

STATE OF MICHIGAN
COURT OF APPEALS

COMMUNITY SHORES BANK,

Plaintiff-Appellee,

UNPUBLISHED
December 19, 2013

v

RIMAR DEVELOPMENT, INC, RNW
INVESTMENT COMPANY, LLC, and
RICHARD N. WITHAM,

No. 310677
Muskegon Circuit Court
LC No. 10-047151-CK

Defendants-Appellants.

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendants, Rimar Development, Inc, RNW Investment Company, LLC, and Richard N. Witham (collectively, the investors), appeal as of right the trial court’s judgment in favor of plaintiff, Community Shores Bank (the bank) following a bench trial. Both the investors and the bank loaned money to BMC Acquisition Company, LLC. The trial court concluded that, under the parties’ subordination agreement, the bank was entitled to \$259,720.53 that the investors received after the owner sold BMC Acquisition’s collateral. We affirm.

I. FACTS

A. FACTUAL BACKGROUND

Richard Sly owned BMC Acquisition. Ronald Maciejewski, the bank’s commercial lender, testified that Grow’s Marine, Inc.—also owned by Sly—had existing floor plan, real estate, and commercial loans with the bank. Grow’s Marine owned and operated commercial properties that sold wave runners and motorcycles.

According to Maciejewski, in late 2006 or early 2007, Sly approached the bank for a loan to purchase Boston Motors. BMC Acquisition eventually borrowed \$350,000 from the bank and \$250,000 from Rimar Development. Rimar Development assigned its interest in the loan to RNW Investments. Witham owns both companies.

The bank conditioned its loan on a subordination agreement between it and the investors. The subordination agreement provides that “[i]n the event of any distribution . . . the [bank’s loan] shall be paid in full before any payment is made upon the [investors’ loan].” It also

provides that the bank retained the right to “determine how, when, and what application of payments and credits, shall be made on the [bank’s loan],” and that the bank could take or fail to take any actions regarding the bank’s loan without affecting its rights under the agreement. Finally, the subordination agreement provided that BMC Acquisition could make payments on the investors’ loan as long as the payments were not from the sale of the loan’s collateral.

In addition to the Boston Motors collateral, the bank also cross-collateralized the loan with Grow’s Marine’s assets and secured a mortgage on the house of Tina Anderson, Sly’s fiancée.

B. SALE OF BOSTON MOTORS

In late 2007, Sly and Edward Babbitt began discussing the sale of Boston Motors. According to Ralph Berggren, the bank’s chief lending officer, Sly agreed to sell his businesses to Babbitt for \$2.6 million. The sale was to take place in two parts—the sale of Boston Motors for about \$1 million and the subsequent sale of a Yamaha franchise for about \$1.6 million.

By 2008, Sly was in default on his loans with the bank. Maciejewski testified at his deposition—which the investors admitted into evidence at trial—that Sly called him on January 31, 2008, to inform him that Sly sold Boston Motors the previous day. According to Maciejewski, Sly told him that he would wire funds to pay off the bank’s loan the next day. However, Sly never wired the funds to the bank.

On February 1, 2008, Edward Newmyer, Sly’s attorney, issued a check to RNW Investment for about \$259,721. Maciejewski testified that the bank also received six checks from Newmyer, payable to the bank, beginning on February 1, 2008. The checks were for a total of about \$183,000 and their memo lines were blank. Berggren testified that Sly had directed the bank to deposit some of the checks into Grow’s Marine’s general account and to use the others to pay off different loans.

According to Berggren, Sly consistently misinformed the bank about where the proceeds from the sale of Boston Motors went. Ultimately, the bank applied the proceeds from the sale of Anderson’s house and the auction of the remainder of Sly’s assets to the bank’s loan. However, these amounts were not sufficient to cover the full balance of the bank’s loan.

C. PROCEDURAL HISTORY

In March 2010, the bank filed its complaint in this case. The bank asserted that Sly had improperly paid off the investors’ loan before paying the bank’s loan, and that the investors had breached the parties’ subordination agreement by retaining the funds. After hearing various motions for summary disposition, the trial court held a bench trial on the bank’s claim that the investors breached the subordination agreement.

The trial court found that the bank had first priority to the proceeds from the sale of Boston Motors, but Sly sold the collateral and did not apply the proceeds to the bank’s loan. The trial court found that Sly’s \$259,721 payment to the investors came from the sale’s proceeds.

The trial court found that Sly directed the bank to use the \$183,000 in checks for other purposes and that the agreement gave the bank the right to apply Sly's payments to other debt. The trial court ultimately determined that the investors were liable for \$290,312.52 in damages.

D. THE INVESTORS' MOTION FOR RECONSIDERATION

The investors filed a motion for reconsideration, asserting in pertinent part that the trial court erred by (1) relying on circumstantial and hearsay evidence when it concluded that Sly's payment to the investors came from the sale of Boston Motors, and (2) improperly computing damages.

The trial court denied the investors' motion in part on the basis that sufficient circumstantial evidence supported its findings and conclusion. But the trial court granted the investors' motion concerning its computation of damages and invited the parties to file motions concerning the proper calculation.

E. CALCULATION OF DAMAGES

In its motion to enter judgment, the bank asserted that the trial court must reduce the credits from the amount of the bank's loan because the parties' subordination agreement provided that the bank's loan must be paid before any "distribution, division, or application . . . by operation of law or otherwise" to the investors' loan. After computing interest and applying the credits from the sale of Anderson's home and the auction, the bank asserted that Sly owed the bank \$308,556.78. The bank asserted that it was therefore entitled to the full \$259,721 that Sly paid the investors. According to the bank, if the trial court allowed the investors to retain the payment, the investors would receive payment before Sly paid the bank's loan in full—contrary to the language of the parties' agreement.

The investors responded that the trial court should apply the credits to the amount that the investors owed the bank—not the amounts that Sly owed the bank—because the subordination agreement was silent on the issue. The investors also asserted that the bank was not entitled to *any* judgment because the bank had failed to mitigate its damages.

The trial court rejected the investors' claim that the bank failed to mitigate its damages. It concluded that the bank was entitled to the full amount that Sly had paid the investors.

II. SOURCE OF FUNDS

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's findings of fact following a bench trial.¹ The trial court's findings of fact are clearly erroneous if, after reviewing the entire record, we have the definite and firm conviction that the trial court made a mistake.²

¹ MCR 2.613(C); *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

This Court reviews de novo the trial court's conclusions of law and issues of contractual interpretation.³

B. USE OF THE INVESTORS' ANSWER

The investors assert that the trial court erred by finding that Newmyer issued a check to RNW Investment for \$259,721 on February 1, 2008. We disagree.

It is settled law that “. . . formal concessions in the pleadings . . . dispense wholly with the need for proof of the fact.”⁴ Here, the investors admitted this fact in its first responsive pleading. The investors subsequently did not contest it before the trial court, and thus its admission became binding.⁵ Further, while the trial court explicitly referred to the investors' admission to support its finding, the investors also admitted a copy of the check into evidence when it admitted Maciejewski's deposition. Thus, we are not definitely and firmly convinced that the trial court made a mistake when it found that Newmyer issued a \$259,721 check to RNW Investment.

C. USE OF MACIEJEWSKI'S DEPOSITION

The investors assert that most of the facts on which the trial court relied are hearsay statements contained in Maciejewski's deposition. We decline to review this issue.

“Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error.”⁶ Here, the investors admitted Maciejewski's deposition into evidence without any reservation concerning its use. Thus, we conclude that the investors have waived review of whether Maciejewski's deposition contains hearsay statements that otherwise would have been inadmissible.

D. USE OF CIRCUMSTANTIAL EVIDENCE

The investors contend that the evidence did not support the trial court's finding that the proceeds from the sale of Boston Motors were the funds that Sly paid the investors. We disagree.

“Circumstantial evidence in support of or against a proposition is equally competent with direct.”⁷ The finder of fact determines the credibility and weight of the evidence.⁸

² *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

³ *Trader*, 293 Mich App at 215.

⁴ *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 419-420; 551 NW2d 698 (1996), quoting 2 McCormic Evidence (4th ed), § 254, p 142, n 11.

⁵ See *Id.*; MCR 2.111(E) and MCR 2.507(B)(1).

⁶ *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004).

⁷ *Zolton v Rotter*, 321 Mich 1, 8; 32 NW2d 30 (1948) (quotation marks and citation omitted).

Here, Sly was in default on his loans to the bank. Sly sold Boston Motors to Babbitt in late January 2008 for about \$1 million. Maciejewski testified that on January 31, 2008, Sly informed him that he would wire the bank its payment from the sale, but Sly never did so. On February 1, 2008, Newmyer issued a check to RNW Investment for the full amount of the investors' loan. Sly resisted informing the bank where the proceeds of the Boston Motors sale went. Considering these facts, the trial court's inference from the circumstantial evidence was reasonable and we are not firmly convinced that it made a mistake when it found that the check represented proceeds from the sale of Boston Motors.

The investors also assert that the trial court based its finding on impermissible inferences. We disagree.

The trier of fact cannot create an "impermissible pyramiding of inferences" by inferring a conclusion from a fact that was itself inferred from circumstantial evidence.⁹ Here, the investors do not identify any fact that the trial court derived from other facts that it inferred from the circumstantial evidence in this case. As illustrated above, the trial court's only inference was its finding that the sale of Boston Motors was the source of the \$259,721 payment. The trial court inferred this from Maciejewski's and Berggren's testimonies about the timing and circumstances of that payment. These testimonies were direct—not circumstantial—evidence from which the trial court permissibly made a single inference.¹⁰ We conclude that the trial court's factual finding was not too far removed from the evidence.

E. TRACING OF FUNDS

First, the investors assert on appeal that (1) the funds could have come from somewhere other than the sale of Boston Motors and (2) the bank did not prove that the funds were solely from that sale. We disagree.

The burden of proof encompasses two aspects—the burden of persuasion and the burden of going forward with the evidence.¹¹ The burden of going forward with the evidence may shift throughout the trial.¹² A trial court must be able to trace funds with a fair certainty.¹³ However, "cash proceeds do not lose their identity merely because the cash proceeds have been commingled with other cash, provided that there is some basis for the court to connect a specified amount of the commingled cash to the original collateral."¹⁴

⁸ *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 101; 754 NW2d 259 (2008).

⁹ *George v Travelers Indemnity Co*, 81 Mich App 106, 113; 265 NW2d 59 (1978).

¹⁰ See *Id.* at 113-114.

¹¹ *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985); *Satterfield v Board of Ed of the Grand Rapids Pub Sch*, 219 Mich App 435, 438; 556 NW2d 888 (1996).

¹² *Widmayer*, 422 Mich at 290.

¹³ *Fidelity & Deposit Co of Maryland v Stordahl*, 353 Mich 354, 359; 91 NW2d 533 (1958).

¹⁴ *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 129; 602 NW2d 390 (1999).

Here, the subordination agreement provided that BMC Acquisition could make payments on the investors' loan as long as the payments were not from the sale of the loan's collateral. Thus, if the funds were attributable to some other source, under the language of the contract, the investors would be entitled to retain them.

The trial court recognized that it was the bank's burden to establish that the \$259,721 came from the sale of Boston Motors's assets, and it found that the bank had done so on the basis of the circumstantial evidence. The circumstantial evidence, including that the check was in the exact amount that BMC Acquisition owed the investors on the Boston Motors loan and it was written a day or two after Sly sold Boston Motors for well more than that amount, supported the trial court's finding that the check represented proceeds from the sale. The investors did not come forward with any evidence to rebut the bank's proofs and establish that the \$258,721 was *not*, in fact, from the sale of Boston Motors's assets.

In other words, the bank met its burden to prove that the check represented proceeds from the sale of Boston Motors. But the investors did not meet their burden of going forward with the evidence. We conclude that the trial court did not misallocate the burden of proof in this case.

The investors also assert that Berggren testified that the proceeds were from the sale of assets of Grow's Marine. We disagree.

The context of Berggren's statement is as follows:

Q. Your information about the allocation of the . . . proceeds that were received from the sale to Babbitt's, was provided to you by—how was that information ultimately provided to you?

A. Well, it was—it was verbalized by—

After an intervening hearsay objection, the exchange continued:

Q. How—how did you become aware of the amounts of money that were received by Mr. Sly from the sale of the Babbitt's—from the sale of the Grow's Marine assets?

A. It was indicated to us by Mr. Sly and his attorney.

After several intervening questions and answers concerning whether Sly correctly informed Berggren about where the money from the sale went, the bank's attorney asked Berggren about his belief concerning where the money went:

Q. . . . at some point you, as I understand your testimony, discovered that the . . . moneys from the sale had gone to extinguish the indebtedness of Rimar, Inc?

A. Yes. That's correct.

The investors urge us to parse this series of questions and answers to have Berggren's answering that it is "correct" that the proceeds from the sale of Grow's Marine assets were the proceeds with which Sly's attorney paid the investors. Given the length of the exchange between the question and Berggren's unspecific answer, we decline to parse the statement as the investors would have us do. Further, even were we to agree with the investors' proposed parsing of the attorney's questions, Berggren's statement would be only one piece of conflicting evidence among all the other evidence in this case.

In sum, we are not firmly convinced that the trial court erred by finding that the funds that Sly used to pay the investors were proceeds from the sale of Boston Motors.

III. CALCULATION OF DAMAGES

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's determination of damages after a bench trial.¹⁵ The trial court's findings of fact will be clearly erroneous if, after reviewing the entire record, we have the definite and firm conviction that the trial court made a mistake.¹⁶

We review de novo the trial court's conclusions of law and issues of contractual interpretation.¹⁷

B. AVOIDABLE CONSEQUENCES DOCTRINE

The investors contend that the bank is not entitled to damages because it failed to mitigate its damages. We disagree.

Under the avoidable consequences doctrine, a party may not recover damages that it could have avoided with reasonable efforts.¹⁸ The defendant has the burden to prove that the plaintiff failed to take reasonable steps to mitigate his or her damages.¹⁹ The defendant must plead failure to mitigate and support its claim with proofs at trial.²⁰

We conclude that the trial court did not err when it determined that the avoidable consequences doctrine does not apply to this case. Here, there were no proofs at trial concerning whether the contract required the bank to enforce its security interest against Babbitt, nor were

¹⁵ *Hannay v Dep't of Transp* 299 Mich App 261, 271; 829 NW2d 883 (2013).

¹⁶ *Peters*, 253 Mich App at 221.

¹⁷ *Trader*, 293 Mich App at 215.

¹⁸ *In re Prichard Estate*, 169 Mich App 140, 153; 425 NW2d 744 (1988); *M & V Barocas v THC, Inc*, 216 Mich App 447, 449; 549 NW2d 86 (1996).

¹⁹ *M & V Barocas*, 216 Mich App at 449-450.

²⁰ *Lawrence v Will Darreh & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994).

there proofs concerning whether the bank reasonably could have done so. As the trial court noted, the investors seek to rely on the trial court's dismissal of the bank's separate case against Babbitt on the basis of an evidentiary ruling in that separate case. That ruling took place in that case *after* the bench trial in this case. Thus, the investors simply failed to plead or support *at trial* their claim that the bank failed to take reasonable steps to mitigate its damages. We conclude that the trial court did not err when it determined that the avoidable consequences doctrine was inapplicable in this case.

C. THE \$183,000 IN CHECKS

The investors assert that the bank should have applied to the bank's loan the \$183,000 in checks received from Newmyer's trust account after the sale of Boston Motors. We disagree.

It is undisputed that the bank had the right to setoff under its promissory note and business loan agreements with BMC Acquisition and that Sly owed the bank around \$1.6 million dollars on unrelated loans. However, in the subordination agreement, the investors agreed that the bank could "take or omit any and all actions with respect to the [bank's loan] . . . without affecting whatsoever" its rights under the agreement. The subordination agreement did not *require* the bank to exercise its right to setoff against checks that it received from Sly, particularly when Sly instructed the bank to use those checks for different purposes. We conclude that the trial court did not err when it found that the subordination agreement did not require the bank to apply the \$183,000 in checks to the bank's loan.

D. APPLICATION OF CREDITS

The investors contend that the trial court erroneously applied the amounts that the bank recovered from its foreclosure of Anderson's house and the auction of the remainder of Sly's assets to the amount of the bank's loan. According to the investors, the trial court instead should have credited those amounts against the amount that Sly paid the investors. We disagree.

Here, even with the amounts that the bank recovered from the remaining collateral, BMC Acquisition still owed the bank more than \$259,721 on the bank's loan. The parties' subordination agreement provides that "the [bank's loan] *shall be paid in full* before any payment is made upon the [investors' loan] . . ." If the trial court allowed the investors to retain any of the payment, the investors' loan would receive payment before the bank's loan was paid in full. This would be directly contrary to this contractual language. Therefore, we conclude that the trial court did not err by requiring the investors to pay the bank the entire amount it received from Sly.

IV. CONCLUSION

We conclude that the trial court did not clearly err when it found that Sly paid the investors from the proceeds of the sale of BMC Acquisition's collateral, against the terms of the parties' subordination agreement. We also conclude that the trial court did not err in its damages determination by (1) declining to apply the doctrine of avoidable consequences, (2) declining to

apply the \$183,000 in checks that Sly wrote the bank to the bank's loan, or (3) determining to apply to the bank's loan to the amounts the bank received from the sale of other collateral.

We affirm.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Elizabeth L. Gleicher