IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-693

Filed: 6 June 2017

Mecklenburg County, No. 13 CVS 10981

EAGLE SERVICES & TOWING, LLC, GEORGE K. CLARDY, JR., and SYLVIA W. CLARDY, Plaintiffs

v.

ACE MOTOR ACCEPTANCE CORP., Defendant

Appeal by defendant from judgments entered 2 December 2015 and 2 February 2016 by Judge W. David Lee in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 March 2017.

Batts, Batts & Bell, LLP, by Joseph G. McKellar and Joseph L. Bell, Jr., for plaintiff-appellees.

Sharpless & Stavola, P.A., by Pamela S. Duffy and R. Bryan Norris, Jr., for defendant-appellant.

CALABRIA, Judge.

Where defendant breached the duty of good faith in a contract by preventing plaintiffs from performing under the contract, the trial court properly found and concluded that plaintiffs were entitled to recourse and defendant was not. We affirm.

I. Factual and Procedural Background

Since 1996, Eagle Services and Towing, LLC ("Eagle"), a South Carolina company, has operated a used car dealership in Fountain Inn, South Carolina. George K. Clardy ("Mr. Clardy") is the owner and principal of Eagle. On 2 November 2010, Eagle entered into a contract ("the contract") with Ace Motor Acceptance Corp. ("Ace"), a North Carolina corporation with its place of business in Matthews, North Carolina. Pursuant to this contract, Eagle agreed to sell its receivables to Ace for consideration. Eagle would continue to service those receivables, which would be paid to Ace; Ace would then remit 40% of the payments received as a fee to Eagle. This contract was signed by a representative of Ace as buyer, and by Eagle, Mr. Clardy, and Sylvia W. Clardy ("Mrs. Clardy") (collectively, "plaintiffs") as sellers. On 17 May 2011, the parties entered into an amendment to the contract ("the amendment"), decreasing the amount Ace would owe Eagle on each collection from 40% to 35%. On 1 June 2011, Eagle entered into an additional contract with Ace to secure a line of credit ("the line of credit agreement").

On 21 June 2013, plaintiffs filed the underlying complaint against Ace. Plaintiffs alleged that, after executing the amendment, Eagle "began experiencing and suffering from numerous accounting irregularities and breaches of contract" by Ace. Plaintiffs' complaint alleged that the fees were either not paid, or credited to the wrong account (i.e. the line of credit), or otherwise not paid in accordance with the contract. The complaint thus sought an accounting, and disclosure of documents, and alleged breach of contract, breach of implied covenant of good faith and fair dealing, and unfair trade practices.

On 16 December 2013, Ace filed an amended motion to dismiss, motion for judgment on the pleadings, answer, and counterclaims. The motion to dismiss, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, alleged that plaintiffs were not entitled to the equitable remedy of accounting because the claim was based in contract; that plaintiffs were not entitled to a breach of contract claim where plaintiffs came to court with "unclean hands" due to their own alleged breach; and that plaintiffs were not entitled to an unfair trade practices claim due to breach of contract "absent substantial aggravating factors which have not been alleged and which cannot be proved." The motion for judgment on the pleadings paralleled these arguments. Ace raised the affirmative defenses of the statute of frauds, the doctrine of unclean hands, prior breach, failure of condition precedent, lack of consideration, waiver, estoppel, failure to mitigate, set-off, the economic loss rule, and an argument that plaintiffs knew or should have known that their unfair trade practices claim was "frivolous and malicious." Ace then raised counterclaims of breach of the contract, breach of the line of credit agreement, breach of guarantees, conversion, tortious interference with contract, and unfair trade practices.

On 27 June 2014, Ace moved for summary judgment. With respect to plaintiffs' claims, Ace alleged that plaintiffs had failed to establish a basis for the relief of an accounting; that plaintiffs failed to establish a breach of the express terms of the contract; and that plaintiffs failed to establish standing to bring a claim for unfair trade practices, let alone any conduct which would support an unfair trade practices claim. With respect to its own counterclaims, Ace moved for partial summary judgment, alleging that there was no genuine issue of material fact that plaintiffs breached the contract, line of credit agreement, and guarantees, and that plaintiffs committed conversion. Ace further alleged that plaintiffs had not alleged any facts with respect to Ace's affirmative defenses. On 27 June 2014, plaintiffs also moved for summary judgment, alleging that no genuine issues of material fact existed with respect to Ace's counterclaims, and that the counterclaims should be dismissed. On 31 July 2014, the trial court entered an order on these motions. This order granted Ace's request to dismiss plaintiffs' claim for accounting, and denied all other aspects of both parties' motions for summary judgment.

After numerous motions, the matter proceeded to a bench trial. On 2 December 2015, the trial court entered its judgment. On 18 December 2015, Ace moved to amend the judgment, and for additional findings of fact, under Rules 52 and 59 of the North Carolina Rules of Civil Procedure. On 2 February 2016, the trial court entered its amended judgment. This judgment contained forty findings of fact and sixteen conclusions of law, and ultimately ordered that (1) plaintiffs were to recover $414,354.16 in damages, consisting of $543,237.54 in damages to which plaintiffs were entitled for Ace's breach of the contract, minus $128,882.73 in damages to which Ace was entitled for plaintiffs' breach of the line of credit agreement; (2) Ace was to recover $19,332.41 in attorney's fees due to plaintiffs' breach of the line of credit agreement; and (3) plaintiffs were to recover attorney's fees, to be calculated at a later hearing, due to Ace's breach of the contract.

Ace appeals.

II. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

III. Post-Termination Servicing Fees

Through numerous arguments, Ace challenges various of the trial court's findings of fact and conclusions of law, and its ultimate determination to award post-termination servicing fees to plaintiffs, as unsupported by evidence and law. We disagree.

A. Findings of Fact and Conclusions of Law

In various arguments, Ace challenges numerous of the trial court's findings of fact and conclusions of law. In the relevant findings of fact, the trial court found:

> 10. Subsequently, on June 20, 2011 that Eagle executed a document styled "Agreement For Line of Credit ("Floorplan")["] establishing a $350,000.00 line of credit subject to certain terms and conditions and requiring certain performance and actions on the part of Ace. The Floorplan permitted Ace to set off curtailments, i.e. monies due from Eagle to Ace under the Floorplan against any monies otherwise owed by Ace to Eagle. The Floorplan made no specific reference to the separate but subsisting amended BHPH contract, the subject matter of which were the BHPH accounts, and the offsetting language in the Floorplan was not resorted to by Ace in its subsequent efforts to avoid paying servicing fees until well after Ace's waiver of any breach by Eagle and Ace's breach of the amended BHPH contract. Prior to its breach of the amended BHPH contract, any right of set off was intentionally relinquished by Ace, it then being Ace's desire to continue to solicit business from Eagle.

. . .

12. In the latter months of 2011 Eagle was making inquiries as to when it would receive the thirty-five percent servicing fees referenced in the amendment. Despite repeated inquiries, Ace, contrary to asserting deficient performance under either the amended BHPH agreement or Floorplan, both verbally and in e-mails to Eagle repeatedly indicated that the payment of servicing fees was imminent and that the details of payment (often referred to by the parties as the "flipping" (Ace's payment of service fees from the reserve account)[)] were being addressed by Ace. These representations were intended to induce Eagle to continue to sell customer contracts to Ace, and Eagle was so induced. It was not until approximately April, 2012 that Ace first conveyed its decision to withhold servicing fees for a period longer than six months without Eagle's approval. Shortly thereafter, Ace began to apply servicing fees acknowledged to be due to Eagle, not as Eagle directed, but in such manner as Ace unilaterally deemed appropriate. This misapplication of fees acknowledged to be due to Eagle was in bad faith and breached the covenant of good faith and fair dealing underlying the amended BHPH contract.

13. Following Ace's knowing and intentional breach of the amended BHPH contract by withholding service fees the parties, on or about June, 2012 agreed that accrued servicing fees then totaled $178,449.21. The delinquency of accounts as to which Ace later asserted a right of setoff against these funds arose out of and was the proximate result of Ace's continuing breach of the amended BHPH contract.

. . .

16. The wrongful and continuing withholding by Ace of the servicing fees for as long as eighteen months, although explicable in light of Ace's discovery of an unrelated

$400,000.00 shortfall on its books, was a material, substantial and continuing breach of the amended BHPH contract. Ace's breach prevented the plaintiff from being able to perform its obligations under the amended BHPH contract. At the time of Ace's initial breach of the amended BHPH contract in December, 2011 Eagle was willing to perform its obligations as agreed and would have done so but for Ace's wrongful conduct. Eagle has met its burden of proving that, at the time of Ace's initial breach by failing to pay servicing fees, it had met all conditions precedent to payment.

17. Eagle's loss of cash flow due to the wrongful withholding and subsequent misapplication of its servicing fees by Ace materially impinged on its ability to continue to do business. Ace's actions were in bad faith and breached the implied covenant of good faith and fair dealing underlying every contract.

18. Rather than asserting any deficiency or default, Bob Buchanan ("Buchanan"), Ace's controller for approximately nine years before his departure in April, 2012, repeatedly represented to Eagle that the formulation of a plan to systematically address the timely payment, or "flipping" of the customer accounts was on-going. Beginning in at least December, 2011 (more than six months after the amendment) and continuing until his departure from the defendant's employ, Buchanan had several communications with Clardy at Eagle regarding what the parties coined as the "flipping" of these accounts, it being understood that Eagle's receipt of its servicing fees would be triggered when these accounts were flipped. At the end of 2011 Eagle, relying on a six-month holding period for servicing fees sitting in the reserve account, contended that at least twenty to thirty accounts qualified to be flipped. None were flipped, or paid.

19. At the end of 2011, Ace continued to buy customer contracts from Eagle, waiving any default with respect to Eagle's obligations under both the pre-amendment 60/40

accounts and Eagle's line of credit obligations.

20. Ace made no criticism of Eagle's collection practices prior to August of 2012. It was not until the departure of Bob Buchanan in April of 2012 that Ace expressed concern to Eagle about buy-back arrearages. Even then, Ace was continuing to buy BHPH customer contracts and continued to do so until very close to the end of the parties' active relationship on or about December 31, 2012.

21. As noted above, shortly after Buchanan's departure, Ace discovered a $400,000.00 "shortfall" on its books. There remains no explanation as to Ace's loss and failure to account for these monies on its books. Moreover, the subsequent "buy-back" computations of Ace, as well as the curtailment assertions and computations were also often erroneous. Ace's assertions as to Eagle's buy-back obligations, contemplated in the contract documents to be dates certain upon which Eagle would be obligated to pay the obligation of the customer on the delinquent account were also continually pushed back, or revised by Ace, were often erroneous and are found by this Court not to be credible. Further, such buy-back obligations were excused by Ace's continuing breach of the amended BHPH contract. Ace thereafter wrongfully terminated Eagle's servicing and collection obligations. Ace's breach and its subsequent wrongful termination of Eagle's servicing and collection obligations were without legal cause, justification or excuse.

22. The Court is unable to rely on the defendant's post-breach audit of its records in determining the rights of obligations of the parties. Eagle has carried its burden of proving that Ace's breach of the amended BHPH contract prevented Eagle from performing its obligations under the contract.

23. John Donaldson ("Donaldson"), Ace's President and Chief Financial Officer followed Buchanan's departure from Ace. A business and accounting major who received

his certification in public accounting in 2007 undertook upon his employment with Ace to conduct an "after the fact" analysis of Ace's accounting records with Eagle with respect to both buy-back obligations and amounts due under the floorplan document. Donaldson's credible testimony was that buy-back notice due dates were consistently pushed back. Further, his testimony tended to show that there were no monies due from Eagle under the floorplan arrangement as of January 20, 2012.

24. It was not until May, 2012 that Ace informed Eagle that such defaults, if not cured, would affect Eagle's right to collect the servicing fees to which it was entitled.

. . .

27. With respect to Ace's claims for conversion, the Court finds that in late July, 2012 Ace acknowledged an error in failing to remit approximately $5,500.00 in servicing fees. A spreadsheet reflecting that Eagle subsequently withheld funds that would otherwise have been payable to Ace was sent to Ace and was received by Ace without objection. Subsequent withholding of servicing fees by Eagle were fully accounted for by Eagle to Ace. Ace, with full knowledge of the circumstances continued to carry on business with Eagle and waived any claims now being asserted for conversion. Finally, as set forth below, the fees not paid over by Eagle serve to diminish or mitigate the damages that Eagle would otherwise be entitled to recover.

. . .

29. In July, 2012 Ace sought to continue its relationship with Eagle as long as it appeared that Eagle would continue to participate in selling customer contracts and utilizing the floorplan. Further, Ace's failure to remit earned servicing fees and its subsequent misapplication of Eagle's money occurred well after Ace's breach of contract and served only to mitigate the damages that Eagle would

otherwise suffer. A non-breaching party has a duty of exercising reasonable diligence to minimize the loss.

30. Ace has failed to carry its burden of proof, and its evidence is insufficient to prove claims for conversion, tortious interference with contract, breach of the amended BHPH contract, and unfair or deceptive acts or practices.

31. Over an extended period of time Ace withheld servicing fees that by late April, 2012 totaled not less than $178,449.21. These funds were funds to which Eagle was entitled and were funds not applied as requested by Eagle. Although the withholding and misapplication of these funds constituted a material and substantial breach of contract, Ace's application of $78,449.21 inured to the benefit of Eagle in that its application reduced Eagle's ultimate liability to Ace. The evidence also convinces the Court that the remaining $100,000.00 is accounted for in the Court's computation of monies otherwise due and owing by Ace to Eagle.

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33. Ace could reasonably foresee that its continuing breaches with respect to all of the accounts it purchased from Eagle (both 65/35 and 60/40 accounts) would preclude Eagle's right to be placed in the position it would have occupied with respect to these purchased accounts in the absence of Ace's breach. It was Ace's continuing breach of the amended BHPH contract (and not any right, in absence of its breach, to terminate the amended BHPH contract) that directly and proximately damaged Eagle as hereinafter set forth.

. . .

35. On December 31, 2012 the active Eagle 65/35 accounts had an aggregate principal balance of $3,862,784.87. A thirty-five percent servicing fee on this principal balance equals $1,351,974.70. It can be

> reasonably inferred, however, based on substantial evidence of historical BHPH sales, collection and repossession data that customers would default on approximately forty percent of these accounts. As to such defaulted accounts Eagle would not be entitled to a servicing fee. Further, it can be reasonably inferred that the related labor and repair costs with regard to repossessed vehicles which were the subject of the 65/35 accounts would have been not less than $202,760.43. With respect to these 65/35 accounts, Eagle has therefore been damaged in the sum of $507,556.83. ($1,351,974.70 discounted by 40%, less related costs of $202,760.43, less a credit to Ace in the amount of $100,867.56 for Eagle's netting of payments (see finding of fact #28).
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> 36. On December 31, 2012 the active Eagle 60/40 accounts had an aggregate principal balance of $334,667.76. A forty percent servicing fee on this principal balance equals $133,867.10. Once again, it can be reasonably inferred, based on substantial evidence of historical BHPH sales, collections and repossessions that customers would default on approximately forty percent of these accounts. As to such defaulted accounts Eagle would not be entitled to a servicing fee. Further, it can be reasonably inferred that the related labor and repair costs with regard to repossessed vehicles which were the subject of the 60/40 accounts would be not less than $44,639.57. Thus, with respect to these accounts, Eagle has been damaged in the additional sum of $35,680.69. ($133,867.10 discounted by 40%, less related costs of $44,639.57).

In the relevant conclusions of law, the trial court concluded:

> 5. At the time of Ace's initial breach of the amended BHPH contract Ace had repeatedly waived any set off right that it had. There was no failure of a condition precedent to Ace paying Eagle's servicing fees as they accrued. Eagle is therefore entitled to recover servicing fees as set forth herein. Further, Ace's continuing breach of the amended BHPH contract, including its failure to make timely

payment of servicing fees, its misapplication of servicing fees as to which Eagle was entitled, and its termination of Eagle's servicing and collection obligations without cause excused further performance by Eagle under the amended BHPH contract.

6. Ace's continuing breaches directly and proximately resulted in Eagle not realizing servicing fees on the customer contracts it sold to Ace. The net loss by which Eagle was damaged as a direct and proximate result of Ace's breaches can be determined with reasonable certainty and the Court's findings reflect such determination.

7. Eagle has proven that its damages directly and proximately resulting from Ace's failure to pay servicing fees on both the 65/35 and 60/40 customer accounts is in the total sum of $543,237.54. ($507,556.83 + $35,680.69).

. . .

9. Subsequent to Ace's initial breach of the amended BHPH contract Eagle materially breached the Floorplan agreement.

. . .

11. The Court's set off extinguishes the claims otherwise asserted by Ace for breach of guarantees.

12. Ace has failed to prove its claims for conversion, tortious interference with contract and unfair or deceptive acts or practices and the same must therefore be dismissed, with prejudice.

13. Ace has failed to prove Eagle's breach of contract arising under the amended BHPH contract and such claim must therefore be dismissed, with prejudice. Thus, Ace has failed to prove either a right of setoff with respect to Eagle's alleged breach of contract arising under the amended

> BHPH contract or a prior breach so that such right of setoff and prior breach defenses necessarily fail.
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> 14. Ace has failed to prove that the parties' post-breach workout efforts resulted either in Eagle's waiver, i.e. knowing and intentional relinquishment of its contract rights or constituted a sufficient basis to raise an estoppel so that Ace's defenses of waiver and estoppel fail.
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> . . .
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> 16. Ace is entitled to recover attorney fees in accordance with paragraph 21 of the Floorplan. Because the amount due under the Floorplan "is collected by or through an attorney-at-law," as set forth in paragraph 21 of the Floorplan, albeit by way of set off, Ace is nonetheless entitled to an attorney fee equal to fifteen percent of the amount collected for breach of the Floorplan agreement, the attorney fee being in the amount of $19,332.41 (15% of $128,882.73). Eagle is entitled to recover attorney fees, court costs and other expenses in accordance with paragraph 16.10 of the initial contract.

We note as a preliminary matter that we are not bound by the trial court's designation of findings of fact versus conclusions of law. *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586 (1987). When exercise of judgment or application of legal principle is required, determinations are more properly classified as conclusions of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Thus, although some of the above determinations may have been labeled by the trial court as findings of fact, we shall treat them as conclusions of law where merited.

B. Post-Termination Servicing Fees

Ace first challenges the trial court's award of post-termination servicing fees. Ace contends that it was "error to award post-termination damages for a terminable at will contract." Specifically, the trial court concluded that Eagle was damaged by not realizing servicing fees that were sold to Ace, and was entitled to those fees as damages.

Ace contends that the contract provided Ace the unfettered and unilateral right to terminate. In support of this, Ace relies on two provisions in the contract. The first, section 6.8, provided that Ace "shall retain the absolute and unfettered right . . . to assume all servicing and collection duties which may be exercised by" Eagle. The second, section 6.9, provided that Eagle was entitled to its service fees "[s]o long as [Eagle] services and collects payments due under the Contracts in accordance with the provisions of this Agreement[.]" Reading these two provisions together, Ace contends that it was able to unilaterally assume all servicing and collection duties, thereby precluding Eagle from making any further collections. Having thus prevented Eagle from collecting on the receivables, Ace contends that it was no longer required to make payments to Eagle.

Even assuming *arguendo* that the contract permitted this conduct, it is clear that this was a breach of the duty of good faith. Ace engineered a situation in which Eagle would be unable to service the receivable accounts in accordance with the contract, and then terminated its payment of servicing fees to Eagle. Yet this situation only arose from the actions of Ace, not due to any misconduct on the part of Eagle.

Ace contends that the contract was terminable at will. Even if this were true, however, an at-will contract remains bound by the requirement that such an agreement be enforced in good faith. *See Bonn v. Summers*, 249 N.C. 357, 359, 106 S.E.2d 470, 472 (1959) (holding that "where no time is fixed for the continuance of a contract between the broker and his principal, either party can terminate the contract at will, subject to the ordinary requisites of good faith"). The trial court correctly found that "Ace's actions were in bad faith and breached the implied covenant of good faith and fair dealing underlying every contract." Ace's retroactive attempts at justification pursuant to sections 6.8 and 6.9 of the contract do not excuse its bad faith dealing. Because Ace's termination of Eagle's servicing violated the duty of good faith, it precluded Ace's at-will termination of the contract.

Despite Ace's contentions, we hold that the trial court correctly found Ace's termination of Eagle's servicing of accounts to be wrongful. We hold that these findings were based on competent evidence, and in turn supported the relevant conclusions.

C. Breach and Remedy

Ace next contends that the trial court erred in concluding that Eagle's further performance was excused due to Ace's breach. Ace first contends that its breach was not material. However, given that the contract was for the sale of receivables, and that Ace's breach involved precluding Eagle from doing precisely that, it seems clear that the breach was indeed material.

Ace next argues that, once Ace breached, Eagle would be entitled to file an action against Ace for breach of contract. Ace notes that instead, however, Eagle continued to purchase contracts from Ace. Yet the trial court found that this, too, was a result of Ace's misconduct. Specifically, the trial court found that Ace used the line of credit agreement to incentivize Eagle to continue to sell receivables to Ace, and concluded that "Ace has failed to prove that the parties' post-breach workout efforts resulted either in Eagle's waiver . . . or constituted a sufficient basis to raise an estoppel[.]"

Eagle correctly notes that the contract at issue was a bilateral contract, and that "[t]he general rule governing bilateral contracts provides that if either party to the contract is materially in default . . . the other party should be excused from the obligation to perform further." *Paul B. Williams, Inc. v. Southeastern Regional Mental Health Center*, 89 N.C. App. 549, 551, 366 S.E.2d 516, 518 (1988). The trial court's conclusion of law is supported by law on point. We hold that the evidence supports the trial court's findings and conclusions that Ace incentivized Eagle's further conduct, that Eagle's performance was excused due to Ace's breach, and that Ace was therefore precluded from recovery for any non-performance by Eagle.

D. Waiver

Ace next contends that the trial court erred in finding and concluding that Ace waived its rights, including recovery, by continuing to do business with Eagle. Ace contends that it is unfair that Eagle's continuing conduct did not constitute waiver while Ace's did.

The trial court's findings showed that Ace used the line of credit agreement to continue to induce Eagle to sell more receivables to Ace. Further, the trial court made several findings concerning Ace's refusal to address any arrearages by Eagle until 2012. As opposed to Ace's conduct in using the line of credit agreement to induce Eagle to continue to sell receivables, Eagle did not engage in any conduct to incentivize Ace to refrain from pursuing Eagle's arrearages. Such conduct was entirely Ace's, and Ace's long-time controller, Bob Buchanan ("Buchanan"), made representations to Eagle that their arrearages would not be actively pursued. Buchanan testified that Ace did not even consider Eagle to be in breach prior to April of 2012. The evidence clearly supports these findings that Ace waived such default by Eagle, and these findings support corresponding conclusions.

E. Prior Breach

Ace next contends that the trial court erred in finding that Ace breached prior to Eagle's breach of the line of credit agreement. Specifically, Ace contends that "[t]here was no finding that Ace was the party to first materially breach, and the evidence does not support that finding or conclusion."

The trial court's findings reflect that, "[b]eginning in at least December, 2011," Buchanan made representations designed to induce Eagle's continued compliance. In parallel with this, the trial court found that "[i]n the latter months of 2011 Eagle was making inquiries as to when it would receive the thirty-five percent servicing fees referenced in the agreement. Despite repeated inquiries, Ace, contrary to asserting deficient performance . . . repeatedly indicated that the payment of servicing fees was imminent . . . . These representations were intended to induce Eagle to continue to sell customer contracts to Ace, and Eagle was so induced."

Taken together, these findings demonstrate that while Ace made repeated representations designed to induce Eagle's continued compliance, Eagle was not receiving the fees it anticipated as early as "at least December, 2011[.]" These findings, which are supported by evidence in the record, support the trial court's further finding that Ace's initial breach occurred in December of 2011. These findings in turn support the trial court's findings and conclusions that Ace's breach of the contract preceded Eagle's subsequent breach of the line of credit agreement.

Ace's further contentions notwithstanding, the evidence at trial showed that Eagle was not considered in default until April of 2012, after Ace's initial breach in 2011. Buchanan specifically testified to this point, which is further supported by

Ace's continued payment of servicing fees to Eagle through May of 2012. This evidence supports the trial court's finding that Eagle's breach of the line of credit agreement occurred after Ace's breach of the contract.

F. Misapplication of Offset

Ace next contends that the trial court erred in concluding that Ace committed a material breach by misapplying offsets. Ace contends that the trial court could not simply decide that Eagle was entitled to payments. Yet the contract provides precisely that. Specifically, section 6.9 of the contract provides that, "[u]pon [Eagle]'s request, the Servicing Fee shall be paid to [Eagle] every month[.]" Instead, these fees were applied to Eagle's obligations under the line of credit agreement. Specifically, these fees were spread thinly among multiple funds, rather than being used, as Eagle requested, to pay off specific accounts. It is clear that Ace did not remit these fees directly to Eagle, and did not employ them as Eagle directed. The evidence thus supports findings and conclusions that Ace misapplied those offsets, which constituted breach of section 6.9 of the contract.

G. Continuing Breach of All Contracts

Ace next contends that the trial court erred in finding that Ace had "continuing breaches with respect to all of the accounts it purchased[.]" Ace contends that, with respect to the 40% accounts (as opposed to the 35% accounts), Ace "paid service fees throughout the parties' relationship[.]" However, the evidence demonstrates that Ace only made these payments at certain times, and that of the withheld and misapplied servicing fees as of July 2012, some of those fees came from the 40% accounts. Further, by assuming servicing of all accounts, Ace breached the contract with respect to both the 35% and 40% accounts. Thus, the evidence supports findings and conclusions that Ace engaged in continuing breach of both 35% and 40% accounts, or "all of the accounts it purchased[.]"

H. Condition Precedent

Ace next contends that Eagle was not entitled to payment of servicing fees, because lack of default on Eagle's part was a condition precedent to recovery. Specifically, Ace cites section 2.2 of the contract, present in both the original and amended contracts, which provides that Ace would pay servicing fees upon Eagle's request, "provided [Eagle] is not in default of this agreement or any other agreement[.]" Ace concedes that the trial court found that "Eagle has met its burden of proving that, at the time of Ace's initial breach by failing to pay servicing fees, it had met all conditions precedent to payment[,]" and concluded that "[t]here was no failure of a condition precedent to Ace paying Eagle's servicing fees as they accrued." Ace contends, however, that the trial court made no findings that Eagle continued to meet the condition precedent subsequent to Ace's initial breach in December of 2011.

Ace's contentions once again notwithstanding, the evidence shows that Eagle's obligations under the contract were not triggered. Ace failed to provide the "buyback" notices necessary to trigger Eagle's obligations, instead continuously postponing due dates in order to prevent Eagle from being in breach. This was supported by the testimony of various members of Ace. Where Ace continued to push back due dates, it was impossible for Eagle to have been in default. This evidence supported the trial court's finding that "Ace's breach prevented Eagle from being able to perform its obligations under the amended . . . contract." The trial court properly determined that it was Ace's misconduct, not Eagle's, that failed to satisfy a condition precedent, and this bad faith effort would not preclude Eagle from recovery. The evidence thus supported the trial court's findings of fact and conclusions of law.

I. Breach by Prevention

Ace next contends that the trial court erred in finding that Ace's breach prevented Eagle's performance and caused Eagle's delinquency. Notwithstanding Ace's arguments, we have already addressed this issue in greater detail above. Succinctly: Ace assumed servicing accounts, thereby precluding Eagle from receiving fees for them, and Ace pushed back and revised its "buyback" notices, thereby preventing Eagle from becoming obligated for payments thereupon. Accordingly, as we have held above, the trial court did not err in finding and concluding that Ace breached by preventing Eagle's conduct.

J. Damages

Ace next contends that the trial court erred in its calculation of damages. Specifically, Ace contends that the trial court failed to consider Eagle's obligation to buy back defaulted contracts at 60% of the balance owed. Certainly, had Eagle bought these contracts back at that rate, it could have resold them, and that award would be appropriate. However, Ace overlooks the fact that, by assuming these contracts, it prevented Eagle from reselling them. Thus, the accounts were a total loss for Eagle, not merely one with a 40% offset. The trial court's findings and conclusions on this point were thus supported by competent evidence.

K. Duty of Good Faith

Ace next contends that the trial court erred in concluding that Ace's breach of the duty of good faith somehow overrode other contractual obligations. We have addressed this argument in greater detail above. Succinctly: Ace's breach of the duty of good faith was a material breach of the contract, in that it was explicitly engineered to prevent Eagle from performing. The trial court's findings and conclusions on this point were supported by competent evidence.

L. Denial of Recourse

Ace next contends that the trial court erred in concluding that Ace was owed no recourse for terminating Eagle's servicing without cause. Again, we have addressed this argument in greater detail above. Succinctly: Ace breached the original contract and amended contract, and Eagle did not. Ace was therefore not entitled to recourse under the contract. The trial court's findings and conclusions on this point were supported by competent evidence.

M. Conversion and Unfair Trade Practices

Ace next contends that the trial court erred in dismissing its claims for conversion and unfair trade practices. Ace contends that Eagle's acquisition of servicing fees constituted conversion of funds to which Ace was entitled, and that this conduct was a breach of fiduciary duty.

However, with respect to conversion, "[t]o recover on a claim for conversion, plaintiff must prove both ownership in himself and the wrongful possession or conversion of the property by the defendant." *Gadson v. Toney*, 69 N.C. App. 244, 246, 316 S.E.2d 320, 321-22 (1984). Because Eagle was entitled to those servicing fees under the contract, Ace could not have proven its own legal ownership. A claim for conversion must necessarily fail. Because this claim was Ace's basis for its unfair trade practices claim, that claim must necessarily fail as well. The trial court did not err in dismissing these claims.

N. Award

Lastly, Ace contends that the trial court erred in determining that Eagle was entitled to attorney's fees, and that claims against plaintiffs' guarantees should be extinguished. This argument is premised entirely upon the notion that Eagle should not have been found to be the prevailing party. Because we have held that the trial court did not err in determining that Eagle was the prevailing party, we hold that the trial court did not err in awarding attorney's fees to Eagle, and extinguishing claims against plaintiffs' guarantees.

AFFIRMED.

Judges HUNTER and BERGER concur in the result only.

Report per Rule 30(e).