2017 IL App (1st) 153436-U

FIFTH DIVISION
April 7, 2017

No. 1-15-3436

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILHELM MANAGEMENT, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 2009 L 9169
	)	
MB FINANCIAL BANK, N.A.,	)	Honorable
	)	Thomas R. Mulroy, Jr.,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 Held: Affirming the judgment of the circuit court of Cook County where the trial court properly granted judgment notwithstanding the verdict.

¶ 2 After experiencing financial difficulties, iMetals, Inc. (iMetals) conveyed its assets to Howard B. Samuels (Samuels), as trustee/assignee (Assignee), pursuant to an assignment for the benefit of creditors, or ABC.[1] The Assignee sold the assets to Prometals, LLC (Buyer), a company formed by iMetals' landlord, Charles Baxter (Baxter). The sale proceeds were insufficient to fully satisfy the indebtedness due and owing to MB Financial Bank, N.A., f/k/a

[1] As discussed herein, an ABC is "a voluntary transfer by a debtor of its property to an assignee in trust for the purpose of applying the property or proceeds thereof to the payment of its debts." *Paul H. Schwendener, Inc. v. Jupiter Electric Co.*, 358 Ill. App. 3d 65, 74 (2005).

Cole Taylor Bank (the Bank),[2] a secured creditor holding the first-priority lien on substantially all of the assets of iMetals. As a result, the Assignee was unable to make any distributions to the other creditors. Wilhelm Management, LLC (Wilhelm Management), an iMetals creditor, filed a third-party complaint against the Bank, asserting that the Bank had induced the Assignee to breach his fiduciary duties with respect to the sale of iMetals' assets. A jury found in favor of Wilhelm Management and awarded $500,000. The circuit court of Cook County granted the Bank's motion for judgment notwithstanding the verdict, vacated the jury verdict, and entered judgment in favor of the Bank. On appeal, Wilhelm Management seeks reinstatement of the jury's verdict. For the reasons set forth below, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Pursuant to a loan and security agreement entered in 2006, the Bank extended to iMetals two revolving lines of credit in an amount of up to $15 million and $500,000, respectively, evidenced by two promissory notes. In 2007, iMetals executed a third promissory note to the Bank in the principal amount of $1 million.

¶ 5 Prior to the extended maturity date of the loan, iMetals retained Rally Capital Services, LLC (Rally) to provide business consulting services in March 2009. On May 29, 2009, iMetals and Samuels, as Assignee, entered into a trust and ABC agreement; Samuels is a managing partner of Rally. The agreement provided that the Assignee was to liquidate the assets of iMetals and distribute the proceeds to iMetals' creditors in accordance with applicable law. As discussed further below, the Assignee agreed to sell the iMetals assets to the Buyer for $1.688 million during sale proceedings on July 14, 2009, and a bill of sale was executed on July 31, 2009.

¶ 6 On August 4, 2009, the Bank filed a verified complaint in the circuit court of Cook

[2] Cole Taylor Bank merged with and into MB Financial Bank, N.A. in August 2014.

County against Thomas Kreher (Kreher) and Jason Fowler (Fowler) – the owners of iMetals – and Kelly Wilhelm (Wilhelm), an owner of Wilhelm Management. According to the complaint, as of July 29, 2009, iMetals under the three notes, plus accruing interest, owed $4,547,587.25, $508,375.22, and $889,437.79, respectively. Kreher, Fowler, and Wilhelm had each guaranteed certain indebtedness under the notes, and Kreher had executed and delivered to the Bank a $1.5 million promissory note. Because iMetals had failed to make full payment, the Bank sought recovery from Kreher, Fowler, and Wilhelm under the guaranties and the Kreher note.

¶ 7 After extensive litigation, the operative pleading for purposes of this appeal was filed: Wilhelm's fifth amended answer and Wilhelm Management's third-party complaint against the Bank, Rally, and Samuels. When the trial commenced, only two counts of the third-party complaint against the Bank remained at issue,[3] one of which is pertinent to this appeal. In Count VII, Wilhelm Management alleged inducement of breach of fiduciary duty, *i.e.*, that the Bank induced Rally and the Assignee to refuse higher offers for iMetals' assets and to instead accept a "very low" bid, to the detriment of iMetals' remaining creditors.

¶ 8 The testimony during the three-day jury trial included the following. Wilhelm testified that Wilhelm Management had loaned a total of $3.5 million to iMetals, beginning in approximately 2004. Pursuant to a subordination agreement, such indebtedness was "behind" the Bank. Although Wilhelm had concerns regarding his company's position, he believed there were sufficient assets prior to the ABC. He acknowledged that a loan modification with the Bank entered in November 2008 stated that iMetals had violated several covenants of its loan agreement, *e.g.*, the loan was overadvanced, and iMetals and the guarantors were thus in default.

[3] The circuit court previously granted summary judgment in favor of the Bank on its breach of guaranty count against Wilhelm and awarded $1,351,729.45, plus attorney fees. Such award is not the subject of the instant appeal.

Although Wilhelm initially testified that he was unaware of the ABC "until after the fact," he later testified that he was aware that the iMetals assets were being sold by the Assignee prior to the sale, and he had not attempted to participate in the sale.

¶ 9 Fowler, an iMetals owner, testified that a banking crisis occurred in 2008, and iMetals' subsequent efforts to obtain credit from another bank were unsuccessful. In February 2009, the Bank communicated with Fowler about iMetals retaining a consultant and suggested two options, Rally and another company. Although iMetals preferred the other consultant, it instead retained Rally due to "threats" from the Bank. Kreher, the other iMetals owner, similarly testified that the Bank did not provide a choice regarding the retention of Rally as consultant.

¶ 10 Fowler testified that CM Acquisitions sent a letter of interest regarding the purchase of iMetals in late April 2009. According to Fowler, the Bank "turned down" CM Acquisitions' offer of $7 million. After iMetals' landlord, Baxter, filed a lawsuit against iMetals on May 1, 2009, seeking its eviction and recovery of unpaid rent, Fowler and Rally discussed the possibility of Baxter forcing iMetals into bankruptcy. Fowler felt pressured by Rally when he signed the ABC agreement. He testified that Rally had indicated the ABC process was a quicker and less expensive means to restructure the company than a Chapter 11 bankruptcy. After the ABC agreement was signed, however, all iMetals employees except two were terminated.

¶ 11 Fowler further testified that the "Esmark steel group" (Esmark) sent a letter of intent through counsel dated June 8, 2009. Esmark expressed an interest in buying iMetals' assets for $4 million,[4] and one of the conditions was to release the guarantors and to release Kreher from his $1.5 million note obligation. The Bank declined but offered to entertain counteroffers, which Esmark did not tender.

[4] The letter stated that Esmark, Inc. or its designee would fund $2 million of the purchase price, Baxter would fund $1 million, and Kreher would fund $1 million.

¶ 12 Andre Madrigal (Madrigal) testified he was the key financing employee at both iMetals from 2006 to 2009 and at the Buyer from 2009 until 2011. According to Madrigal, the Bank had tightened credit availability after iMetals violated covenants in the loan agreement. An audit report dated January 2009 which was prepared after the Bank conducted a field examination, listed the value of the iMetals inventory at $10.6 million. A Rally audit in late March 2009 valued the receivables at $4.7 million and the inventory at $9.2 million. Madrigal testified that, as of the ABC, the value of the receivables was $1.8 million and the inventory was $7.9 million.

¶ 13 Richard Simons (Simons), a senior vice president at the Bank, testified that the Bank maintained a first position on iMetals' assets. In a credit memorandum prepared by the Bank dated May 26, 2009, the collateral was described as $1.6 million of accounts receivable, and $8.5 million in inventory. Simons testified that Wilhelm Management – owed $3.5 million of subordinated debt – would receive nothing until the Bank was paid in full.

¶ 14 Simons was questioned regarding an April 2009 email addressing the value of the inventory that was forwarded by Fowler to Rally, and then by Rally to the Bank. Simons did not know whether iMetals had authorized Rally to send the email to the Bank, but he opined that any reputable consultant makes it "very clear" to its troubled client that the consultant will engage in open communications with the bank. According to Simons, a consultant would not ruin its reputation by concealing information from the bank. Steven Baer (Baer), a former Rally partner, later testified that if he forwarded the email to the Bank, iMetals had authorized him to do so.

¶ 15 Mary Alberts (Alberts) testified she was the senior vice president at the Bank in charge of managing a portfolio of distressed loans. She did not recall discussing with Samuels the possibility of him being designated as the Assignee prior to the ABC. After the ABC, the Assignee indicated to Alberts that his fee would be $30,000 and the estimate for costs and

expenses for advertising would not exceed $5,000. Alberts testified that such fees and expenses were paid out of the Bank's cash collateral. She further testified that the Assignee's expenditures during the ABC were based on a budget she approved.

¶ 16 Alberts recalled a "big landlord issue," *i.e.*, if Baxter evicted iMetals, then the Bank could potentially lose access to its collateral. Discussing the sale of assets, she also opined that a landlord may reduce his bid on assets based on the back rent he is owed, and other potential purchasers may discount their bids because they will have to pay the landlord.

¶ 17 Alberts testified that she had received an email from the Assignee regarding the Esmark offer stating "the game is finally afoot and it's your serve." According to Alberts, the Bank was owed approximately $6.4 million at that point. Alberts further testified that the Bank rejected the $4 million Esmark offer because of its proposed release of the guarantors and the Kreher debt.

¶ 18 Alberts testified that two advertisements regarding the sale were placed by the Assignee in the Chicago Tribune, on Sunday, June 21, 2009, and Sunday, June 28, 2009. She testified that she wanted a robust sale of the assets, and explained that an assignee's "job" is to canvas the market. Alberts further testified that the publication of the sale notice was important because the Chicago Tribune is the source for prospective purchasers of distressed companies. She also indicated that she would have spoken with her colleagues at the Bank to determine whether any Bank customers would be interested in the assets. The only such name Alberts could recall forwarding to the Assignee was Lockport Steel.

¶ 19 Prior to the first sale proceeding on June 29, 2009, Baxter "stalked" Alberts but she directed him to the Assignee. Because the Assignee was subsequently out of the office, he stated that Alberts should coordinate directly with Baxter. In a letter from Baxter to Alberts dated July 7, 2009, Baxter made an offer of $1.45 million. Baxter increased the offer to $1.688 million

three days later. In a July 13, 2009, email to the Bank's attorney and the Assignee, Alberts stated, "I've struck a deal with a new entity owned by Charles Baxter to purchase the assets of iMetals." She testified that the Bank was still owed between $4 and $4.5 million after the sale of the assets for $1.688 million.

¶ 20 The deposition of Martin Salzman (Salzman), the Bank's attorney, was read for the jury. After the July 14, 2009, sale proceeding, the Assignee called Salzman and asked him to draft the sale agreement because the Assignee's attorney was out of the country. Although Salzman considered this request unusual as he did not represent the Assignee, Salzman circulated a draft agreement to Alberts and the Assignee. Salzman initially testified that the Assignee "cut himself out of the process and wanted me to take care of it," but subsequently clarified that he had spoken directly with Baxter's attorney because the Assignee was out of town. Salzman further testified that he did not negotiate the sale documentation, but instead described relaying information between the Buyer's counsel and the Assignee.

¶ 21 Samuels testified that he acted as an assignee several hundred times since 1995 and had previously worked with Alberts. He described an ABC as a process in which assets are transferred in trust to an independent third party who is a fiduciary for creditors. He testified that his goal as an assignee is to monetize assets and use the proceeds to pay creditors in accordance with the priority scheme established by law. According to Samuels, the trust agreement described the payment hierarchy, and he did not have discretion regarding the order of payment.

¶ 22 Samuels testified that he owed a fiduciary duty to all creditors. He also testified that he was obligated to devote his best efforts to secure the highest and best value for any assets. Samuels explained that his role was to ferret out interested parties to create a robust sale process.

¶ 23 Samuels testified that iMetals, not the Bank, contacted him about being the assignee.

According to Samuels, it is customary and proper when he is approached to handle an assignment to contact the secured lender and obtain the lender's "tacit consent" to the ABC process. He also testified that he conducts a lien and tax search before taking an assignment. The lien search results for iMetals indicated that the Bank had a first-priority security interest but did not include Wilhelm Management.

¶ 24 Samuels described the initial notice sent to creditors informing them about the ABC and asking creditors to complete claim forms indicating what they were owed. After describing a $4 million offer (Esmark) and a public sale of the assets, the iMetals ABC notice provided that a sale date had not yet been scheduled, and that creditors would receive a new notice when such date was set. Samuels acknowledged that no such notice was mailed.

¶ 25 Samuels testified that he had forwarded the letter of intent from Esmark to Alberts because the Bank was the first-priority secured lender and its consent was necessary for the Assignee to facilitate the "free and clear" transfer of the assets. He also testified that, if the purchase price was higher than the amount owed to the Bank, the Bank's consent technically would not be required.

¶ 26 Samuels testified that he was contacted by and had sent information to representatives of Capital Steel on June 22, 2009, Kreher Steel on June 23, 2009, and Diameters Corporation on June 29, 2009. He also conversed with representatives of Pinkert Steel (Pinkert) on June 29, 2009. Samuels further testified that he had contacted other individuals in his business network to determine whether they may have interest in the asset sale. During the first sale proceeding on June 30, 2009, the participants were: the Assignee; Rally employees; Alberts and Salzman for the Bank; Baxter and his colleague; and Eaton Steel Bar Company (Eaton). During the proceedings, Salzman (Bank's counsel) suggested that the sale be briefly postponed to provide

Eaton the opportunity to determine whether or not it wished to bid.

¶ 27 Samuels sent information packages to Rossetto Partners and Pinkert on July 6, 2009. The participants in the continued sale proceedings on July 7, 2009, included Baxter, a representative of Diameters Corporation, and an attorney representing North American Hoganas. The sole negotiations at that time were with Baxter, and the sale proceedings were again continued to July 14, 2009. When asked why the Bank was communicating with Baxter, Samuels responded that the proposed offer was substantially lower than "any values that we had and below the bank debt" and thus "the quickest path to a decision here would be to put them directly in contact with the bank, because they would have to consent to the transaction." During the July 14, 2009, proceedings, Samuels indicated that he had met with Pinkert representatives earlier that morning, but they elected not to pursue a transaction after inspecting the premises.

¶ 28 Samuels opined that he had created a commercially reasonable market to obtain the highest value for iMetals' assets. He further testified that although Salzman acted as a "scrivener," a Rally employee prepared the bill of sale. Samuels noted that there were specific clauses in both the bill of sale and the asset purchase agreement that were "incumbent" for him, as Assignee, to have in place.

¶ 29 After the close of evidence, the jury was provided with instructions agreed upon by the parties, including:

> "To succeed on Count VII, Wilhelm Management, LLC's claim for Inducement of a Breach of Fiduciary Duty, Wilhelm Management LLC must prove that MB Financial Bank, N.A.:
>
> (1) colluded with Howard Samuels in committing a breach of duty;
>
> (2) induced or participated in such breach and

(3) obtained benefits resulting from the breach of fiduciary duty; and

(4) MB Financial Bank, N.A.'s inducement of Samuels' breach of his fiduciary duty to Wilhelm Management, LLC caused damage to Wilhelm Management, LLC

'Collusion' is an agreement between two or more persons to defraud a person of his rights by the form of law, or to obtain an object forbidden by law.

If you find from your consideration of all of the evidence that any of these provisions has not been proved, then your verdict shall be for MB Financial Bank, N.A. on Count VII."

¶ 30 The jury found in favor of Wilhelm Management on Count VII, awarding $500,000 in damages. The Bank filed a motion for judgment notwithstanding the verdict. The circuit court granted the Bank's motion, finding that there was no evidence presented that the Bank colluded with the Assignee in committing a breach of his duty, that the Assignee breached his duty to Wilhelm Management, or that the Bank obtained any benefit by the alleged breach of duty. The trial court also characterized the $500,000 award as a "mysterious figure" with no basis in the record. The trial court thus vacated the jury verdict and judgment was entered in favor of the Bank. Wilhelm Management filed this timely appeal.

¶ 31 ANALYSIS

¶ 32 On appeal, Wilhelm Management contends that it presented sufficient evidence to support the jury's finding that the Bank induced the Assignee to breach his fiduciary duty to iMetals' creditors by failing to foster an environment conducive to a commercially reasonable sale, selling iMetals' assets for a fraction of their value, turning the sale and its negotiations over to the Bank, and rushing through a sale that could have netted more proceeds at a later date.

Wilhelm Management asks this court to overturn the trial court's ruling on the motion for judgment notwithstanding the verdict, or JNOV, and to reinstate the jury verdict. "A motion for JNOV should be granted only when the evidence and inferences therefrom, viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Ries v. City of Chicago*, 242 Ill. 2d 205, 215 (2011). We review a decision on a motion for JNOV *de novo*. *Id*.

¶ 33 Collusion

¶ 34 Wilhelm Management contends that it presented adequate evidence of collusion to support the jury's verdict. The term "collusion" was defined in the jury instructions to require agreement between the Bank and the Assignee to defraud iMetals' creditors, including Wilhelm Management, of their legal rights. The legal rights of iMetals' creditors are governed by Illinois law on assignments for the benefit of creditors.

¶ 35 An assignment for the benefit of creditors is a "voluntary transfer by a debtor of its property to an assignee in trust for the purpose of applying the property or proceeds thereof to the payment of its debts and returning any surplus to the debtor." *Schwendener*, 358 Ill. App. 3d at 74. An ABC is "simply a unique trust arrangement in which the assignee (or trustee) holds property for the benefit of a special group of beneficiaries, the creditors." *Illinois Bell Telephone Co. v. Wolf Furniture House, Inc.*, 157 Ill. App. 3d 190, 195 (1987). An assignee thus owes a fiduciary duty to the creditors. *First Bank v. Unique Marble & Granite Corp.*, 406 Ill. App. 3d 701, 707 (2010).

¶ 36 Wilhelm Management cites various examples of pre-ABC conduct in support of its claim of collusion. For example, it asserts that the Bank forced iMetals to hire Rally as a business consultant and that Rally failed to fulfill its role as a consultant to help iMetals reorganize.

Wilhelm Management also points to evidence that Rally relayed an email containing "sensitive information" to the Bank, allegedly in violation of the confidentiality clause in its consulting agreement. Although iMetals may have had a claim based on the foregoing conduct, Wilhelm Management appears to lack standing to assert such a challenge. "A party must assert its own legal rights and interests, rather than assert a claim for relief based upon the rights of third parties." *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 36. To the extent that the Assignee's fiduciary duty to iMetals creditors – including Wilhelm Management – resulted from the ABC, the significance of pre-ABC acts is questionable at best.

¶ 37 As support for the "collusion" element of its claim, Wilhelm Management also contends that it adequately demonstrated at trial that the Bank wanted iMetals' assets to be sold as quickly as possible and that the Assignee acted accordingly. Although Alberts indicated that the Bank wanted the iMetals assets sold quickly in light of landlord issues and other concerns, her unrebutted testimony was that in *all* ABCs, "the whole focus is to get as many people interested as possible to have a robust auction and to do it fast, because otherwise you're going to lose things, because you lose access to the building or access to trucks or access to equipment or whatever else is going on at that time." Furthermore, Wilhelm Management does not cite any evidence that the Bank instructed or mandated that the Assignee sell the iMetals assets in a commercially unreasonable manner. As this court has recognized, ABCs "are less costly and completed more quickly" than bankruptcies. *Unique Marble*, 406 Ill. App. 3d at 707.

¶ 38 Wilhelm Management also argues that it presented evidence that immediately upon accepting the assignment, the Assignee turned over control of the sale to Mary Alberts. As an initial matter, we disagree with any assessment that the Assignee relinquished his responsibilities post-assignment. The Assignee testified regarding his efforts to advertise and otherwise cultivate

interest in the sale, to share information with prospective purchasers, and to conduct sale proceedings that spanned three separate dates. The Assignee further testified that the Bank had no power to terminate him, did not control who assisted him, and had no input regarding the content or recipients of the ABC notice. More significantly, Wilhelm Management's position does not acknowledge the Bank's unique role within the ABC, as the holder of the first-priority security interest in substantially all of iMetals' assets.

¶ 39 Under Illinois law, if a creditor has a properly-perfected secured claim, such claim carries over to the assignee's disposition of the encumbered property. See, *e.g.*, *Kolton v. K & L Furniture & Appliances, Inc.*, 82 Ill. App. 3d 868, 871 (1979) (addressing an unsecured creditor's objection to a proposed sale because the "sale price left no surplus" for unsecured creditors after payment of the secured creditor). The undisputed trial testimony was that no other iMetals creditor would be paid out of the sale proceeds unless the indebtedness to the Bank was fully satisfied. The Bank's consent was needed for any sale of iMetals' assets in order to provide a release of its liens. In light of the Bank's position within the ABC, Wilhelm Management fails to cite any evidence that any direct negotiations between Alberts and Baxter was improper.

¶ 40 Wilhelm Management further contends that it demonstrated to the jury that the Assignee had a professional and monetary motive to please the Bank. Although the Assignee testified that he had previously worked with Alberts, there was no evidence that such interactions influenced the Assignee's conduct in the ABC. Furthermore, as another indicator of collusion Wilhelm Management points to the requirement that the Bank approve payment of the Assignee's fee and expenses. As the funds used to pay the fees and expenses constituted its cash collateral the Bank's consent was necessary for such expenditures. The evidence does not support any conclusion that the Bank's relationship with the Assignee was collusive, or even unusual, in an

ABC of this kind.

¶ 41 A motion for JNOV "presents a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the [plaintiff], there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case." (Internal quotation marks omitted.) *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37. Wilhelm Management failed to meet its burden with respect to the "collusion" element of its claim, and thus JNOV was proper.

¶ 42 Inducement of Breach of Fiduciary Duty

¶ 43 Wilhelm Management next contends that it sufficiently established that the Assignee violated his fiduciary duty to iMetals' creditors and that the Bank induced such breach. Specifically, Wilhelm Management argues that the Assignee failed to secure the highest and best price for iMetals' assets, and despite being aware of multiple valuations and offers concerning iMetals in the months leading up to the sale, he sold the assets for a fraction of their value.

¶ 44 "In order to succeed on a claim for breach of fiduciary duty, a plaintiff must establish the existence of a fiduciary duty, a breach of that duty, and any damages proximately resulting from the breach." *Schwendener*, 358 Ill. App. 3d 65, 76-77 (2005). To plead a cause of action for *inducement* of a breach of fiduciary duty, a plaintiff must allege that a third party: (1) colluded with the fiduciary in committing a breach of duty; (2) induced or participated in such breach; and (3) obtained the benefits resulting from the breach. *Id.* In his trial testimony, the Assignee acknowledged that he owed a fiduciary duty to iMetals' creditors. See, *e.g.*, *First Bank*, 406 Ill. App. 3d at 707. The parties' disagreement, however, appears to center on the contours of that duty and, more specifically, which actions or inactions may constitute a breach of the duty. For the reasons discussed below, we share the view of the trial court that the evidence

overwhelmingly favored the conclusion that there was no breach of fiduciary duty by the Assignee and thus no inducement or participation in any breach by the Bank.

¶ 45 Wilhelm Management accurately observes that certain appraisals or valuations of the iMetals assets conducted prior to the ABC were significantly higher than the ultimate sale price. The Assignee testified, however, that an appraisal would not necessarily inform his opinion regarding the fair value of assets "[b]ecause there's other considerations to take into account: Markets change, events occur that could render something more or less valuable than at that specific point in time of the appraisal." The Assignee viewed "the ultimate arbiter of what value is" as "who walks in the door at that given point in time." Wilhelm Management fails to cite any evidence presented at trial that pre-ABC valuation of iMetals' assets would dictate a particular purchase price during a subsequent sale by the Assignee. Although in a different context, our supreme court has recognized, "[t]he best indication of the fair cash value of the property is the actual sales price obtained rather than an appraisal of its worth." *Advanced Systems, Inc. v. Johnson*, 126 Ill. 2d 484, 498 (1989). See also *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (1st) 121147, ¶ 20 (noting that "[m]erely comparing the bid to the appraisal" in a judicial sale of land did not establish whether the sale price was "unconscionably low").

¶ 46 Wilhelm Management contends that the Assignee received a letter of intent from CM Acquisitions to purchase iMetals in April 2009 that purportedly valued iMetals' assets at $7 million, not including the accounts receivable. In the letter, however, CM Acquisitions stated that it "anticipate[d] being in a position to execute a letter of intent shortly" and proposed the commencement of due diligence. Even assuming *arguendo* that CM Acquisitions actually made a cash offer with respect to iMetals' assets, Simons testified that he believed "[t]hey decided not to buy the company after they learned more about it."

¶ 47 Other than the Buyer, the sole party to submit an offer during the ABC was Esmark, which proposed a $4 million purchase price in a letter of intent to the Assignee dated June 8, 2009. The Esmark letter listed several conditions that were required to be satisfied or waived prior to the closing of the sale. One condition was the Bank's release of the guarantees executed by Fowler, Kreher, and Wilhelm, and its release of any claim based on Kreher's $1.5 million note. The Bank rejected the offer based on such condition. Although Alberts indicated her willingness to entertain a counteroffer, none was received.

¶ 48 No evidence was presented at trial, however, that the Bank's rejection of the Esmark offer constituted or caused a breach of the Assignee's fiduciary duty to iMetals' creditors. The Assignee's trial testimony established that he accepted the assignment of the assets with all existing liens in place. He ordered and examined filings to determine which creditors had valid and perfected liens on the property. As the Bank held the first-priority lien on iMetals' assets, its consent was needed for any sale at a price less than the amount of its outstanding indebtedness. The Bank chose not to consent to a $4 million offer that would require its release of significant debt and guarantee obligations, instead consenting to the purchase of the assets by the Buyer. As the trial court observed, "had [the Bank] refused to waive its lien, the sale would not have been consummated and there would have been no proceeds."

¶ 49 Wilhelm Management further contends that the Assignee failed to notify potential buyers of the sale. The Assignee's notice of the ABC mailed to iMetals' creditors stated that they would receive a new notice when a sale date was set, but no such notice was sent. Even assuming *arguendo* that such failure to send a follow-up notice constituted a breach of the Assignee's fiduciary duty to creditors, no evidence was presented at trial that the Bank induced or participated in such breach. Furthermore, there is no indication in the record that any party who

wished to bid on the iMetals assets was unable to do so due to the absence of a second notice.

¶ 50 The Assignee testified regarding his efforts to attract potential buyers, including two notices regarding the sale in the Sunday edition of the Chicago Tribune. "As an experienced assignee," he opined, "I would consider it the gold standard in terms of notification based upon what I'm led to believe is the readership on the Sunday Tribune." The Assignee further testified that it was neither his practice, nor the regular practice of other assignees, to re-notice an adjourned sale in the Tribune. The Assignee's testimony regarding his notification practices in an ABC – and the practices of assignees generally – was uncontroverted.

¶ 51 Wilhelm Management also argues on appeal that the Assignee failed to seek interested buyers, though he knew of several parties interested in iMetals' assets. According to Wilhelm Management, despite his fiduciary duties to iMetals' creditors, upon accepting the assignment, the Assignee testified that he never endeavored to discover who the top appraisers, traders, service centers, mills, or remelters were in the steel industry, and instead relied on his "basic knowledge" of the industry. Although Fowler was asked during his testimony to identify such companies, no evidence was presented that the Assignee was required to search out those companies or that any failure to do so constituted a breach of his fiduciary duty to creditors. We further note that certain companies identified by Fowler at trial were mailed notice of the ABC by the Assignee and were thus aware of the contemplated sale of iMetals' assets. The Assignee testified that the notice to creditors "spreads the word, because the creditors talk to other people in the industry, and they may be motivated to protect their own interest and bring someone to the table."

¶ 52 According to Wilhelm Management, the Assignee failed to "reach out" to potential buyers between the second and third sale proceedings and accepted the Buyer's offer "just 20

minutes" into the third sale proceeding without attempting to find other bidders. Such allegations of purported inaction, however, ignore efforts by the Assignee, including his coordination with and dissemination of materials to multiple prospective purchasers in and prior to early July 2009 and his meeting with Pinkert on the day of the third and final sale proceeding. Wilhelm Management also raises concerns regarding an email response from Baer at Rally to an Esmark executive, which stated that the sale had been "indefinitely deferred" on July 7, 2009, as opposed to adjourned to the following week. No evidence was presented, however, that such response affected the sale results in any respect. Even assuming *arguendo* that such response constituted a breach of the Assignee's fiduciary duty, there was no evidence that the Bank induced or participated in such breach.

¶ 53 In sum, there was a total lack of evidence at trial that the Bank induced or participated in any breach of fiduciary duty by the Assignee. As the evidence overwhelmingly favored the Bank on this element of Wilhelm Management's claim, JNOV was proper.

¶ 54 Damages

¶ 55 Wilhelm Management contends that it proved its damages to a reasonable degree of certainty, presented evidence that was not too remote or speculative, and offered a reasonable basis on which to compute damages. The jury instructions agreed upon by the parties provided that Wilhelm Management was required to prove its damages to a reasonable degree of certainty, *i.e.*, the evidence it presented could not be remote, speculative, or uncertain. Specifically, Wilhelm Management was required to present evidence that tended to demonstrate a basis for the computation of damages with a fair degree of probability. After reviewing the evidence presented at trial, the trial court concluded that "the jury awarded [Wilhelm Management] damages of $500,000, a number not mentioned, proved, or argued in the case and one

unsupported by evidence, common sense or logic."

¶ 56 Wilhelm Management initially asserts that it presented evidence that iMetals' assets were worth substantially more than the amount paid by the Buyer and that even at liquidation value, iMetals' inventory had significant worth. As discussed above, however, the two purchase offers (Esmark and the Buyer) during the ABC were substantially lower than the purported values set forth in the appraisals and valuations relied upon by Wilhelm. "It has long been recognized that property does not bring its full value at forced sales, and that price depends on many circumstances from which the debtor must expect to suffer a loss." *Horney v. Hayes*, 11 Ill. 2d 178, 185 (1957). Accord *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 114 (1993).

¶ 57 Wilhelm Management also claims, without any legal support, that the evidence of the Buyer's "quick resale" of iMetals' inventory and collection of accounts receivable is a reliable indicator of the value of the assets at the time of the sale. At a minimum, Wilhelm Management's characterization of such resale of the inventory as "quick" is dubious. Although Madrigal testified that the Buyer sold 80% to 90% of the acquired inventory, such sales took place prior to his departure from the Buyer's employ in 2011. The inventory sales thus occurred over a two-year period. Such an extended sale process almost certainly necessitated the expenditure of additional funds, *e.g.*, insurance and storage. Furthermore, Madrigal testified that the Buyer "sold that inventory anywhere between book value and market value," and he defined "book value" as "the cost of the inventory." It is unclear whether Madrigal's use of "book value" referred to iMetals' book value ($7.9 million) – as Wilhelm Management contends – or the Buyer's cost (a lower amount). In any event, Wilhelm Management's speculative assessment of the amounts recovered by the Buyer is of limited significance, at best, where such sales occurred months or years after the ABC and presumably in a non-distressed sale context.

¶ 58 Wilhelm Management further contends that the jury heard conflicting evidence from different witnesses regarding the amount of iMetals' indebtedness to the Bank. Based on our review of the record, the evidence was consistent regarding the approximate amount of debt.[5] For example, Fowler testified that the Bank was owed $6.5 million in March 2009. Alberts testified that the Bank was owed approximately $6.4 million at the time of the Esmark offer in early June 2009, and at least $6.3 million at the time of the negotiations with Baxter in early July 2009. The trial testimony indicated that the amount of the indebtedness was reduced as monies were collected on iMetals' accounts receivable before and during the ABC. Wilhelm Management asserts that "Madrigal testified that, in May 2009, the line of credit stood at $4.9 million." Madrigal was questioned, however, regarding the balance on a particular line of credit, not the total indebtedness owed from iMetals to the Bank. The record is clear that the Bank was owed in excess of $6 million at the time of the ABC.

¶ 59 Wilhelm Management argues that, if the Assignee had held a robust sale of iMetals' assets, the sale price would have exceeded the outstanding indebtedness to the Bank, and Wilhelm Management thus would have received a pro rata share of the remaining proceeds in the amount of $500,000. The record is devoid of evidence, however, that could have led the jury to the $500,000 amount. As discussed above, the sole offers for the iMetals assets were in amounts less than the indebtedness to the Bank. Even assuming *arguendo* that the sale price would have been substantially higher but for the conduct of the Bank and the Assignee – and that funds would have been available for distribution to other creditors – it was impossible for the jury to calculate with any reasonable degree of certainty Wilhelm Management's potential *pro rata*

[5] Citing the ABC notice, the Bank contends on appeal that it was "undisputed that the Bank's secured debt was $8,368,528 as of the date of the Assignment." Such amount, however, is not consistent with the evidence presented at the trial, and possibly reflects *all* secured debt as of the date of the ABC, not only the indebtedness to the Bank.

recovery without information regarding the amounts and priorities of the other creditors' claims. No such evidence was presented at the trial.

¶ 60 As the evidence was "remote, speculative, or uncertain" regarding the calculation, or even the existence, of Wilhelm Management's damages, JNOV in favor of the Bank was proper. See, *e.g.*, *Benford v. Everett Commons, LLC*, 2014 IL App (1st) 130314, ¶ 34 (stating that a "jury verdict must be supported by the evidence and cannot be based on conjecture or speculation").

¶ 61 Closing Argument

¶ 62 Wilhelm Management's final argument is that the trial court abused its discretion by restricting the content of its attorney's arguments regarding its damages. The trial court stated, in part, that counsel would not be permitted to argue that damages were $3.5 million, *i.e.*, the amount Wilhelm Management loaned iMetals. The trial court further stated that counsel could argue that additional money may have been received if the Assignee had waited a period of time for a better offer. The trial court would not permit counsel to argue regarding the potential purchaser or the purchase amount on any such offer "because there was no evidence of that."

¶ 63 "Attorneys are afforded wide latitude during closing argument and may comment and argue on the evidence and any inference that may be fairly drawn from that evidence." *Clarke v. Medley Moving & Storage, Inc.*, 381 Ill. App. 3d 82, 95 (2008). We will not reverse a trial court's determinations regarding closing arguments absent a clear abuse of discretion. *Id.*

¶ 64 We cannot conclude that the trial court abused its discretion in not permitting Wilhelm Management's counsel to comment on hypothetical purchase offers with respect to the iMetals assets. See, *e.g.*, *People v. Harris*, 132 Ill. 2d 366, 391 (1989) (finding no abuse of discretion where the trial court sustained the prosecutor's objection to the defense counsel's "speculative" comments). In addition, for the reasons discussed above, the $3.5 million *debt* to Wilhelm

Management purportedly incurred by iMetals in a period prior to the ABC does not mean that Wilhelm Management's *damages* due to the Bank's conduct during the ABC amounted to $3.5 million. Finally, given that the jury ruled in Wilhelm Management's favor on Count VII and awarded $500,000, any negative effect of the trial court's restrictions on its counsel's arguments appears to have been minimal. As we share the trial court's view that the jury's verdict was unsupported by the evidence, we need not further analyze the impact of the trial court's restrictions on closing arguments.

¶ 65 CONCLUSION

¶ 66 The evidence and the inferences therefrom, viewed in the light most favorable to Wilhelm Management, so overwhelmingly favored the Bank that no contrary verdict based on that evidence could ever stand. We thus affirm the judgment of the circuit court of Cook County granting the Bank's motion for judgment notwithstanding the verdict, vacating the jury verdict, and entering judgment in favor of the Bank.

¶ 67 Affirmed.