thus, the record does not indicate whether there was actually money in the form of cash buildup that was distributed after the 2013 sale. We conclude that the cash buildup that Greenspan projected in 2014 was unforeseeable consequential damages that Five Mile could not recover. Based on this result, we will not address the parties' other arguments about the merits of Greenspan's analysis.

¶ 47 Lastly, Five Mile contends that the circuit court frustrated a complete understanding of damages by not allowing Five Mile to obtain information in discovery about the hotel's 2017 financial performance. Five Mile asserts that two of its experts, Cusick and Greenspan, concluded that a sale at the end of 2017 would maximize recovery for all investors. We will not address this argument because, as discussed above, Five Mile has not shown that Berkadia caused Five Mile's damages after 2014.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, the circuit court's judgment is affirmed.

¶ 50 Affirmed.