COURT OF APPEALS DECISION DATED AND FILED

October 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals of Wisconsin

NOTICE

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No. 99-0899

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

BANK ONE MILWAUKEE, N/A,
A NATIONAL BANKING ASSOCIATION,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

WILLIAMS BAY TRADING CO., LTD.,
A WISCONSIN CORPORATION,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

MICHAEL D. SCHUTTE,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment and orders of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Bank One Milwaukee appeals from the judgment awarding Williams Bay damages, taxable costs and interest on its claims for breach of contract and bad faith. Bank One argues that the trial court erred by: (1) finding that it breached its agreement with Williams Bay; (2) failing to apply the correct legal standard in determining that Bank One breached its duty of good faith; (3) finding that Bank One's conduct caused Williams Bay's damages; (4) awarding damages to Williams Bay for lost profits and loss of business value; (5) treating Williams Bay's debt to its president, Michael Schutte, as equity rather than debt when valuing the business's tangible assets; (6) failing to deduct the minimum investment required to continue Williams Bay's operations from its measure of the going concern value of the business; and (7) failing to consider the events that occurred between Williams Bay's valuation date and the date of the breach in calculating the damages.[1] We affirm on these issues.

¶2 Bank One also appeals, and Williams Bay cross-appeals from the trial court's order granting in part and denying in part Williams Bay's motion to amend the judgment to award Williams Bay 12% post-judgment interest on the damages, taxable costs and interest recovered. Following the trial court's order, Bank One filed a motion to reconsider which the trial court denied. Bank One also appeals from the trial court's order denying it motion for reconsideration. Bank One argues that the trial court erred in awarding post-judgment interest on the double costs awarded under WIS. STAT. § 807.91. Williams Bay argues that the trial court erred in refusing to award post-judgment interest under WIS. STAT.

[1] Bank One also argues that the trial court erred in refusing to dismiss Williams Bay's tort claims with prejudice. However, we need not address this issue as it is moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App. 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy. In other words, a moot question is one which circumstances have rendered purely academic.").

§ 815.05(8) on the prejudgment interest awarded under WIS. STAT. § 807.01. We affirm the trial court's decision to award 12% interest on the damages, but we reverse the trial court's award of 12% interest on the double costs under WIS. STAT. § 807.91.

I. BACKGROUND.

¶3 In 1993, Michael Schutte purchased the assets of the Plenge Trading Company and the Plenge Glove Company, and changed the names of the companies to Williams Bay Trading Company, Inc. Williams Bay imported flannel shirts and gloves and sold them to retail stores. Due to the nature of the clothing Williams Bay imported, its business was seasonal with sales and profits weighted almost exclusively in the second half of the year. The record indicates that Williams Bay typically sustained operating losses during the first and second quarter of the fiscal year while it was purchasing merchandise. However, in the third and fourth quarters, Williams Bay would sell the merchandise to customers realizing a profit from these sales.

¶4 Williams Bay asserts that it purchased all of its merchandise from foreign vendors that do not provide financing for small companies like Williams Bay. Williams Bay explained that the only way it could purchase merchandise from foreign vendors was to obtain letters of credit from a bank or other financial institution. Therefore, Williams Bay depended on bank financing to be able conduct its operations. Originally, Williams Bay obtained a line of credit from First Bank. However, in July 1994, Williams Bay entered into a financing agreement with Bank One.

¶5 On July 26, 1994, Bank One and Williams Bay entered into a written financing agreement. Under the terms of the agreement, Bank One extended a 5.5

million-dollar line of credit to Williams Bay for its business operations. According to the agreement, Williams Bay's ability to borrow funds was determined by a borrowing base formula. The available credit was determined by comparing Williams Bay's collateral to its loan balance. The agreement allowed Williams Bay to borrow 65% of the value of its inventory and 80% of its accounts receivable. In other words, as Bank One stated it, "[t]he more good collateral [Williams Bay] had, the more it could borrow." Finally, the agreement required Williams Bay to maintain minimum capital funds of $800,000 at all times. The agreement matured on March 31, 1996.

¶6 When the credit agreement was in operation, Williams Bay was required to report collateral levels, submit borrower's certificates and provide financial statements to Bank One on a monthly basis. During the time between monthly submission dates, Williams Bay was required by the agreement to monitor its collateral levels and to maintain compliance with the borrowing formula prescribed by the agreement. Bank One then reviewed the materials Williams Bay submitted in order to monitor Williams Bay's compliance with the borrowing formula. Pursuant to the terms of the agreement, Williams Bay calculated the value of its inventory by adding the cost of purchasing, shipping and storing the merchandise, as well as the duties owed on the merchandise. The parties dispute the effect of maintaining the borrowing base. If Williams Bay exceeded its borrowing base, Bank One asserts that, under the agreement, it was not obligated to fund Williams Bay's operations in excess of the borrowing base. However, Williams Bay contends that it complied with the agreement regarding its borrowing base and that the parties contemplated that it might experience difficulty maintaining the $800,000 minimum capital requirement. Williams Bay

argues that this temporary problem would not constitute a breach as long as Schutte provided additional collateral.

¶7 In 1993 and the first part of 1994, Williams Bay enjoyed a measure of success, realizing cumulative sales growth of over 110% and pretax profits of over $600,000. However, in the later months of 1994 and into 1995, Williams Bay began experiencing financial difficulties. In 1994, the parties became aware that Williams Bay would be short of the required minimum capital funds; however, Schutte assured Bank One that he would provide the necessary infusion of capital through cash or personal assets. In fact, Schutte provided Williams Bay with several temporary infusions of capital to cover shortfalls during the course of the parties' relationship.

¶8 Then in 1995, Williams Bay sustained significant losses. Williams Bay began experiencing problems with suppliers who were attempting to commit customs fraud by transshipping or mislabeling the country of origin on the merchandise to avoid customs quotas. Unwilling to violate customs laws, Williams Bay refused shipment of the merchandise, which represented a majority of its 1995 inventory. Williams Bay was unable to obtain replacement merchandise and sustained an after-tax loss of approximately $400,000 for the year, causing it to fall out of the borrowing base formula. The parties amended the credit agreement so that Williams Bay might cure the default by shortening the maturity date to October of 1995, and Schutte was required to sign over to Bank One additional loans he had made to Williams Bay to cover its 1995 losses. Williams Bay cured the default and returned to compliance with the borrowing base formula by September 1995.

¶9 In the fall of 1995, shortly before the original agreement was to reach maturity, Bank One and Williams Bay discussed extending the credit agreement for one year. Bank One relationship managers Ed Radi and Carl Rinaldi discussed the extension with Schutte and informed him that they would request the bank's loan committee to approve a one-year extension of the agreement with a new loan amount of 4 million dollars and increased interest rates. The committee approved Radi and Rinaldi's proposal subject to an audit of Williams Bay. Bank One officials performed the audit and, in November 1995, Radi forwarded to Schutte a new note extending the agreement for one year and reflecting the new loan amount and interest rates.[2] Schutte signed the new note on Williams Bay's behalf and returned it to Radi. Bank One approved the credit agreement extension and Williams Bay began placing orders with suppliers and taking orders from customers for its 1996 merchandise.

¶10 In March 1996, Bank One approached Williams Bay about a second amendment to the credit agreement. The proposed amendment would change several of the terms of the existing credit agreement, including raising the minimum capital fund requirement. Radi, Rinaldi and Schutte met in April to discuss the proposed amendment to the credit agreement. Schutte refused to agree to an increase in the minimum capital requirement without certain concessions

[2] The record indicates that this 1995 "field audit" raised several questions. The audit revealed that at all times during the operation of the agreement, Williams Bay had been including merchandise subject to unpaid duties in its borrowing base. The merchandise had been stored in "bonded warehouses," which meant that once Williams Bay received the merchandise and stored it in the warehouse, the duties were not due until the merchandise was removed. Although Bank One now argues that this practice violated the agreement, in January 1996, when Radi and Rinaldi discussed the results of the audit with Schutte, they agreed to drop the issue because Schutte was in the process of phasing out use of the bonded warehouses. However, the trial court found that the 1995 field audit resulted in three additional recommendations: (1) creation of a reserve fund to pay off the unpaid duties; (2) creation of a collateral account or "lock box"; and (3) reduction of "stale" merchandise.

from Bank One. Specifically, Schutte requested that Bank One extend the term of their agreement into 1997 and allow him to temporarily exceed the borrowing base formula without covering the shortfall.

¶11 Schutte also informed Bank One that Williams Bay needed letters of credit in the amount of 1.3 million dollars for new merchandise, even though these letters of credit would place Williams Bay outside of its borrowing base. Radi and Rinaldi informed Schutte that to obtain the letters of credit, he would have to provide additional collateral. Schutte refused, reiterating his request to temporarily operate Williams Bay outside the borrowing base in exchange for his consent to the amendment raising the minimum capital funds. Radi and Rinaldi informed Schutte that the only individual with the authority to approve Schutte's request to operate Williams Bay outside of the borrowing base formula was Jack Bastian from Bank One's "special assets" loan division. Following this meeting, Bank One transferred Williams Bay's account to Bastian and the special assets division.

¶12 On April 30, 1996, Bastian, Radi and Rinaldi met with Schutte, who repeated his request for the letters of credit without being required to cover any collateral shortfalls. Bastian informed Schutte that Bank One would only issue the letters of credit if Williams Bay covered any collateral shortfall. Schutte would not agree to this condition, and Bastian informed him that he should decide how he would like to proceed in liquidating Williams Bay.

¶13 Shortly thereafter, Schutte informed Radi that he was willing to provide the necessary collateral to receive the letters of credit, as long as Bank One agreed that if the letters of credit were not used, or if Williams Bay remained within its borrowing base, Bank One would not use the additional collateral to

cover Williams Bay's existing debt. Radi and Bastian met with Schutte to discuss his request. Bastian requested additional information from Schutte, including liquidation and turnaround budgets, Schutte's personal financial statement and tax returns, and Williams Bay's accounts receivable, accounts payable and inventory as of the end of April 1996. Schutte and Bastian also discussed Schutte's ability to provide the necessary collateral infusion to obtain the letters of credit. However, nothing was resolved at the meeting and, several days later, Schutte's lawyers contacted Bastian to inquire why Bank One would not accept Schutte's proposal. Bastian informed them that Schutte would have to pledge the bulk of his entire net worth to convince the bank to issue the letters of credit. Bastian also informed Schutte that Bank One would no longer allow Williams Bay to convert line of credit debt to "Banker's Acceptances." Schutte asked Bastian if this meant that his accounts were frozen, and Bastian replied, "I guess you could say that."

¶14 In June 1996, Bastian informed Schutte that Bank One would not extend any additional letters of credit, regardless of Williams Bay's and Schutte's available collateral. Then in July, Bank One refused to issue new credit to Williams Bay, and froze its accounts. Finally, Bank One called the loan it had issued to Williams Bay and commenced the instant action to seize Williams Bay's assets.

¶15 Following a bench trial, the trial court issued its findings of fact and conclusions of law indicating in pertinent part:

> [Williams Bay] and Bank One entered into a contract in November of 1995 which involved an extension of the Credit Agreement for a period of one year. Bank One's conduct in refusing to issue new credit, refusing conversion of line of credit debt to Banker's Acceptances, calling [Williams Bay's] loan and commencing a replevin action against Williams Bay breached the Credit Agreement.

> [Williams Bay] was damaged by Bank One's breach of contract.

The court also concluded that Bank One's conduct in (1) in refusing to issue new credit, (2) limiting Williams Bay's ability to manage its debt, (3) calling Williams Bay's loan and commencing a replevin action, (4) failing to provide accurate and thorough information to the special assets loan committee and to each other regarding Williams Bay's account, and (5) failing to explore or exercise options other than refusing new credit to Williams Bay, violated Bank One's duty to act in good faith. Finally, the court concluded that Bank One's conduct caused Williams Bay to liquidate its assets.

¶16 Pursuant to its findings of fact and conclusions of law, the trial court ordered Bank One to pay Williams Bay $1,714,834.00 in damages for its breach of contract and bad faith. Bank One was also ordered to pay Williams Bay 12% interest on the damages award from November 13, 1997, until the judgment was paid, as well as double taxable costs pursuant to WIS. STAT. § 814.04.[3] Further, the trial court dismissed without prejudice Williams Bay's tort and equitable estoppel claims, as well as Schutte's counterclaim for breach of fiduciary duty and breach of good faith. Finally, the trial court dismissed Bank One's claim for attorneys fees.

[3] In its findings of fact and conclusions of law, the trial court found that Williams Bay extended an offer of settlement to Bank One in the amount of 1.55 million dollars, but that Bank One rejected the offer. As noted, the trial court awarded damages to Williams Bay in the amount of $1,714,834.00. Because the damages awarded to Williams Bay exceeded its offer of settlement, which Bank One rejected, we conclude that Williams Bay's recovery of double tax costs is governed by WIS. STAT. § 807.01(3). However, the trial court awarded double taxable costs under WIS. STAT. § 814.04. The trial court was mistaken, and, on remand, we direct the clerk to amend the judgment to reflect the correct statute.

¶17 Bank One filed a motion for relief pending appeal and Williams Bay and Schutte filed a motion to amend the judgment. Granting in part and denying in part Williams Bay's and Schutte's motion to amend the judgment, the trial court ordered Bank One to pay all of the damages, and taxable costs awarded in the original judgment, as well as 12% post-judgment interest on the damages and taxable costs from the date the judgment was entered until the amount would be paid. However, the trial court determined that Williams Bay was not entitled to recover post-judgment interest on the pre-judgment interest that had accrued on the original damages award. The trial court also granted Bank One's motion for relief pending appeal. The trial court granted a stay of execution because Bank One provided proof that it had posted a bond in an amount sufficient to cover the judgment, costs and any interest that had accrued or would accrue on the judgment through the appeal period.

II. ANALYSIS.

¶18 On appeal, Bank One argues that the trial court erred by: (1) finding that it breached its agreement with Williams Bay; (2) failing to apply the correct legal standard in determining that Bank One breached its duty of good faith; (3) finding that Bank One's conduct caused Williams Bay's damages; (4) awarding damages to Williams Bay for lost profits and business value; (5) treating Williams Bay's debt to Schutte as equity rather than debt when valuing the business's tangible assets; (6) failing to deduct the minimum investment required to continue Williams Bay's operations from its measure of the going concern value of the business; (7) failing to consider the events that occurred between Williams Bay's valuation date and the date of the breach; and (8) awarding post-judgment interest on the double costs awarded under WIS. STAT. § 807.01. Additionally, Williams Bay cross-appeals from the trial court's

order denying, in part, its motion to amend the judgment, arguing that post-judgment interest under WIS. STAT. § 815.05(8) may be awarded on the pre-judgment interest awarded under WIS. STAT. § 807.01.

A. The trial court's finding that Bank One breached the agreement was not clearly erroneous.

¶19 Bank One argues that the trial court erred for two reasons in finding that it breached the agreement by refusing to issue new credit, refusing to convert Williams Bay's line of credit debt to Banker's Acceptances, and calling the loan and commencing a replevin action. First, Bank One contends that it could not have breached the agreement because Williams Bay was already in default for failing to maintain sufficient collateral under the borrowing base formula. Second, Bank One asserts that when Williams Bay informed the bank that it would be in default under the borrowing base formula, Williams Bay anticipatorily breached the agreement excusing Bank One's subsequent breach. For these reasons, Bank One concludes that it did not breach the agreement by calling the loan and demanding payment in full from Williams Bay.

¶20 While the interpretation of a contract is a question of law subject to *de novo* review, *see* ***Edwards v. Petrone***, 160 Wis. 2d 255, 258, 465 N.W.2d 847 (Ct. App. 1990), the issue of whether either party breached the contract is a factual determination, *see* ***Koenigs v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 358, 377 N.W.2d 593 (1985). This court will only overturn findings of fact if they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Finally, "an appellate court need not defer to the trial court's determination on a question of law, although it should be given weight where the legal and factual determinations are intertwined, as they are here." ***Koenigs***, 126 Wis. 2d at 358.

1. *Default*

¶21 Bank One argues that the trial court erred in finding that it breached the agreement because, prior to any breach, Williams Bay defaulted on the agreement by failing to maintain sufficient collateral under the borrowing base formula. Bank One asserts that, contrary to the agreement, Williams Bay included merchandise in its borrowing base that was encumbered by unpaid duties. Bank One contends that, pursuant to the agreement, all merchandise encumbered by unpaid duties should have been excluded from Williams Bay's borrowing base, and once that merchandise was excluded, Williams Bay lacked sufficient collateral under the borrowing base formula to support the amount borrowed. Bank One reasons that because Williams Bay wrongfully included merchandise encumbered by unpaid duties in its borrowing base, and because Williams Bay lacked sufficient collateral to support the amount it had borrowed once the encumbered merchandise was removed from the formula, Williams Bay defaulted on the agreement. Therefore, Bank One concludes that because Williams Bay defaulted, it was justified in refusing to issue new credit, calling the loan and commencing a replevin action against Williams Bay. We disagree.

¶22 Bank One correctly notes that § 1.22 of the agreement defines "qualified inventory" in pertinent part as "finished goods ... which [are] owned by the Company free and clear of all encumbrances and security interests." Bank One is also correct in asserting that Williams Bay included merchandise subject to unpaid duties in its calculation of the qualified inventory under the borrowing base formula. However, the trial court concluded, and this court agrees, that "[t]he inclusion of unpaid duties by Williams Bay in its borrowing base as a part of the cost of the inventory was not a violation of the provisions of the credit agreement at any time relevant to this case."

¶23 The credit agreement is not clear regarding the treatment of unpaid duties in the calculation of "qualified inventory." Bank One argues that unpaid duties unquestionably constitute an encumbrance and, therefore, under the agreement, must be excluded from the calculation. Williams Bay disagrees, suggesting that, at best, the agreement is ambiguous and any ambiguity should be construed against Bank One as the drafter. The trial court did not address this issue, but rather, concluded:

> The unpaid duties were consistently listed in documents provided to the bank by Williams Bay as unpaid obligations of the company. The company was consistent in its treatment of the unpaid duties from the time the relationship began and while the provision of the credit may have made it possible for the bank to insist that the amount of the unpaid duties be removed from the value of the inventory, no such demand was ever made and in January of 1996 when this issue was specifically raised by the field audit Mr. Radi and Mr. Rinaldi made a conscious decision to ignore the issue because they felt it was moot in view of Mr. Schutte's decision to phase out the bonded warehouse.

Therefore, the trial court found that Williams Bay did not violate the agreement by including merchandise subject to unpaid duties in its borrowing base. Implicit in the trial court's finding is the conclusion that Williams Bay did not default on the agreement. We are satisfied that the trial court's finding is not clearly erroneous. Thus, the record supports the trial court's conclusion.

¶24 The record clearly indicates that from the inception of the parties' relationship under the credit agreement, Williams Bay included merchandise subject to unpaid duties in its calculation of qualified inventory. The record also indicates that Bank One became aware of this practice during a field audit of Williams Bay in November 1995. However, Bank One determined that the issue

would be rendered moot as Williams Bay phased out the use of bonded warehouses. Bank One never directed Williams Bay to exclude the merchandise at issue, nor did it inform Williams Bay that it would be in default if it continued to include the merchandise. Moreover, even if we assume Williams Bay had defaulted, Bank One never provided Williams Bay with written notice of the default as required by § 7.1(d) of the agreement.[4] For these reasons, we are satisfied that the trial court's findings are not clearly erroneous.

2. *Anticipatory breach.*

¶25 Bank One argues that the trial court erred in finding that it breached the agreement because, prior to any alleged breach, Williams Bay repudiated its obligations under the agreement and, therefore, anticipatorily breached. Bank One asserts that Williams Bay anticipatorily breached the agreement when Schutte submitted Williams Bay's business plan, providing that Williams Bay would either borrow in excess of its borrowing base or fail. Bank One contends that the plan effectively repudiated Williams Bay's obligations under the agreement in advance of the time for performance and, therefore, Bank One concludes that Williams Bay anticipatorily breached the agreement entitling it to call the loan. We disagree.

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[4] Section 7.1(d) of the agreement provides:

> 7. Default; remedies;
>
> 7.1 Events of Default. The occurrence of any one or more of the following shall constitute an Event of Default:
>
> ….
>
> (d) *Default in Other Provisions*. The company defaults in the performance or observance of any other agreement herein contained and such default shall continue for a period of 10 days after the mailing of written notice to the Company from the holders of any Note.

¶26 "Most jurisdictions hold that in order to constitute an anticipatory breach of contract (repudiation), there must be a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives." ***Wisconsin Dairy Fresh, Inc. v. Steel & Tube Products Co.***, 20 Wis. 2d 415, 427, 122 N.W.2d 361 (1963). "Doubtful and indefinite statements that performance may or may not take place and statements that, under certain circumstances that in fact do not yet exist, the performance will not take place, are not held to create an immediate right of action." ***Id.*** Expressions of doubt regarding the ability to perform under a contract, and requests for delays or cancellation, also do not constitute repudiations. *See* ***id.*** at 427-28. Finally, contract law in Wisconsin has long required that to constitute an anticipatory breach, the non-breaching party must, in fact, treat the breaching party's conduct as a breach, because if the non-breaching party continues to demand performance, the contract is kept alive for the benefit of both parties. *See, e.g.,* ***Woodman v. Blue Grass Land Co.***, 125 Wis. 489, 495, 103 N.W. 236 (1905).

¶27 Bank One failed to provide definite and unequivocal evidence that Williams Bay repudiated its obligations under the agreement. Bank One contends that the record clearly reflects that: (1) it asked Schutte to provide the necessary capital for Williams Bay, but Schutte refused; (2) even though Schutte considered collateralizing the default, he required unacceptable conditions; (3) despite the difficulties it was having with Schutte, Bank One gave him the opportunity to devise a business plan demonstrating how the proposed infusion of capital would return Williams Bay to compliance with the borrowing base formula; but that (4) Schutte's plan merely demonstrated that there would continue to be material

defaults for an extended period. The record, however, contradicts Bank One's assertion that Schutte and Williams Bay anticipatorily breached the agreement.

¶28 The record indicates that Schutte made several attempts to comply with Bank One's demands in an effort to save Williams Bay. The trial court found that, although Schutte initially opposed the creation of a cash collateral account, he ultimately agreed to the proposal. Schutte agreed to begin liquidating "stale merchandise," as well as reducing the amount of merchandise to $250,000 by the end of 1996.[5] The trial court also found that when Schutte first requested additional letters of credit, with the understanding that the additional amount would remove Williams Bay from the borrowing base formula, Bank One officers Radi and Rinaldi informed him that he would have to provide the collateral necessary to cover the shortfall. The trial court found that Schutte originally refused; however, he eventually indicated that he was willing to provide the necessary collateral as long as the additional collateral would not be used for existing debt, if the letters of credit went unused, or if Williams Bay remained within the borrowing base. The trial court found that Schutte promised a second time to provide the necessary collateral under the stated conditions, before Bank One responded by asking Schutte to devise a business plan. We are satisfied that these findings are not clearly erroneous and we conclude that these findings do not illustrate a definite or unequivocal manifestation of Schutte's intention to repudiate his obligations under the agreement.

[5] Significantly, the creation of a cash collateral account and the liquidating of stale merchandise were two of the three recommendations raised by Bank One as a result of the 1995 field audit. *See* supra n. 2.

B. The trial court properly determined that Bank One breached its duty of good faith.

¶29 Bank One argues that the trial court erred in finding that it breached the duty of good faith because the trial court failed to articulate the legal standard it was applying and, under the proper standard, it did not breach the duty of good faith. Bank One asserts that it did not breach its duty of good faith under the agreement with Williams Bay because the agreement explicitly permitted its actions; the record is devoid of evidence that it intended to take unfair advantage of Williams Bay or that it intended to engage in conduct prohibited by the agreement; Williams Bay could have prevented the harm; and the trial court's concerns regarding Bank One's conduct are not supported by the record.

¶30 A covenant of good faith conduct is implied in all contracts "as a guarantee against 'arbitrary or unreasonable conduct' by a party." ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995) (quoting WIS JI—CIVIL 3044). The RESTATEMENT (SECOND) OF CONTRACTS § 205 provides that even though an actor believes that his or her conduct is justified, he or she will violate the obligation of good faith in performance if he or she engages in subterfuges and evasions. *See* ***id.*** at cmt. a (quoted in ***Foseid***, 197 Wis. 2d at 796). Also, "a party may be liable for breach of the implied contractual covenant of good faith even though all the terms of the written agreement may have been fulfilled." ***Foseid***, 197 Wis. 2d at 796 (construing ***Estate of Chayka***, 47 Wis. 2d 102, 176 N.W.2d 561 (1970)). Either overt action or simple inaction can constitute bad faith. *See* ***id.*** Judicial decisions have recognized various types of bad faith including, but not limited to: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a

power to specify terms, and interference with or failure to cooperate in the other party's performance." ***Id.***

¶31 Williams Bay accurately summarizes the trial court's findings on the issue of bad faith as follows. The trial court found that Bank One's officers:

> 1. Refused to issue new credit, froze [Williams Bay's] loan accounts, called [Williams Bay's] loan and commenced a replevin action against [Williams Bay] despite their knowledge that [Williams Bay] had relied upon their communications with respect to a one year extension of the Credit Agreement and despite their awareness that this would cause [Williams Bay] to liquidate;
>
> 2. Were careless in their communications when the account was transferred to special assets about the status of the [Williams Bay] account and their communications with [Williams Bay] that the bank would not pursue the issue of the unpaid duties;
>
> 3. Were careless in communicating information about [Williams Bay's] account and Mr. Schutte's offer of additional collateral to the special assets loan committee, which contributed to the loan committee's decision to call the loan;
>
> 4. Failed to consider or exercise other options besides refusing to issue new credit, freezing [Williams Bay's] accounts and calling the loan;
>
> 5. Took unfair advantage of [Williams Bay] through attempting to use the demand feature in the note to call the loan, despite the prior understanding regarding the extension of the Credit Agreement and with knowledge that this would cause [Williams Bay] to liquidate.

From these findings, the trial court concluded that Bank One violated its duty to Williams Bay to act in good faith. Notably, Bank One does not challenge these findings, but rather, argues that they do not demonstrate a violation of the duty of good faith. We disagree.

¶32 We are satisfied that the trial court's findings are supported by the record and, as such, are not clearly erroneous. *See* WIS. STAT. § 805.17(2). We conclude that under the expansive definition of bad faith found in ***Foseid***, Bank One's actions, at best, constitute "evasion of the spirit of the bargain, lack of diligence and slacking off," *see* 197 Wis. 2d at 796, and at worst, amount to "willful rendering of imperfect performance [or] interference with or failure to cooperate in the other parties performance," *see* ***id.*** Nor are we persuaded by Bank One's arguments that it can not be held liable for violating the duty of good faith for performing acts authorized by the agreement. ***Foseid*** and the RESTATEMENT (SECOND) clearly provide that a party may still violate the duty of good faith, even though that party has fulfilled the contract's written requirements and the party believes its actions are justified. Therefore, we reject Bank One's arguments that the trial court erred in concluding that it violated its duty of good faith.

C. The trial court properly found that Bank One's conduct caused Williams Bay's damages.

¶33 Bank One argues that the trial court erred in finding that its conduct caused Williams Bay's damages because the evidence demonstrates that any damages sustained by Williams Bay were the result of supply problems, Schutte's mistakes in operating the business, and his decision not to provide adequate collateral to continue Williams Bay's operations. Bank One asserts that Williams Bay and Schutte should have taken steps to avoid the harm. Bank One also maintains that Schutte drained Williams Bay of much needed cash at critical times, and then chose to liquidate rather than to continue operating the business. Therefore, Bank One concludes that the trial court erred in finding that it caused

Williams Bays damages, because any damages incurred by Williams Bay were caused by Schutte's conduct. We are not persuaded by Bank One's arguments.

¶34 The evidence in the record clearly supports the trial court's finding that Bank One caused Williams Bay's damages. Williams Bay's expert testified that Williams Bay was 100% reliant on bank financing to sustain its operations. Bank One's expert testified that a company like Williams Bay could only obtain merchandise through a bank providing letters of credit. Bank One's employees knew of Williams Bay's reliance on the line of credit and, in fact, Schutte informed Bank One that without the letters of credit, Williams Bay would be unable to maintain operations. Nevertheless, Bank One refused to issue the additional letters of credit Williams Bay needed to obtain inventory to meet its 1996 orders. Then Bank One froze Williams Bay's accounts, prohibiting it from converting its line of credit debt to Banker's Acceptances, called the loan and commenced a replevin action to seize Williams Bay's assets, rendering it all but impossible for Williams Bay to conduct business.

¶35 Further, at the June 1996 meeting, Bastian informed Schutte that Bank One intended to liquidate Williams Bay through either a forced or a voluntary liquidation. Bank One cannot now claim that it did not cause this result. Moreover, Bank One's arguments—that the trial court erred because Schutte either failed to mitigate/avoid the damages or caused them himself—at best merely affect the calculation of damages. Thus, we are not persuaded that the trial court's finding that Bank One caused Williams Bay's damages was clearly erroneous.

D. The trial court properly awarded lost profits and business value damages to Williams Bay

¶36 Bank One argues that the trial court erred in awarding lost profits and loss of business value damages to Williams Bay because the damages constitute consequential damages, which were precluded under the agreement. Bank One cites § 8.16, "Limitation on Damages," of the agreement, which states: "The Company, the Guarantor and the Bank hereby waive any right either [sic] of them have to claim or recover from the other party any special, exemplary, punitive or consequential damages or any damages of any nature other than actual, compensatory damages." Pursuant to this section of the agreement, Bank One maintains that the parties waived any right to special or consequential damages, and any other damages that are not actual and compensatory. Although the trial court found that Williams Bay's claimed damages were allowable, notwithstanding the waiver of consequential damages, because they were compensatory, Bank One argues that the trial court neglected to specify which compensatory damages were allowable direct damages, and which were prohibited consequential damages. Bank One asserts that there is no evidence of direct compensatory damages.

¶37 We are satisfied that the record supports the trial court's ruling that the damages it awarded were recoverable compensatory damages, and not consequential damages precluded by the agreement. In its decision and order on damages, the trial court noted that its earlier ruling on Bank One's motion for summary judgment indicated that the credit agreement precluded recovery of consequential damages. The trial court then asserted that the issue of the recoverable damages was revisited in Bank One's motion in limine seeking to prohibit Williams Bay from introducing evidence of lost profits and loss of

business value. The trial court denied Bank One's motion and, in the order on damages, indicated that the two prior rulings put the parties on notice that only compensatory damages could be recovered. The trial court ultimately arrived at a damages award by calculating Williams Bay's ongoing business value and its net tangible asset value, adding the two amounts together, and subtracting from the total the amount Schutte received in the bankruptcy action. Bank One fails to persuade this court that the trial court erred.

¶38 It has long been held that in a breach of contract action, the non-breaching party is entitled to the damages that arise naturally from the breach and are within the parties' contemplation. *See* ***Buxbaum v. G.H.P. Cigar Co.***, 188 Wis. 389, 206 N.W.2d 59 (1925). Here, the trial court's ruling is inextricably linked to its finding that Bank One knowingly caused Williams Bay to liquidate. As discussed, Williams Bay's operations were completely dependent upon bank financing, a fact Bank One knew. Bank One not only refused to issue the additional letters of credit Williams Bay needed to purchase necessary merchandise, but it also prevented Williams Bay from using its existing line of credit. Given this set of facts, we conclude that the trial court properly determined that Williams Bay's claimed damages were recoverable compensatory damages because the damages flowed naturally from the breach and were within the parties' contemplation.[6]

[6] We also note that Bank One asserts that Williams Bay "neither asked for more time to obtain replacement financing nor made serious efforts to obtain replacement financing." From this assertion, Bank One argues that "[t]he damages awarded are based entirely on lost profits and loss of business and other damages flowing from the failure to obtain replacement financing. These are consequential damages not recoverable in this case." However, we have already concluded that the trial court correctly found that Bank One's conduct directly caused Williams Bay's damages. Therefore, we conclude that the damages awarded flowed from Bank One's breach, and not from Williams Bay's failure to obtain replacement financing, as Bank One contends, and we reject Bank One's argument.

E. The trial court properly excluded the debt Williams Bay owed to Schutte from the calculation of damages.

¶39 Bank One argues that the trial court erred in treating the 1.5 million dollar loan Schutte made to Williams Bay as equity instead of debt when measuring damages. Bank One asserts that it is undisputed that the 1.5 million dollars Williams Bay owed to Schutte had always been treated as debt in "[e]very financial record ... including books; financial statements; corporate tax returns; and Schutte's tax return." The loan was also treated as a debt in the bankruptcy proceedings. Therefore, Bank One concludes that Williams Bay cannot now change its mind, that the trial court is precluded from treating the amount as equity by the doctrines of issue preclusion and estoppel, and that the damages award must be reduced by 1.5 million dollars. However, Williams Bay correctly argues that it never denied that the loan was a debt, but rather, the issue at trial was how the loan should be treated for purposes of valuing the company in order to calculate damages. Therefore, Williams Bay concludes that it did not assert an inconsistent position and it submits that the trial court properly excluded the debt owed to Schutte from the calculation of damages. The record supports Williams Bay's argument.

¶40 In its decision and order on damages, the trial court stated that "[t]here appears to be no dispute that the value of Williams Bay consists of two general factors. First, the value of its 'net tangible assets' and second, its 'ongoing business' value." The trial court indicated that Bank One argued that the value of Williams Bay's net tangible assets was zero because the 1.5 million-dollar debt it owed to Schutte exceeded the value of its assets. The trial court asserted that "[p]erhaps this argument has some validity in a theoretical sense, however, the fact is if Mr. Schutte decided to sell [Williams Bay], he is not going to include the debt

as part of the purchase." The trial court reasoned further that if Schutte forgave the debt, Williams Bay had a net tangible asset value of 1.288 million dollars, as calculated by its valuation expert Dan Gotter. The trial court rejected Bank One's argument and concluded that the debt Williams Bay owed to Schutte did not reduce the value of Williams Bay's net tangible assets and, therefore, it accepted Mr. Gotter's valuation of $1,288,000.

¶41 The trial court's position is supported by a portion of the trial testimony of Bank One's valuation expert, Robert Vrakas:

> [Mr. Fishbach]: Now, during the trial the hypothetical was rendered by the court. And the hypothetical was as follows: That let's suppose two individuals buy an apartment building. A lends $100,000 to the partnership entity that buys the apartment building. Does that $100,000 loan affect the value of the apartment building?
>
> [Mr. Vrakas]: No.
>
> [Mr. Fishbach]: Why is that?
>
> [Mr. Vrakas]: Because the apartment building is worth whatever it's worth. It's just an asset of the entity.

In other words, if a third party were to purchase the apartment building, it would pay the value of the building to the seller, who would in turn pay off the mortgage from the sale proceeds. Mr. Gotter also testified that the amount of a shareholder loan, like the loan Schutte made to Williams Bay, is generally removed from the liabilities when calculating the value of a company's stock. Gotter testified that Schutte owned something of value, either because the loan would be repaid from the sale proceeds or, as the sole shareholder, the stock had value and the proceeds would be paid for the stock. Therefore, Gotter concluded that the amount of the loan should not be considered in calculating the value of the company.

¶42 For these reasons, the trial court rejected Bank One's argument that the value of Williams Bay must be first reduced by the amount of the loan owed to Schutte. We agree with the trial court and, therefore, reject Bank One's argument that the damage award must be reduced by the amount of the loan Williams Bay owed to Schutte.

F. <u>The trial court did not err by failing to deduct the minimum investment required for Williams Bay to continue operations from the going concern value of the business</u>

¶43 Bank One argues that the trial court erred in awarding damages to Williams Bay in the amount of $642,907, for lost going concern value of the business, because the amount "disregards undisputed evidence that [Williams Bay] could not have continued without an immediate infusion of capitol." Bank One asserts that Williams Bay lacked the capital necessary to purchase merchandise for the 1996 season, and that an immediate infusion of capital was necessary to obtain the letters of credit required for the business to continue. Bank One also maintains that Williams Bay remained responsible for unpaid duties on merchandise in its possession. Bank One contends that the trial court determined Williams Bay's ongoing business value without regard to the infusion of capital necessary to continue to operate the business. Bank One argues that the trial court mistakenly assumed that it was valuing a viable operating business and that it should have reduced its valuation by the capital investment necessary to continue to operate Williams Bay. Therefore, Bank One concludes that the trial court erred because its valuation put Williams Bay in a better position than it would have been in had the parties' relationship under the agreement continued.

¶44 The trial court's decision and order on damages reflects a well-reasoned and thorough analysis regarding the issue of Williams Bay's ongoing

business value. After considering the expert testimony of both Vrakas, Bank One's valuation expert, and Gotter, Williams Bay's valuation expert, the trial court accepted Gotter's method of determining Williams Bay's ongoing business value. The trial court stated, "In reaching a decision as to [Williams Bay's] 'ongoing business' value, the court utilized the method of Mr. Gotter but used the actual numbers for 1993 and 1994 for the four financial performance indicators. For certain indicators the Court made certain modifications...." After discussing the four financial indicators used by Gotter—net sales, average gross profit, average income before taxes, and average income before taxes after adjustments—the court asserted: "This court is satisfied that a fair valuation is obtained by averaging the four separate values obtained by the Gotter method as modified by the Court and set the value of the 'ongoing business' of Williams Bay." Bank One fails to establish that the trial court's conclusion is erroneous.

¶45 We reject Bank One's argument that the trial court's method of calculating the ongoing business value puts Williams Bay in a better position than it would have enjoyed had the parties' relationship continued. In the face of the trial court's analysis, Bank One asserts that the trial court erred because "[n]o buyer would pay [Williams Bay] for a business without factoring in the buyer's need to immediately infuse cash." Bank One also asserts that "[Williams Bay's] own expert testified that a buyer would be concerned about the need to add capital. Moreover, logically, an investment producing income at no further cost to the owner is worth more than an investment producing the same income only if the owner invests $500,000." However, Bank One's conclusory allegations are not persuasive enough to convince this court to overturn the trial court's decision. In its decision, the trial court asserted:

> It is impossible for the Court to theorize how [Williams Bay] would have turned out had the Bank not breached its contract with [Williams Bay]. It is not impossible to infer what would have occurred if Mr. Schutte had attempted to sell [Williams Bay] in December of 1995. The buyer would have pointed to the low profits relative to sales in an attempt to minimize the price and the seller would have pointed to increased sales and potential for increased profits in an attempt to get a higher price, and ultimate[ly] the market place would have brought them somewhere in the middle.

We agree. Furthermore, we conclude that, while there may exist certain considerations that might affect the price a potential buyer is willing to pay for the company, here these considerations do not affect the value of the company itself. Therefore, we conclude that the trial court did not err in calculating Williams Bay's ongoing business value.[7]

G. The trial court properly selected the valuation date in order to assess the damages.

¶46 Bank One argues that the trial court erred in assessing the damages because it selected a valuation date six months prior to the breach and failed to take into account the events occurring between the date of valuation and the date of breach. Bank One asserts that it is undisputed that the alleged breach occurred in June 1996, but that the trial court valued the business as of December 31, 1995. Bank One contends that between the date of the alleged breach and the valuation of Williams Bay, the company lost $490,000, and at least $223,000 was paid to Schutte. Bank One alleges that "[t]he use of December 31, 1995 as a valuation

[7] We also note that Bank One again raises the issue of the unpaid duties, this time as support for its assertion that the trial court erred by failing to reduce Williams Bay's ongoing business value. Bank One raises this argument for the first time on appeal and, therefore, we need not consider it here. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (appellate court will generally not review issue raised for the first time on appeal).

date effectively credits [Williams Bay] with tangible assets that did not exist at the time of the breach of contract and charges [Bank One] with decreases in the value of [Williams Bay] resulting from cash being paid to the Schuttes." Therefore, Bank One concludes that the trial court erred by measuring the damages without adjusting for the events that occurred between the valuation date and the alleged breach.

¶47 The record clearly supports the trial court's decision to value the business as of December 31, 1995. The trial court once again based its determination on the testimony of both Vrakas and Gotter. The trial court indicated that "Mr. Vrakas and Mr. Gotter both testified that when doing a valuation of a cyclical business such as [Williams Bay], it is critical to include the entire business cycle." Vrakas determined that the business should be valued as of June 1996; however, the court rejected his valuation because he had not considered the full business cycle. The court concluded that Gotter's valuation, "based upon data available December 31, 1995, does take a full business cycle into account and therefore, it is the more valid assessment of [Williams Bay's] asset valuation for the purposes of the Court's decision." Moreover, although Bank One correctly indicates that the trial court determined that it breached the agreement in June 1996, the trial court also determined that it breached its duty of good faith in March, April and May 1996. Therefore, we are satisfied that, given the difficulty the trial court would have had in pinpointing an exact valuation date relative to the breach, and the requirement that any valuation include an entire business cycle, the trial court properly valued the business as of December 31, 1995.

H. <u>The trial court properly awarded post-judgment interest on the double costs pursuant to WIS. STAT. § 807.01, and properly denied post-judgment interest on the pre-judgment interest.</u>

¶48 Finally, Bank One appeals and Williams Bay cross-appeals on the issue of post-judgment interest. Following the trial court's judgment, Williams Bay moved to amend the judgment to include 12% interest on the damages recovered, the double taxable costs, and the interest that accrued between the date of the statutory settlement offer and the date the judgment was entered. The trial court ordered Bank One to pay 12% post-judgment interest to Williams Bay on the double costs, but found that Williams Bay was not entitled to post-judgment interest on the pre-judgment interest that had accrued. Bank One argues that the trial court erred in awarding post-judgment interest on the double costs pursuant to WIS. STAT. § 807.01. Williams Bay disagrees, arguing that the trial court properly granted post-judgment interest on the double costs; however, Williams Bay argues that that the trial court erred in refusing to grant post-judgment interest on the prejudgment interest that had accrued.[8]

[8] In its original order dated January 15, 1999, the trial court awarded $1,714,834.00 in damages to Williams Bay. The trial court also ordered Bank One to pay interest at the rate of 12% per year on the damages award from November 13, 1997, until the judgment is paid, and double taxable costs under WIS. STAT. § 814.04. Then, in its order granting in part and denying in part Williams Bay's motion to amend the judgment, the trial court awarded Williams Bay 12% interest on the damages award from the date of the settlement offer (November 13, 1997), until the judgment is paid. Neither party challenges this aspect of the trial court's order on appeal. However, the trial court also determined that Williams Bay was entitled to recover 12% post-judgment interest on the taxable costs from the date the judgment was entered (January 27, 1999), until the costs are paid. Bank One challenges this aspect of the trial court's order on appeal. Finally, the trial court determined that Williams Bay was not entitled to recover post-judgment interest on the pre-judgment interest that accrued on the damages award. Williams Bay cross-appeals from this aspect of the trial court's order.

1. *12% interest on the taxable costs.*

¶49 As noted above, the trial court found that Williams Bay submitted an offer of settlement pursuant to WIS. STAT. § 807.01 to Bank One, on November 13, 1997, in the amount of 1.55 million dollars. Bank One rejected the offer of settlement. The record reflects that, following a trial to the court, the court awarded Williams Bay $1,714,834.00 in damages. Therefore, because the damages awarded exceeded the original offer of settlement, under § 807.01(4), Williams Bay was entitled to recover 12% annually on the amount recovered from the date of the offer of settlement until the amount is paid. The trial court awarded Williams Bay 12% interest on the damages award, as well as double taxable costs. The trial court subsequently granted Williams Bay's motion to amend the judgment, awarding 12% interest on the double taxable costs, as well as the damages award. Bank One now argues that the trial court erred in awarding the 12% interest on the double taxable costs. We agree.

¶50 Our decision on this issue is governed by ***American Motorists Ins. Co. v. R&S Meats, Inc.***, 190 Wis. 2d 196, 526 N.W.2d 791 (Ct. App. 1994). In that case, this court determined whether "interest awarded under [WIS. STAT. § 807.01(4)] is allowed on double costs." ***Id.*** at 213. After construing the statutory language, this court concluded that although a party is entitled to 12% interest on a damages award under the statute, "the interest does not run on the double costs portion of the judgment." ***Id.*** at 214-15. Therefore, we conclude that, under ***American Motorists***, the trial court erred by granting in part Williams Bay's motion to amend the judgment and awarding 12% interest on the double taxable costs.

2. *12% post-judgment interest awarded on the pre-judgment interest.*

¶51 Williams Bay argues that the trial court erred in concluding that it was not entitled to recover post-judgment interest on the pre-judgment interest that accrued on the damages award. Williams Bay asserts that, under WIS. STAT. § 814.10(1), it is entitled to post-judgment interest on the interest awarded pursuant to WIS. STAT. § 807.01. However, Williams Bay provides no authority to support its proposition, and we are satisfied that both § 807.01 and the relevant case law refute Williams Bay's argument.

¶52 WISCONSIN STAT. § 814.10(1) requires the clerk to tax and include in the judgment certain costs and disbursements "as provided in this chapter." WISCONSIN STAT. § 814.04 sets out the items of costs the clerk must include in the judgment. Under these sections, the clerk must calculate the disbursements and costs to be added to the judgment and, then, under § 814.04(4), the clerk shall calculate 12% interest per year from the time of the verdict until the judgment is entered and add that amount to the costs. Then the entire amount is inserted in the judgment, and the prevailing party may seek to execute the judgment under WIS. STAT. Ch. 815. Specifically under, § 815.05(8), "every execution upon a judgment for the recovery of money shall direct the collection of interest at the rate of 12% per year on the amount recovered from the date of entry thereof until paid." However, both § 814.04(4) and § 815.05(8) begin with the phrase "except as provided in [WIS. STAT. § 807.01(4)]." Further, § 807.01(4) provides that interest awarded under that section is "in lieu of interest computed under §§ 814.04(4) and 815.05(8)." This court has already concluded that Williams Bay's recovery is governed by § 807.01; therefore, we must look to the interest provision of § 807.01(4), which simply awards interest "at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the interest

is paid." Thus, we are satisfied that the statutory language precludes the award of post-judgment interest on the prejudgment interest which has accrued on the damages award.

¶53 Moreover, Wisconsin case law is in accord. *See, e.g.,* ***Knoche v. Wisconsin Mut. Ins. Co.***, 151 Wis. 2d 754, 762, 445 N.W.2d 740 (Ct. App. 1989) ("Thus, interest under [WIS. STAT. § 807.01(4)] is not included in interest computed by the clerk and added to the costs under [WIS. STAT. § 814.04(4)]."); ***Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Ins. Co.***, 152 Wis. 2d 7, 14-15, 447 N.W.2d 367 (Ct. App. 1989) ("The legislative history of [WIS. STAT. § 807.01(4)] does not support a construction of the statute requiring compound interest."). For these reasons, we conclude that the trial court properly concluded that Williams Bay was not entitled to post-judgment interest on the pre-judgment interest which had accrued on the damages award.

By the Court.—Judgment and orders affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.