EXHIBIT K

LEXSEE 1997 OHIO APP LEXIS 237

ED WOLF, INC., ET AL., Plaintiffs-appellants -vs- NATIONAL CITY BANK, CLEVELAND, Defendant-appellee

NO. 68898

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1997 Ohio App. LEXIS 237

January 23, 1997, DATE OF ANNOUNCEMENT OF DECISION

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:

CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas. Case No. 253045.

DISPOSITION:

JUDGMENT: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: The Court of Common Pleas of Cuyahoga County (Ohio) entered summary judgment in favor of appellee bank in an action by appellant automobile dealership on a floorplan financing agreement between the parties. Automobile dealership challenged the trial court's ruling on its claims for breach of contract, promissory estoppel, breach of covenant of good faith and fair dealing, fraud, and interference with corporate governance.

OVERVIEW: Automobile dealership operated under a floorplan financing agreement with bank. Eventually, bank terminated its relationship with automobile dealership. Automobile dealership initiated an action against bank in the trial court. The trial court granted summary judgment in favor of bank. On review, the court affirmed the trial court's decision. The court found no error in the trial court's ruling on the breach of contract claim, because the financing agreement between the parties granted bank the power to cease the floorplan financing for any reason, in its sole discretion. With regard to the promissory estoppel and fraud claims, the court found that automobile dealership failed to submit any evidence which created a genuine issue of material fact on either claim. The court found that bank did not breach its duty to act in good faith and fairly deal with automobile dealership. Lastly, the court rejected automobile dealership's claim as to interference with corporate governance. The court explained that the cause of action was not recognized in Ohio and, in any event, bank merely enforced its rights, rather than interfering with automobile dealership's corporate governance.

OUTCOME: The court affirmed the judgment of the lower court.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Legal Entitlement
Civil Procedure > Summary Judgment > Standards > Materiality
[HN1] The granting of summary judgment is only appropriate if there is no genuine issue of material fact, and reasonable minds can come to but one conclusion which is adverse to the nonmoving party. An order granting summary judgment will, therefore, only be upheld where the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law when construing the evidence most

strongly in favor of the nonmoving party. Summary judgment is a procedural device which is used to terminate litigation and, therefore, must be awarded with caution with all doubts resolved in favor of the nonmoving party. However, it forces the nonmoving party to produce evidence on any issue for which that party bears the production at trial.

Contracts Law > Defenses > Ambiguity & Mistake > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview
Labor & Employment Law > Employment Relationships > General Overview
[HN2] The purpose of contract construction is to effectuate the intent of the parties. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Affirmative Defenses
Contracts Law > Contract Conditions & Provisions > Waivers > Acceptance of Late Payment
Contracts Law > Debtor & Creditor Relations
[HN3] Past acceptance of late payments does not constitute a waiver of the creditor's right to accelerate on a loan following a subsequent default where the loan document contains an anti-waiver provision.

Contracts Law > Consideration > Detrimental Reliance
Contracts Law > Consideration > Enforcement of Promises > General Overview
Contracts Law > Consideration > Promissory Estoppel
[HN4] Promissory estoppel is defined as a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Not only must the promise be clear and unambiguous, but the burden is on the party who asserts the claim to prove by clear and unequivocal evidence all the elements of the claim.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Torts > Business Torts > Fraud & Misrepresentation > Nondisclosure > General Overview
[HN5] The six elements that are required to be proven for a claim of fraud are: 1) a representation or, where there is a duty to disclose, concealment of fact, 2) which is material to the transaction at hand, 3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, 4) with the intent of misleading another into relying upon it, 5) justifiable reliance upon the representation or concealment, and 6) a resulting injury proximately caused by the reliance.

Family Law > Marital Duties & Rights > Causes of Action > Loss of Consortium
Governments > Courts > Authority to Adjudicate
Governments > Legislation > Interpretation
[HN6] A cause of action for interference with corporate governance is not recognized in the State of Ohio. Its creation is not, moreover, within the power of the Court of Appeals of Ohio. The Supreme Court of Ohio and the General Assembly are the only bodies which can create new causes of action.

COUNSEL: APPEARANCES:

FOR PLAINTIFFS-APPELLANTS: Timothy A. Shimko, Esq., Frank Piscitelli, Jr., Esq., 2010 Huntington Bldg., 925 Euclid Avenue, Cleveland, Ohio 44115.

FOR DEFENDANT-APPELLEE: Stephen F. Gladstone, Esq., Patrick F. Haggerty, Esq., Michael E. Smith, Esq., 1100 National City Bank Bldg., Cleveland, Ohio 44114.

JUDGES: JAMES D. SWEENEY, P.J., DIANE KARPINSKI, J., SARA J. HARPER, J., DISSENTS IN PART, WITH DISSENTING OPINION ATTACHED.

OPINION:

JOURNAL ENTRY and OPINION

PER CURIAM:

Plaintiffs-appellants, Ed Wolf, Inc., formerly known as Ed Wolf Shaker Saab, Inc. ("EWSS"), and Sherry Wolf, as Executrix of the Estate of Don Wolf, appeal from the granting of summary judgment in favor of

defendant-appellee, National City Bank, Cleveland ("NCB"), by the Court of Common Pleas of Cuyahoga County. Appellants submit that genuine issues of material fact remain for litigation regarding NCB's 1992 decision to terminate a financing arrangement with EWSS. A careful [*2] review of the record compels an affirmance of the action.

I.

EWSS, previously known as Wolf Garage, and originally owned and operated by Ed Wolf, sold Saab automobiles since the 1960's. Don Wolf acted as owner and operator of EWSS until his death in June 1992.

NCB, except for a brief period in the 1980's, provided floorplanning or floorplan financing to EWSS from 1973 to 1993 for both new and used motor vehicles. Through the floorplanning arrangement, NCB extended a line of credit to EWSS which allowed the dealership to purchase vehicles from Saab Cars USA, Inc. ("Saab"). EWSS would take out a separate loan for each vehicle purchased from Saab; the loan would then be counted against EWSS's line of credit. EWSS only paid interest on the loans made for each vehicle and only for so long as the particular vehicle remained for sale. NCB retained a security interest in the vehicles purchased by EWSS in order to secure the loans.

A Loan and Security Agreement ("the agreement") covered by R.C. Chapter 1309 (codified version of Article 9, Uniform Commercial Code), dictated the floorplanning arrangement between EWSS and NCB. n1 Sections 2 and 3 of the agreement afforded NCB "sole discretion" [*3] to grant floorplan loans to EWSS. n2 Subsection 3.1, however, specified that the floorplan financing remained in effect until its termination pursuant to either subsection 3.2 or section 22.

> n1 The parties executed two Loan and Security Agreements on July 14, 1988, one for new vehicles, the other for used vehicles. Both agreements contain identical language with respect to the provisions which are relevant to the determination of this appeal. The provisions cited in this opinion are taken from the agreement which governs new vehicles.

n2 Sections 2 and 3 of the agreement provide:

> 2. This Agreement sets forth (a) an arrangement ("the floorplan") whereby Bank in its sole discretion may grant to Debtor floorplan loans for the purpose of, among other things, enabling Debtor to offer floorplanned items for sale to its customers, all subject to the terms and conditions of this Agreement, (b) covenants and warranties made by Debtor to induce Bank to enter into this Agreement and (c) other material provisions.
>
> 3. So long as the floorplan remains in effect Bank will, subject to the terms and conditions of this Agreement, grant to Debtor such floorplan loans Debtor may from time to time request and as Bank in its sole discretion may be willing to grant.

[*4]

EWSS had the option under subsection 3.2 to terminate the floorplan by providing written notice to NCB. Otherwise, section 22 dealt with NCB's rights and remedies in "any event of [continuing] default," and its subsections read as follows, in pertinent part:

> ***
>
> 22.1 Bank may, without notice to Debtor, terminate the floorplan, whereupon Bank's obligation, if any, to make further floorplan loans shall cease.
>
> 22.2 Bank may declare any and all floorplan loans to be due forthwith,

> whereupon the principal of and interest on the floorplan loans shall become immediately payable in full, all without any presentment, demand or notice of any kind, which are hereby waived.
>
> ***
>
> 22.5 Debtor will, on Bank's demand, deliver to Bank all of Debtor's books and records in respect of the collateral.
>
> ***

Section 21, in turn, enumerated eight instances of activity or inactivity which constituted an event of default. Relevant to this appeal are the following:

> (b) the non-payment by Debtor of any floorplan loan or any other debt as and when the same becomes due and payable;
>
> (c) the making of any representation, warranty or other statement in this Agreement or any [*5] related writing by or on behalf of any obligor that is false or erroneous in any material respect;
>
> (d) any failure or omission by an obligor to perform and observe any agreement or other provision in this Agreement or any related writing that is on the obligor's part to be complied with;
>
> ***
>
> (g) any event, condition or thing which constitutes or which with the lapse of any applicable grace period or the giving of notice (or both) would constitute, a default which accelerates or gives the bank the right to accelerate the maturity of any debt then outstanding; and
>
> (h) the giving or written notice to Debtor that Bank, in the exercise of its reasonable discretion, feels insecure in respect of any debt then outstanding or any security therefor.

Pertaining to section 21(b), subsection 7.3 of the agreement regulated when EWSS was to pay the floorplan loan. Either the loan was to be repaid upon termination of the floorplan in accordance with subsection 3.2 or section 22, or on the date of the sale of the floorplanned item, whichever event occurred first.

NCB required prompt repayment of EWSS's loans, specifically within twenty-four hours after the dealer received payment [*6] from the customer. In order to track compliance with this payment schedule, NCB conducted routine, unannounced audits of EWSS whereby the inventory was inspected to account for all vehicles with outstanding loans. EWSS, therefore, was not originally required to provide daily information on its sales. If NCB discovered through an audit that EWSS failed to timely pay the outstanding loan on a sold vehicle, NCB declared EWSS as "SOT" or "sold out of trust." A SOT constituted a breach of the agreement.

The agreement also contained provisions which required EWSS's assistance in protecting NCB's security interest in the floorplan inventory. EWSS agreed to comply with NCB's written request to do a certain act or thing, *e.g.,* executing and delivering a manufacturer's statement of origin, "for the better evidence, validation, perfection, enforcement or other protection of its security interest." Section 10. It also agreed, absent default, "to collect the receivables in the ordinary course of business for the benefit of both Bank and Debtor at no cost or expense to Bank." Section 15. EWSS agreed further to maintain accurate and complete records of its collateral, records which NCB could [*7] "examine, inspect and make extracts *** to arrange for verification of receivables directly with account debtors or by other method and to examine, appraise and protect the collateral consisting of inventory." Section 18.

Finally, section 24 of the agreement set forth a standard anti-waiver clause. It reads:

> No course of dealing in respect of, nor any omission or delay in the exercise of, any right, power or privilege by Bank under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any further or other exercise thereof or of any other, as each such right, power or privilege may be exercised either independently or concurrently with others and as often and

> in such order as Bank may deem expedient. Bank may from time to time in its discretion grant Debtor waivers and consents in respect of this Agreement, but no such waiver or consent shall be binding upon Bank unless specifically granted by Bank in writing, which writing shall be strictly construed. Each right, power or privilege specified or referred to in section 22 (including subsection 22.1 through 22.6 thereof) or in any other part of this Agreement is in addition [*8] to and not in limitation of any other rights, powers and privileges that Bank may otherwise have or acquire by operation of law (including, without limitation, the right of offset), by other contract or otherwise. The provisions of this Agreement shall bind and benefit Debtor and Bank and their respective successors and assigns. This Agreement and the respective rights and obligations of the parties hereto shall be construed in accordance with and governed by Ohio law. (Emphasis added.)

NCB also provided floorplan financing to Wolf Import Motors, Inc. ("Wolf Import"), a sister dealership owned by Don Wolf. Don Wolf opened Wolf Import, located in Painesville, Ohio, in 1982. Don Wolf sold Wolf Import on January 31, 1991.

II.

Appellants and NCB offer drastically different overviews of EWSS's financial condition through the 1980's and into the '90s. According to appellants, EWSS had a record year in 1988, with sales of $ 9,205,000, and an even more profitable year in 1989, with sales increasing 13.2 percent. They also submit that NCB increased its floorplan financing through these years, from $ 1 million in 1988 and 1989, to $ 1.15 million in March 1990, then to $ 1.45 million [*9] in August 1990. NCB, on the other hand, refers to EWSS's bank records to show that the dealership suffered net losses in 1987 and 1988, and only recognized a net profit of $ 94,000 in 1989. NCB attributed the shaky financial condition of EWSS to the fact that EWSS loaned significant sums of money to the financially struggling Wolf Import. Moreover, changing market conditions affected most European manufactured automobiles in the late 1980's.

Don Wolf and Ray Longhitano, EWSS's General Manager, attended a meeting at NCB on February 14, 1990. Appellants submit that NCB "assured" them at this meeting that if they sold Wolf Import, NCB would continue to finance EWSS.

NCB's concerns with EWSS's financial condition, however, surfaced by early 1990 as a major portion of the dealership's assets was in the form of debt owed by Wolf Import to EWSS. EWSS's aging inventory also affected profitability. Moreover, Longhitano sought to be released as a personal guarantor of EWSS's debts on or about March 26, 1990. NCB's concerns with EWSS's financial condition were communicated to EWSS on or about April 2, 1990 in a letter from one of NCB's Vice Presidents, Kimberly Brindley. This letter closed [*10] with, "once the Wolf Import Motors dealership is liquidated, it is our intent to request that the Ed Wolf Shaker Saab dealership find financing elsewhere."

NCB met with Don Wolf in July 1990 with regard to the sale of Wolf Import. There was some talk about the purchase price, proposed to be $ 200,000 by NCB representatives.

NCB conducted a routine audit at EWSS in September 1990. It was then discovered that EWSS previously sold $ 170,000 worth of vehicles SOT, but could not pay for the vehicles out of EWSS's cash or assets. According to Peggy Banchek, an assistant vice president in NCB's Dealer Credit Department, Don Wolf and Bernard Abrams, an associate, proposed that Abrams put up $ 250,000 in bonds as collateral to cure this SOT. Though this proposal was amenable to NCB, EWSS cured the SOT problem through other means.

NCB discovered a similar situation in December 1990. EWSS sold vehicles which totaled approximately $ 50,000, but failed to repay NCB for the applicable loans. NCB advised EWSS, in a December 18, 1990 letter written by Banchek, that EWSS must follow certain procedures with regard to the sale of its vehicles. One procedure was that NCB "is requiring that when monies [*11] are received for a vehicle, that those monies are used to pay off that vehicle within 24 hours." NCB also required EWSS to provide daily sales logs in order to confirm that EWSS was in compliance with the terms of the agreement. EWSS, according to NCB, did not heed the instructions contained in this letter.

Brindley met with Don Wolf in January 1991 to

discuss EWSS's financial status. She addressed the impact of the sale of Wolf Import upon EWSS. Brindley told Don Wolf that the sale would virtually nullify EWSS's net worth because EWSS could not collect the debt owed to it by Wolf Import. She also reiterated the significance of NCB's request for daily sales logs--if EWSS failed to supply the requested information, its floorplan financing would be placed on hold. Despite this meeting, EWSS allegedly failed to satisfy the discussed obligations.

Brindley again met with Don Wolf on April 2, 1991 to discuss the status of EWSS's floorplan financing. She and Gregory Godec, one of her superiors at NCB who attended the meeting, requested that EWSS obtain $ 250,000 in working capital because of its current financial situation. They also told Don Wolf that if the recapitalization could not [*12] be obtained, EWSS had to seek another finance source for its line of credit by July 2, 1991 for both the new and used vehicles floorplanning.

EWSS did nothing to obtain the $ 250,000 working capital. Longhitano stated at deposition that EWSS did nothing because Don Wolf thought the request was an unreasonable one. There was also no indication that EWSS sought a different source of financing in line with their failure to obtain the recapitalization.

Following another audit, NCB uncovered another SOT situation at EWSS in the amount of $ 235,000. Banchek conferred with Don Wolf on June 13, 1991 to discuss the situation. Don Wolf acknowledged the situation, but communicated that EWSS was unable to pay the necessary funds. He suggested to Banchek that the $ 235,000 could be paid to NCB "over time." According to Banchek's notes relating to her discussion with him, she told him that even if EWSS paid off the $ 235,000, NCB "still required the dealership to find alternative financing." NCB, in a letter of the same date, notified EWSS that its financing was on hold.

Don Wolf and Abrams met with NCB representatives the following day. It was agreed that Abrams would pay the $ 235,000, said [*13] sum accepted by NCB for payment of the SOT.

NCB nonetheless viewed EWSS's refusal to cooperate with NCB, including non-compliance with the 24-hour repayment of loans requirement, as a failure to abide by the terms of the agreement. NCB consequently informed Don Wolf on June 14, 1991, that it was unwilling to continue the floorplan arrangement. Rather than cancel the plan forthright, NCB provided EWSS with 120 days to "work down" the financing as EWSS continued to sell the vehicles covered under the existing plan. In other words, EWSS could continue to operate while seeking alternative financing sources.

NCB also implemented other procedures to protect its collateral. For example, it placed security guards at EWSS's lot; required its approval prior to the sale of collateralized vehicles; required EWSS's daily sales logs; and notified Saab as to EWSS's financing hold.

Even though EWSS did not make alternative financing arrangements by October 1991, NCB extended the deadline to end its relationship with the dealership. The relationship terminated in early 1992 when Don Wolf sold EWSS.

III.

EWSS, as a result of NCB's termination of the financing arrangement, filed a complaint against [*14] NCB and Saab in the trial court on June 2, 1993. An amended complaint was filed on October 13, 1994, adding Sherry Wolf as a plaintiff. The amended complaint contained eight claims for relief against NCB, and three against Saab. Appellants voluntarily dismissed Saab as a defendant on January 27, 1995.

The remaining claims against NCB were for breach of implied duty of good faith and fair dealing (count one); breach of fiduciary duty (count two); tortious interference with the business dealings of EWSS (count three); defamation (count four); interference with the corporate governance of EWSS (count eight); breach of contract (count nine); promissory estoppel (count ten); and fraud (count eleven). NCB filed its motions for summary judgment on all of these claims on January 6, 1995.

After the parties filed additional briefs, the trial court granted summary judgment in favor of NCB on all eight claims for relief. The court found that appellants failed to demonstrate the existence of a genuine issue of material fact regarding their first, third, ninth, tenth and eleventh claims. As to count two, the trial court found no fiduciary relationship between EWSS and NCB. The court found that [*15] count four was time-barred by *R.C. 2305.11(A)*, and count eight was not a recognized cause of action in Ohio.

In its final judgment, the trial court "expressed its disapproval of plaintiffs' numerous misrepresentations and disconnected assertions which strained the acceptable parameters of advocacy." The court then stated that it nonetheless viewed the evidence in a light most favorable to appellant as required by *Civ.R. 56(C)* prior to determining NCB's entitlement to summary judgment on all of appellants' claims for relief.

IV.

Appellants now partially contest the trial court's grant of summary judgment in favor of NCB. Specifically, appellants' five assignments of error challenge the trial court's rulings on the claims for breach of contract, promissory estoppel, breach of covenant of good faith and fair dealing, fraud, and interference with the corporate governance of EWSS. n3

n3 See Appendix.

[HN1]

The granting of summary judgment is only appropriate if there is no genuine issue of material fact, and reasonable [*16] minds can come to but one conclusion which is adverse to the nonmoving party. *Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc. (1986), 24 Ohio St. 3d 198, 201, 494 N.E.2d 1101; Civ.R. 56(C).* An order granting summary judgment will, therefore, only be upheld where the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law when construing the evidence most strongly in favor of the nonmoving party. *Wooster v. Graines (1990), 52 Ohio St. 3d 180, 184-185, 556 N.E.2d 1163; Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 375 N.E.2d 46.*

Summary judgment is a procedural device which is used to terminate litigation and, therefore, must be awarded with caution with all doubts resolved in favor of the nonmoving party. *Osborne v. Lyles (1992), 63 Ohio St. 3d 326, 333, 587 N.E.2d 825;* see, also, *Murphy v. Reynoldsburg (1992), 65 Ohio St. 3d 356, 359, 604 N.E.2d 138.* However, it "forces the nonmoving party to produce evidence on any issue for which that party bears the production at trial." *Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St. 3d 108, 111, 570* [*17] *N.E.2d 1095,* citing *Celotex Corp. v. Catrett (1986), 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265;* see also *State ex rel. Zimmerman v. Tompkins (1996), 75 Ohio St. 3d 447, 663 N.E.2d 639.*

A.

In the first assignment of error, appellants argue that the trial court erred in granting summary judgment to NCB on the claim for breach of contract. Specifically, appellants argue that genuine issues of material fact exist regarding whether there was a "continuing default" in complying with the floorplan agreement (because the term continuing is not defined in the agreement) and that NCB was required to, but did not, provide documentation of the continuing default or comply with grace period guarantees prior to terminating the floorplan agreement.

In analyzing the construction of a written contract, we note the following:

> [HN2] The purpose of contract construction is to effectuate the intent of the parties. *Skivolocki v. East Ohio Gas Co. (1974), 38 Ohio St. 2d 244, 67 Ohio Op. 2d 321, 313 N.E.2d 374,* paragraph one of the syllabus. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Id.; Blosser v. Enderlin (1925),* [*18] *113 Ohio St. 121, 148 N.E. 393,* paragraph one of the syllabus. A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning. See *Blosser, supra,* at paragraph two of the syllabus; 4 Williston on Contracts (3 Ed. 1961) 532-533, Section 610B.

Kelly v. Medical Life Ins. Co. (1987), 31 Ohio St. 3d 130, 132, 509 N.E.2d 411.

Although the term "continuing" is not defined by the Agreement, we may give it its ordinary meaning in analyzing the contract construction. Although the citation which immediately follows pertains to an insurance policy case, its application to a commercial loan contract

is no less appropriate:

> In an insurance policy, as in any other contract, words and phrases are to be given their plain and ordinary meaning unless otherwise provided in the policy. *Burris* at 89. "When the language of an insurance policy has a plain and ordinary meaning, it is unnecessary and impermissible for this court to resort to construction of that language." *Karabin v. State* [*19] *Automobile Mut. Ins. Co. (1984), 10 Ohio St. 3d 163, 166-167, 462 N.E.2d 403.* See, also, *Jarvis v. State Farm Mut. Auto. Ins. Co. (Dec. 30, 1993), 1993 Ohio App. LEXIS 6275,* Cuyahoga App. No. 64597, unreported (provided plain and ordinary meaning of insurance policy required rather than technical or strained construction.) n4

Slam Jams II v. Capitol Indemnity Corp. (July 18, 1996), 1996 Ohio App. LEXIS 3106, Cuyahoga App. No. 69754, unreported, *1996 Ohio App. LEXIS 3106, at 5.*

> n4 See *Burris v. Grange Mut. Cos. (1989), 46 Ohio St. 3d 84, 89, 545 N.E.2d 83.*

The term "continuing" is not an ambiguous term as used in the agreement. Ordinary usage of the term "continuing" would impart more than one episode of defaulting conduct by the borrower. Such multi-episode default by plaintiff Ed Wolf, Inc., is exactly what occurred under the facts of this case, giving NCB the right under the agreement, pursuant to its sole discretion, to stop funding the floorplan agreement.

Contrary to the assertions of the appellants, NCB did not breach a condition of [*20] the agreement in failing to provide notice or a grace period to the dealership prior to the termination of the agreement. NCB properly relied on Section 22.1 on the agreement, which provides that termination of the agreement is permitted without notice to the debtor upon a continuing default by the debtor. As to the grace period argument, the trial court's reasoning in support of its conclusion that the agreement did not provide appellants with a grace period is dispositive of the issue. The court's judgment entry provides as follows, in relevant part:

> Section 21(e) describes the transfer of an obligor's assets to give the obligor general relief from creditor's (i.e., a bankruptcy proceeding) as an event of default. The nexus between section 21(e) and a grace period is, at best, inscrutable. Furthermore, and once again, the testimony of Greg Godec does not support plaintiffs' assertion that "according to NCB it is not the general practice of auto dealers to pay NCB as soon as it receives funds from the purchaser." Plaintiffs' brief at 20. To the contrary, Godec testified that it is the general practice that the dealership pay the bank within 24 hours of received payment [*21] for the car. Godec Depo. at 61. This is entirely consistent with the December 18, 1990 letter from NCB to Don Wolf requiring that when monies are received for a vehicle, those monies are used to pay off that vehicle within 24 hours." NCB's MSJ, Exh. A-4. Plaintiffs also draw attention to Longhitano's testimony that EWSS was always permitted a grace period when paying off vehicles. Plaintiffs' brief at 20. However, Section 24 of the Agreement provides that although NCB may from time to time grant a waiver, no course of dealing shall operate as a waiver, and for any waiver to be binding it must be in writing. Therefore, the unmodified terms of the Agreement govern and do not provide for a grace period. (Emphasis *sic.)*

Appellants submit *ACME Cleveland Corp. v. Trayco Elec. Co., Inc. (1983), 27 Ohio Misc. 2d 1, 499 N.E.2d 930,* in support of their position that NCB waived its right as a creditor to take advantage of the agreement's acceleration clause when it unconditionally accepted past-due payments from EWSS. However, as the trial court found, the agreement contains a provision at section 24 which expressly negates appellant's waiver argument. n5 [HN3] Past acceptance of late payments [*22] does not constitute a waiver of the creditor's right to accelerate on a loan following a subsequent default where the loan document contains an anti-waiver provision. See, e.g.,

Metropolitan Life Ins. Co. v. Triskett Illinois, Inc. (1994), 97 Ohio App. 3d 228, 646 N.E.2d 528; Gaul v. Olympia Fitness Center, Inc. (1993), 88 Ohio App. 3d 310, 623 N.E.2d 1281, citing *Philmon v. Mid-State Homes, Inc. (1968), 245 Ark. 680, 434 S.W.2d 84.* See, also, *Farm Credit Servs. v. Will (July 17, 1991), 1991 Ohio App. LEXIS 3363,* Medina App. No. 1870, unreported; *Frank B. Thomas Trust v. Imperial 400 Natl., Inc. (Mar. 28, 1990), 1990 Ohio App. LEXIS 1242,* Summit App. No. 14202, unreported. Compare *Bank One, Cleveland, NA v. Rockside Medical Clinic (June 6, 1991), 1991 Ohio App. LEXIS 2716,* Cuyahoga App. No. 58685, unreported (distinguishing *ACME Cleveland Corp.).*

> n5 Appellants direct this court to the deposition testimony of Lawrence Daniel Hottois and Kimberly Brindley to strengthen its "float period" argument. Hottois testified to the contrary, i.e., that the general procedure was for the dealer to promptly pay the bank, either the same day or within a day of receiving payment. Brindley testified that "the average float from when you get paid to when you pay us is reasonable ***." Though this statement may support appellants' position, the fact remains that the agreement rejected course of performance as a defense to non-payment.

[*23]

Finally, the argument that Section 2's "sole discretion" standard is somehow limited by Section 22 is without merit. Section 24, which expressly fails to provide a limitation on the sole discretion of NCB, states the following:

> Each right, power or privilege specified or referred to in section 22 (including subsections 22.1 through 22.6 thereof) or in any part of this Agreement is in addition to and not in limitation of any other rights, powers and privileges that Bank may otherwise have or acquire by operation of law ..., by contract or otherwise. (Emphasis added.)

Sole discretion means sole discretion, and the Bank could stop funding the floorplan arrangement of the dealership for any reason, notwithstanding those instances in Section 22, as evidenced by the application of Section 24, in its sole discretion.

Appellant's first assignment of error is overruled.

B.

Appellants' second assignment of error relates to the trial court's grant of summary judgment in favor of NCB on their claim for promissory estoppel. They challenge the trial court's grant of summary judgment on the claim for fraud in their fourth assignment of error. These assignments of error are [*24] addressed jointly as they both concern certain promises allegedly made by NCB.

[HN4] Promissory estoppel is defined as:

> "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

The Limited Stores, Inc. v. Pan American World Airways, Inc. (1992), 65 Ohio St. 3d 66, 73, 600 N.E.2d 1027, quoting 1 *Restatement of the Law 2d, Contracts (1982) 242,* Section 90. See *Russ v. TRW, Inc. (1991), 59 Ohio St. 3d 42, 570 N.E.2d 1076.* Not only must the promise be clear and unambiguous, *Juergens v. Strang, Klubnik and Associates, Inc. (1994), 96 Ohio App. 3d 223, 231, 644 N.E.2d 1066,* but the burden is on the party who asserts the claim to prove by clear and unequivocal evidence all the elements of the claim, *Kroll v. Close (1910), 82 Ohio St. 190, 194, 92 N.E. 29.*

In the present case, appellants propose that two separate promises by NCB created a genuine issue of material fact with regard to their promissory estoppel claim. First, they refer to NCB's promise in April 1991 to [*25] continue EWSS's financing through July 1991 if Don Wolf injected $ 250,000 of capital into EWSS. Second, appellants maintain that NCB promised to continue EWSS's financing if Don Wolf sold Wolf Import. n6

> n6 Appellants, in their brief,

> "emphasized that the trial court failed to recognize that [their] promissory estoppel claim concerns two distinct promises by NCB to EWSS of continued financing." The trial court unquestionably recognized that appellants relied on two promises in support of this claim, as it discussed in its judgment entry the relevance of the sale of Wolf Import and NCB's promise to finance until July 1991.

Assuming arguendo that NCB promised to continue EWSS's financing if Don Wolf injected capital into EWSS, this promise in and of itself fails to demonstrate all the necessary elements of a promissory estoppel claim. The record discloses that Don Wolf did not inject $ 250,000 of capital into EWSS because he believed the request was unreasonable. NCB's alleged promise, therefore, neither induced [*26] action nor forbearance on behalf of EWSS. In other words, since the alleged promise of continued financing was premised on the injection of capital, NCB was never obligated to fulfill the promise because Don Wolf never injected the capital.

Appellants otherwise rely on the deposition testimony of Longhitano to support their claim that NCB promised to continue EWSS's financing. Specifically, they refer to the portion where Longhitano related his belief as to what NCB meant when Godec stated at the February 14, 1990 meeting, "We don't want to see you out of business. We don't want to put you out of business ***." Appellants suggest that the trial court took this statement out of context, because when read in view of Longhitano's entire deposition, it is clear that it was not only EWSS's interpretation of Godec's comment that NCB was going to continue financing, but "rather, NCB made this statement."

This court views appellants' characterization of Longhitano's testimony as an outright mischaracterization. Longhitano never expressly testified that NCB promised to continue financing EWSS at any time. The deposition reveals that this was Longhitano's interpretation of Godec's statement, [*27] and not the type of clear and unambiguous promise required under *The Limited Stores, Inc.* and *Juergens.*

Appellants' claim for fraud also hinges on the validity of their claim that NCB promised to continue financing EWSS if Don Wolf sold Wolf Import. They direct this court once again to Longhitano's deposition testimony to illustrate this promise, and moreover, refer to all of the meetings had between EWSS and NCB representatives to discuss the sale of Wolf Import.

The Supreme Court of Ohio identified [HN5] the six elements that are required to be proven for a claim of fraud in *Burr v. Stark Cty. Bd. of Cmmrs. (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101.* These elements are:

> 1) a representation or, where there is a duty to disclose, concealment of fact;
>
> 2) which is material to the transaction at hand;
>
> 3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
>
> 4) with the intent of misleading another into relying upon it,
>
> 5) justifiable reliance upon the representation or concealment, and
>
> 6) a resulting injury proximately caused by the reliance.

Id., paragraph [*28] two of the syllabus. See *Gaines v. Preterm-Cleveland, Inc. (1987), 33 Ohio St. 3d 54, 514 N.E.2d 709; Pollock v. Kanter (1990), 68 Ohio App. 3d 673, 589 N.E.2d 443.*

The trial court's reasoning in support of its grant of summary judgment in favor of NCB on appellants' claim for fraud is logical, factually supported by the record, and legally supported by the applicable law. The court stated, in part:

> The language used in a representation is to be interpreted by the effect which it would produce upon an ordinary mind, and words will be given their usual and natural meaning. 50 Ohio Jurisprudence 3d (1984), Fraud and Deceit, Section 28. When a professor tells a problem student, "I don't want to see you flunk out," it is

not an assurance of a passing grade; when an employer tells an employee, "I don't want to see you collecting welfare," it is not an assurance of continued employment; and when a creditor tells a debtor, "We don't want to see you go out of business," it is not an assurance of continued financing. To hold otherwise would torture the English language and produce absurd results.

Moreover, even if the court were to transmogrify Greg Godec's comment into [*29] a representation of continued financing, any reliance thereon would not be justified. The evidence demonstrates that Don Wolf was attempting to sell DWI [Wolf Import] prior to the complained of representations of NCB. In addition, given the financial condition of DWI, Don Wolf had a good reason to sell it independent from any representation from NCB. Austin Depo. at 91. Furthermore, and most importantly, any such representation carried an implied obligation upon EWSS to stay out of default. Austin Depo. at 34, 37. *** Finally, Ray Longhitano was unable to state why Don Wolf sold DWI. Longhitano Depo. at 52. The plaintiffs have simply failed to meet their burden of production with evidence of justifiable reliance as required by *Wing*.

***

In conclusion, appellants failed to submit any evidence which created a genuine issue of material fact with regard to even the first element of their claims for promissory estoppel and fraud. The record discloses that NCB never promised to continue EWSS's financing at any point, or otherwise represented that the financing would continue upon the sale of Wolf Import. Accordingly, the trial court's grant of summary judgment in favor of NCB [*30] on these two claims was appropriate. *Wooster; Civ.R. 56(C)*.

Appellants' second and fourth assignments of error are overruled.

C.

Appellants third assignment of error argues that the trial court erred in granting summary judgment in favor of NCB on the claim that NCB violated its duty to act in good faith and fairly deal with EWSS in violation of the Uniform Commercial Code, as codified under *R.C. 1301.01*, .09 and .14.

Applying Section 24 and Section 2, the sole discretion allowed the Bank in not funding the floorplan renders reliance on the UCC-based (*R.C. 1301.01*, .09, and .14) "commercially reasonable" argument to be irrelevant. Whether commercially justified or not, it was still the Bank's sole discretion, which discretion is not limited by other rights, privileges or powers, by contract or otherwise, to decline to further fund the floorplan.

The third assignment of error is overruled.

D.

Appellants' fifth and final assignment of error pertains to the trial court's grant of summary judgment in favor of NCB on their claim for interference with the corporate governance of EWSS. The trial court concluded that the state of Ohio does not recognize this claim for relief. [*31] n7

n7 Even assuming *arguendo* that such a cause of action exists in this state, the court concluded that NCB merely exercised its rights under the agreement to secure its interest in the floorplanned collateral.

Appellants allege that NCB interfered with the corporate governance of EWSS by: (1) requiring the sale or liquidation of Wolf Import; (2) draining EWSS cash after the decision to terminate the floorplan; (3) requiring EWSS to call in all dealer trades; (4) placing security guards at EWSS's premises; (5) requiring EWSS to provide daily monitoring sheets regarding car sales and telefax daily sales log; (6) using previously deposited EWSS proceeds for previously paid items; (7) requiring the availability of individual customer files; (8) requiring EWSS to maintain an equity position of $ 250,000; and (9) retaining final approval of EWSS's transactions.

Initially, appellants acknowledge that [HN6] a cause of action for interference with corporate governance is

not recognized in this state. Its creation is [*32] not, moreover, within this court's power. The Supreme Court of Ohio and the General Assembly are the only bodies which can create new causes of action. *Anderson v. St. Francis-St. George Hosp. (1992), 83 Ohio App. 3d 221, 227, 614 N.E.2d 841;* see, generally, *Gallimore v. Children's Hosp. Med. Ctr. (1993), 67 Ohio St. 3d 244, 617 N.E.2d 1052,* overruling *High v. Howard (1994), 64 Ohio St. 3d 82, 592 N.E.2d 818* (child's cause of action for loss of consortium after negligent or intentional injury to parent established in Ohio).

Appellants nonetheless rely almost exclusively on *State National Bank of El Paso v. Farah Manufacturing Co. (Tex.Civ.App. 1984), 678 S.W.2d 661* and *Kenty v. Transamerica Premium Ins. (1995), 72 Ohio St. 3d 415, 650 N.E.2d 863,* to demonstrate that the traditional concept of tortious interference with a contract should be expanded to include the corporate governance process in Ohio. Appellants also cite *Melamed v. Lake County National Bank (C.A.6, 1984), 727 F.2d 1399,* to bolster this expansion.

In *Farah,* the corporate debtor, Farah Manufacturing Company ("FMC"), charged that the lenders interfered with its "rights to lawful management and [*33] proper corporate governance" by, among other things, influencing the makeup of the board of directors. *State National Bank of El Paso* ("State National") relied on its contractual rights and financial interests, and never intended to harm FMC, in arguing that FMC had no legal basis for an interference claim. *Farah, 678 S.W.2d at 688.* The bank also submitted that there was "no evidence of interference with an existing or reasonably probable future contract or business relation." *Id., 689.* The *Farah* court recognized that actionable interference generally falls within one of the two latter categories. *Id.;* see, generally, *Davis v. Lewis (Tex.Civ.App. 1972), 487 S.W.2d 411.*

Under this framework, and taking into consideration the elements necessary to prove interference with a contract, the *Farah* court stated:

> The central theme of FMC's case is that the lenders interfered with FMC's own business relations and protected rights. Although the lenders may have been acting to exercise legitimate legal rights or to protect justifiable business interests, their conduct failed to comport with the standards of fair play. [Citations omitted.] Upon consideration of the private [*34] interests of the parties and of the social utility thereof, the social benefits, derived from permitting the lenders' interference are clearly outweighed by the harm to be expected therefrom. [Citation omitted.]
>
> The evidence is legally sufficient that the lenders interfered with FMC's business relations, its election of directors and officers and its protected rights. FMC was entitled to have its affairs managed by competent directors and officers who would maintain a high degree of undivided loyalty to the company. [Citations omitted.] ***
>
> The evidence is factually sufficient that the interference compelled the election of directors and officers whose particular business judgment and inexperience and whose divided loyalty proximately resulted in injury to FMC. The interference by the lenders was done willfully, intentionally and without just cause or excuse. As a matter of law, FMC has established a cause of action for interference. ***

678 S.W.2d at 688, 689-690.

In the within case, appellants connect *Farah* to *Kenty* by correctly noting that the Supreme Court of Ohio, for the first time, recognized in *Kenty* the tort of tortious interference with a contract. [*35] *Kenty,* paragraph one of the syllabus; see *Developers Three v. Nationwide Ins. Co. (1990), 64 Ohio App. 3d 794, 582 N.E.2d 1130.* The court adopted the *Restatement of the Law 2d, Torts (1979), Section 766,* and held that five elements are necessary to prove this tort. First, there must be a contract. Second, the wrongdoer(s) must know about the contract. Third, the wrongdoer(s) must intentionally procure a breach of the contract. Fourth, there must be lack of justification. Finally, there must be resulting damages. *Kenty,* paragraph two of the syllabus.

Appellants suggest that since the *Farah* court started

its analysis by referring to the elements necessary for an interference with a contract claim, then went on to discuss, in essence, interference with corporate governance, a logical extension of *Kenty* would be that an interference with corporate governance cause of action should be recognized in the state of Ohio. Although the Supreme Court of Ohio may accept this "logical expansion," this court is not inclined to create a new cause of action.

Even assuming that the cause of action exists, NCB retained a security interest in all of the vehicles purchased by EWSS [*36] from Saab with the bank's funds. Section 10 of the agreement granted broad rights to NCB regarding the securing of these interests. Under these circumstances, we concur with the trial court that NCB merely enforced these rights, rather than interfered with EWSS's corporate governance.

Appellant's fifth assignment of error is overruled.

Accordingly the Bank did not breach the Agreement in not continuing to fund the floorplan and the judgment of the trial court is affirmed in all respects.

Judgment affirmed. n8

n8 Due to the inordinate delay in issuing this opinion, this panel feels that a short explanation is owed to the parties and counsel. This case was heard on November 22, 1995, at which time Judge Harper was assigned to be the writing judge. Thereafter, differences of opinion arose between panel members relative to two aspects of the appeal. Judge Harper circulated to the panel members her draft opinion approximately eleven months after the hearing date. Judge Sweeney prepared and circulated on November 7, 1996, a proposed partial dissent. Judge Karpinski concurred in the partial dissent. Judge Harper, after considering the partial dissent of Judge Sweeney, declined to modify her proposed majority opinion. As a result of this difference of opinion among the panel, Judge Sweeney was assigned to prepare a new majority opinion. This new majority opinion was circulated to the panel members in early 1997.

[*37]

It is ordered that appellee recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate

JAMES D. SWEENEY, P.J.

DIANE KARPINSKI, J.

SARA J. HARPER, J., DISSENTS IN PART, WITH DISSENTING OPINION ATTACHED.

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *25(A)*; Loc. *App.R. 27*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)*, unless a motion for reconsideration with supporting brief, per *App.R. 26(A)* is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II*, Section 2(A)(1).

APPENDIX

I. ASSIGNMENTS OF ERROR

A. THE COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR WHEN [*38] IT RULED, AS A MATTER OF LAW, APPELLEE WAS ENTITLED TO SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR BREACH OF CONTRACT

B. THE COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR WHEN IT RULED, AS A MATTER OF

LAW, APPELLEE WAS ENTITLED TO SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR PROMISSORY ESTOPPEL

C. THE COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR WHEN IT RULED, AS A MATTER OF LAW, APPELLEE WAS ENTITLED TO SUMMARY JUDGMENT *[sic]* ON APPELLANTS' CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

D. THE COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR WHEN IT RULED, AS A MATTER OF LAW, APPELLEE WAS ENTITLED TO SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR FRAUD

E. THE COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR WHEN IT RULED, AS A MATTER OF LAW, APPELLEE WAS ENTITLED TO SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR UNLAWFUL INTERFERENCE WITH APPELLANTS' RIGHT OF CORPORATE GOVERNANCE

CONCUR BY: SARA J. HARPER (In Part)

DISSENT BY: SARA J. HARPER (In Part)

DISSENT:

DISSENTING

JOURNAL ENTRY AND OPINION

SARA J. HARPER, J., DISSENTING:

I concur with the majority's opinion with regard to the trial court's grant of summary judgment in favor of NCB on appellants' claims for promissory estoppel, [*39] fraud and interference with corporate governance. However, I respectfully dissent from the affirmance of the summary judgment on appellants' claims for breach of contract and breach of the covenant of good faith and fair dealing. I, therefore, would have sustained appellants' first and third assignments and remanded the specified claims for trial.

Appellants, in the first assignment of error, challenge the trial court's grant of summary judgment in favor of NCB on the breach of contract claim. The trial court concluded that NCB validly terminated its floorplan arrangement with EWSS because EWSS was in "continued default", and moreover, failed to provide documentation as required by the agreement. Appellants, in part, argue that genuine issues of material fact remain with regard to these conclusions.

The construction of a written contract is generally a question of law for the court. *Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St. 2d 241, 374 N.E.2d 146,* paragraph one of the syllabus. The court must look to the express terms contained in the agreement when determining the rights and obligations of the parties unless the language in the agreement is unclear or ambiguous. [*40] *Shifrin v. Forest City Ent., Inc. (1992), 64 Ohio St. 3d 635, 638, 597 N.E.2d 499,* citing *Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St. 3d 130, 132, 509 N.E.2d 411.* See *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc. (1984), 15 Ohio St. 3d 321, 474 N.E.2d 271.* A breach occurs upon any failure to perform a contractual duty. *Kotyk v. Rebovich (1993), 87 Ohio App. 3d 116, 121, 621 N.E.2d 897,* citing Restatement of the Law 2d, Contract (1978), Section 235(2).

Regarding EWSS' alleged default(s), NCB basically asserts that there were three separate and distinct reasons, any one of which justified its decision to terminate the agreement "without notice." As defined by the agreement, an event of default occurred when EWSS failed to make payment on any floorplan loan when due and payable or failed to perform and observe any provision in the agreement. Sections 21(b) and (d). An event of default also was "any event, condition or thing which constitutes, or which the lapse of any applicable grace period or the giving of notice (or both) would constitute a default which accelerates or gives Bank the right to accelerate the maturity of any debt then outstanding." Section [*41] 21(g). Finally, if NCB felt insecure about any of EWSS's debt(s) then outstanding, and provided EWSS with written notice to this effect, it could terminate the agreement. Section 21(h).

Appellants counter that NCB could only terminate the agreement upon a "continuing" default, a necessary

occurrence under section 21. They strongly suggest that NCB breached the agreement because not one of the defaults was "continuing."

The Supreme Court of Ohio stated in *Inland Refuse Transfer Co.* that "if a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *15 Ohio St. 3d at 322.* Conversely, the determination as to whether a party complied with ambiguous contract terms is a question of fact. See *First Fed. S. & L. Assn. of Akron v. Cheton & Rabe (1989), 57 Ohio App. 3d 137, 567 N.E.2d 298.*

In the within case, a review of the loan agreement leads to the following pertinent observations and interpretations. The agreement speaks to the termination of the agreement as well as NCB's discretionary powers. Section 2 states that the agreement sets forth, in part, the "floorplan." The "floorplan" permits NCB to grant loans to EWSS [*42] in its sole discretion, *e.g.,* to enable the dealer to offer items for sale to its customers. Section 3 reiterates that NCB may grant loans to EWSS in its sole discretion so long as the floorplan remains in effect.

According to subsection 3.1, there are only two means to terminate the "floorplan" *i.e.,* via subsection 3.2 or section 22. Although sections 2 and 3 afford NCB with the discretion to grant or deny loans, section 22 specifically restricts NCB's power of termination to a "continuing" default. Although the agreement specifies act(s) which constitute an "event of default," it fails to contain any language that defines "continuing."

The agreement is thus ambiguous in the following respect. NCB could deny EWSS a loan in its sole discretion under sections 2 and 3. However, NCB could only terminate the agreement upon a continuing default, an event to be ascertained as a factual matter since the agreement fails to define "continuing." Although NCB could *constructively* terminate the agreement by never loaning any funds to EWSS, it could only *actually* terminate the agreement upon a continuing default. Compare *Bradfield v. Hale (1902), 67 Ohio St. 316, 65 N.E. 1008; Union Cent.* [*43] *Life Ins. Co. v. Curtis (1880), 35 Ohio St. 357; King v. Safford (1869), 19 Ohio St. 587;* and *Gaul v. Olympia Fitness Center, Inc. (1993), 88 Ohio App. 3d 310, 623 N.E.2d 1281* (under Ohio law, once a default [versus continuing default] in payment has occurred under the terms of a note, and the note is accelerated, the holder is entitled to judgment).

In conclusion, genuine issues of material fact exist with regard to appellants' claim that NCB breached the agreement when it terminated the floorplan in 1991. n9 Specifically, issues of fact remain as to whether the default or defaults was or were continuing to justify the section 22 decision to terminate the floorplan financing. I, unlike the majority, cannot ignore the ambiguity created by sections 2 and 3 and subsection 3.1, and the insertion of the undefined word "continuing" in section 22. The trial court, therefore, erred in granting summary judgment in NCB's favor on appellants' breach of contract claim. See *Wooster v. Graines (1990), 52 Ohio St. 3d 180, 556 N.E.2d 1163; Civ.R. 56(C).* Compare, *Truck World, Inc. v. Fifth Third Bank (Sept. 29, 1995), 1995 Ohio App. LEXIS 4382,* Hamilton App. Nos. C-940029, C-940399, unreported, appeal dismissed [*44] (1996), Supreme Court No. 95-2301 (where default continues unremedied for thirty days beyond written notice of said default, defendant bank entitled to accelerate payments under loan agreement without notice); *The Central Trust Co., N.A. v. Fleet Nat'l Bank (May 11, 1994), 1994 Ohio App. LEXIS 1969,* Hamilton App. No. C-930162, unreported (where loan documents required a "material event of default" prior to bank's execution of rights, but "material" was not defined therein, materiality is a question of fact thereby precluding summary judgment).

> n9 Appellants also rely on two promises allegedly made by NCB in support of this assignment of error, but I do not find that these alleged promises assist appellants' breach of contract claim.

Appellants, in the third assignment of error, furthermore criticize the trial court's decision to grant NCB's motion for summary judgment on their claim that NCB violated its duty to act in good faith and fairly deal with EWSS. Specifically, appellants submit that the violation of the duty is demonstrated [*45] by NCB's course of dishonest conduct from April 1990 up until the time of the termination of the parties' financial arrangement.

Appellants specify certain actions by NCB which allegedly establishes its "course of dishonest conduct." These actions are: (1) NCB's decision in April 1990 to discontinue EWSS's financing because the bank promised Don Wolf just weeks before that financing would continue if he sold Wolf Import n10; (2) NCB's decision

to terminate the floorplan only days after it increased the floorplan to $ 1.15 million; (3) NCB's increase of the floorplan financing year after year despite internal documents that demonstrated its intent to terminate the financing; (4) NCB's decision to terminate the financing notwithstanding the net worth of Don Wolf; (5) NCB's termination of the financing following the sale of Wolf Import in January 1991; and (6) NCB's demand in April 1991 that EWSS inject $ 250,000 of capital even though the bank knew that the funds were not available.

The source of a lender's duty of good faith and fair dealing is found in the Uniform Commercial Code (as codified in Section 1301.01 *et seq.* of the Ohio Revised Code), and the Restatement of the Law [*46] 2nd, Contracts. n11 The relevant sections of the Ohio Revised Code are *R.C. 1301.01* n12, 1301.09 n13 and *R.C. 1301.14* n14. In order to find that NCB failed to act in good faith in its dealings with EWSS, this court must determine whether any alleged acts were "commercially unjustifiable." See *Master Chemical Corp. v. Inkrott (1990), 55 Ohio St. 3d 23, 563 N.E.2d 26; Appley v. West (C.A.7, 1987), 832 F.2d 1021; R.C. 1301.01(S).* Compare *G.F.D. Enterprises, Inc. v. Nye (1988), 37 Ohio St. 3d 205, 525 N.E.2d 10* ("good faith" under *R.C. 1301.01*[S] does not mean that a party acts in a "commercially reasonable" manner).

n10 I fail to find support in the record for such a promise.

n11 *Restatement of the Law 2d, Contracts (1979), Section 205,* states in reference to the applicable UCC provisions, "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

n12 *R.C. 1301.01(S)* (Section 1-201[19] of the UCC) defines "good faith" as "honesty in fact in the conduct or transaction concerned."

n13 *R.C. 1301.09 (Section 1-203 of the UCC)* provides that every contract falling within the UCC "imposes an obligation of good faith in its performance or enforcement."

[*47]

n14 *R.C. 1301.14* (Section 1-208 of the UCC) provides that where a term in an instrument allows a party to accelerate a payment or performance "at will" or at his choice, the holder may exercise these rights "only if he in good faith believes that the prospect of payment or performance is impaired."

A line of cases dealing with a bank's alleged bad faith acts focuses on lenders who, without adequate notice to the debtors, terminate current credit facilities and accelerate existing obligations. One of the most famous of these cases is *K.M.C. Co., Inc. v Irving Trust Co. (C.A.6, 1985), 757 F.2d 752,* wherein the court found demand provisions to be a type of acceleration clause which required good faith performance in demanding repayment. Ohio courts, however, uniformly reject the holding in *K.M.C.,* and instead, find a lender does not act in "bad faith" when it decides to enforce its contract rights. See, *e.g., Ed Schory & Sons, Inc. v. Soc. Natl. Bank (1996), 75 Ohio St. 3d 433, 662 N.E.2d 1074; Metropolitan Life Ins. Co. v. Triskett Illinois, Inc. (1994), 97 Ohio App. 3d 228, 646 N.E.2d 528; Gaul* [*48] *v. Olympia Fitness Center, Inc., supra; Bennco Liquidating Co. v. Ameritrust (1993), 86 Ohio App. 3d 646, 621 N.E.2d 760; First Fed. S. & L. Assn. of Akron, supra.* But, see, *Cardinal Federal Savings and Loan Assoc. v. Michaels Building Company (May 8, 1991), 1991 Ohio App. LEXIS 2199,* Summit App. No. 14521, unreported, cause dismissed (1992), *63 Ohio St. 3d 1042.*

In *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting (C.A.7, 1990), 908 F.2d 1351,* the court found that when a bank is not contractually obligated to advance additional funds under an otherwise sufficient line of credit, its refusal to do so fails to amount to "bad faith." *Id., 1358.* The *Kham* court explained:

> Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of "good faith." Although courts often refer to the obligation of good faith that exists in every contractual relation, e.g., *UCC [Section] 1-201*; *Jordan v. Duff & Phelps,*

Inc., 815 F.2d 429, 438 (7th Cir.1987), this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the [*49] document. "Good faith" is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.

***

Although Bank's decision left Debtor scratching for other courses of credit, Bank did not create Debtor's need for funds, and it was not contractually obliged to satisfy its customer's desires. The Bank was entitled to advance its own interests, and it did not need to put the interests of Debtor and Debtor's other creditors first. To the extent *K.M.C., Inc. v. Irving Trust Co. 757 F.2d 752, 759-763 (6th Cir.1986),* holds that a bank must loan more money or give more advance notice of termination than its contract requires, we respectfully disagree. First Bank of Whiting is not an eleemosynary institution. It need not throw good money after bad, even if other persons would catch the lucre.

908 F.2d at 1357-1358. See *Ed Schory & Sons, Inc.; Fasolino Foods Co. v. Banca Nazionale del Lavaro (C.A.2, 1992), 961 F.2d 1052, 1056-1057; Gaul,* 320; *Bennco,* 649-650.

Despite *Kham's* language, given my conclusion in appellants' [*50] first assignment of error that the trial court erred in granting summary judgment to NCB on appellants' claim for breach of contract, I am not convinced that the court did not likewise error with regard to whether NCB was commercially justified in terminating the agreement. As stated *supra,* NCB could only rely on section 22, *i.e.,* a "continuing default," to justify its decision. If none of the defaults were continuing, NCB's principal rationale for termination is unfounded, and the reasonableness of the termination becomes a question of material fact. See *Firsdon v. Mid-America Nat'l Bank (Sept. 16, 1994), 1994 Ohio App. LEXIS 4046,* Wood App. No. 94 WD018, unreported.

I accordingly dissent from the majority's affirmance of the trial court's rulings concerning the breach of contract and good faith claims, but otherwise concur in the affirmance.