NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIRST DIVISION
December 27, 2005

No. 1-03-3163

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD C. ROSENOW,	) Appeal from
	) the Circuit Court
Defendant-Appellant	) of Cook County
	)
v.	) No. 02 L 00365
	)
AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC.,	) Honorable
	) Barbara J. Disko,
	) Judge Presiding.
Plaintiff-Appellee.	)

ORDER

Plaintiff American Builders & Contractors Supply Co., Inc. sued defendant Richard C. Rosenow for breach of guaranty. After a bench trial, the trial court found in plaintiff's favor and ordered defendant to pay plaintiff $250,000. Defendant appeals. We affirm.

Defendant owned and operated a group of construction companies (the Rosenow companies) engaged in the roofing and siding trades. He was part owner of U.S. Exteriors, another construction company. By 1998, the Rosenow companies and U.S. Exteriors had

amassed a debt of $5 million to plaintiff, a seller of building supplies. U.S. Exteriors' share of the debt was $850,000. As part of a series of agreements to mitigate the debts, plaintiff agreed to accept the assignment of profits from contracts that U.S. Exteriors had assigned to another company, Fox Valley Exteriors (FVE). Defendant signed a guaranty agreement with plaintiff in which defendant assumed personal liability for $250,000 of the U.S. Exteriors debt. Defendant also signed a 90-day employment agreement with a new company, Rosenow Roofing, Inc., incorporated by plaintiff. Separate employment and guaranty agreements between the defendant and plaintiff were executed on the same date, June 17, 1998.

The employment agreement provided, in part, that defendant would help collect the Rosenow assets acquired by plaintiff and "any other assets of the Rosenow Companies assigned to [plaintiff] to be collected or liquidated." The FVE accounts were assets of Rosenow that had been assigned to plaintiff for collection. Defendant was to be paid at a monthly rate equal to $150,000 per year.

The guaranty agreement provided, in relevant part:

> "[Defendant] hereby unconditionally *** guarantees to [plaintiff], *** the full and prompt payment to [plaintiff] at maturity *** of any indebtedness, obligations and liabilities of every kind and nature up to a maximum sum of $250,000, of U.S. Exteriors to [plaintiff] ***.
>
> [Defendant] hereby further agrees as follows:
>
> ***
>
> 2. Release of Guaranty. [Plaintiff] will release [defendant] from any further

liability under this Guaranty if: (i) Alan Meier [head of Rosenow Roofing], or *** Kenneth Hendricks [owner of plaintiff firm], in his sole discretion, determines that [defendant] has faithfully performed, and has not breached, all of his duties under the Employment Agreement; and (ii) [defendant] takes all reasonable steps requested by [plaintiff] in the collection of all sums due pursuant to the FVE contract with U.S. Exteriors, previously assigned to [plaintiff]; and (iii) a determination of [defendant's] performance under paragraph (ii) of this subparagraph will be deferred until the earlier of (a) all reasonable efforts to collect the amounts due under the FVE contract have been expended, or (b) June 17, 1999, shall have occurred; or (iv) the U.S. Exteriors indebtedness to [plaintiff] is paid in full."

After 90 days, defendant's employment contract with Rosenow Roofing expired, but the guaranty agreement, by its terms, remained in effect for one year. In June 1999, defendant received a letter with plaintiff's decision that defendant had "failed to take reasonable steps requested by [plaintiff]" to assist in collecting sums from FVE. The letter demanded $250,000 under the terms of the guaranty agreement.

In January 2002, plaintiff filed the complaint at issue here, claiming defendant breached the guaranty agreement and owed plaintiff $250,000, plus costs and interest.

Defendant testified at trial that his duties under his 90-day employment contract with Rosenow Roofing were to "facilitate collections, operation transfer, equipment evaluation, whatever was asked of me during that period of time." He said plaintiff prevented him from

attempting to collect on the FVE contracts during his employment despite persistence in urging plaintiff to approach and audit FVE. Defendant said he would have been acting "out of order" had he contacted FVE independently. Defendant admitted he was aware that Rosenow Roofing had other priorities besides the collection of the FVE contracts during the time of his employment. Defendant said that soon after the end of his employment contract, John Cox, a manager for plaintiff, asked defendant to go to FVE to evaluate the contracts, but defendant refused without additional compensation

Cox testified that in mid-September 1998, shortly before the end of defendant's employment contract, Cox asked defendant to assist with the FVE accounts, but defendant refused unless he received additional compensation. Cox said the company was unwilling to pay defendant more than the amount in the employment contract and defendant did not assist with the FVE accounts. Cox admitted that defendant urged Rosenow Roofing to conduct an audit of FVE during his 90 days of employment, but opined that an audit within the time frame advocated by defendant would not have been worth the expense. Cox said plaintiff collected no money from the FVE accounts and $830,000 of the U.S. Exteriors debt to plaintiff remained unpaid.

Jeffrey Stents, president of Rosenow Roofing in June 1998, said he negotiated the employment and guaranty contracts with defendant. He said the agreements were signed at the same time but they were separate documents. Stents said that the company's priorities were changing during the 90–day period of defendant's employment contract, but the first priority was to collect Rosenow Roofing receivables. Stents said defendant's obligation to help collect FVE accounts was to last for one year, not 90 days. The trial court found in favor of plaintiff.

Defendant appeals.

Plaintiff first argues that we should not consider these claims because defendant waived them under Supreme Court Rule 341(e)(7) (Official Reports Advance Sheet No. 21 (October 17, 2001), R. 341(e)(7), eff. October 1, 2001) ("[p]oints not argued [in an appellant's brief] are waived and shall not be raised in the reply brief, in oral argument or on petition for rehearing"). Our review of defendant's brief shows that his arguments were sufficient to survive waiver.

Defendant claims on appeal that plaintiff's actions were: (1) commercially unreasonable; (2) subject to equitable estoppel; (3) tainted by "unclean hands"; or (4) in breach of an implied covenant of good faith and fair dealing. Our standard of review is whether the trial court's decision was against the manifest weight of the evidence. See Standard Bank & Trust Co. v. Callaghan, 177 Ill. App. 3d 973, 978, 532 N.E.2d 1015 (1988) (whether an action is commercially reasonable is a question for the trier of fact and its findings will not be reversed unless they are against the manifest weight of the evidence); In re Marriage of Case, 351 Ill. App. 3d 907, 911, 815 N.E.2d 67 (2004) (a trial court's decision on the application of equitable estoppel will not be disturbed unless it is against the manifest weight of the evidence); Klehm v. Grecian Chalet, Ltd., 164 Ill. App. 3d 610, 615, 518 N.E.2d 187 (1987) (the applicability of the doctrine of unclean hands rests within the sound discretion of the trial court whose decision will not be disturbed unless it was against the manifest weight of the evidence); Dawdy v. Sample, 178 Ill. App. 3d 118, 125, 532 N.E.2d 1128 (1989) (generally, compliance with an implied covenant of good faith and fair dealing is a question of fact and the trial court's finding will be reversed only when it is contrary to the manifest weight of the evidence). "Against the manifest weight of the evidence"

means that the opposite conclusion is "clearly evident" or the finding is "unreasonable, arbitrary or not based on the evidence." 1350 Lake Shore Associates v. Mazur-Berg, 339 Ill. App. 3d 618, 628-29, 791 N.E.2d 60 (2003).

Commercial reasonableness is a standard of honesty and fair dealing. Servbest Foods, Inc. v. Emessee Industries, Inc., 82 Ill. App. 3d 662, 674, 403 N.E.2d 1 (1980). See also the Uniform Commercial Code, 810 ILCS 5/1-203 (West 2002). What is fair and "commercially reasonable" varies by product, industry and the time of controversy. Servbest, 82 Ill. App. 3d at 674. In cases involving a guaranty, "[a] guarantor should be entitled to expect a creditor to behave with at least a minimal degree of commercial reasonableness and care ***." North Bank v. Circle Investment Co., 104 Ill. App. 3d 363, 370, 432 N.E.2d 1004 (1982).

The doctrine of equitable estoppel is applied to prevent fraud and injustice. Gold v. Dubish, 193 Ill. App. 3d 339, 348, 549 N.E.2d 660 (1989). Conscience and honest dealing may require that a party be estopped when that party, by words or conduct, reasonably induces another to rely on his representations and change his position to his injury. Gold, 193 Ill. App. 3d at 348.

The applicability of the doctrine of unclean hands depends on the intent of a party, not the effect of its actions, and a court will find unclean hands only in a case of fraud or bad faith. Schivarelli v. Chicago Transit Authority, 355 Ill. App. 3d 93, 103, 823 N.E.2d 158 (2005).

"Every contract implies good faith and fair dealing between the parties to it." Bank One, Springfield v. Roscetti, 309 Ill. App. 3d 1048, 1059, 723 N.E.2d 755 (1999). But good-faith principles do not diminish the rights of a party to enforce the terms of a contract to the letter.

Bank One, 309 Ill. App. 3d at 1060. An implied covenant of good faith does not override or change the express terms of a contract. Bank One, 309 Ill. App. 3d at 1060. "The covenant of good faith and fair dealing does not enable a guarantor to read an obligation into a contract that does not exist." Bank One, 309 Ill. App. 3d at 1060, citing Northern Trust Co. v. VIII South Michigan Associates, 276 Ill. App. 3d 355, 368, 657 N.E.2d 1095 (1995). Where the express terms of the guaranty signed by a defendant negate the defendant's claims, then the plaintiff has not violated the duty of good faith and fair dealing. Bank One, 309 Ill. App. 3d at 1064.

Here, defendant's own testimony was his only evidence that plaintiff acted unreasonably or unfairly, or deprived defendant of the opportunity to fulfill his guaranty. Defendant admitted that his efforts to collect the FVE accounts consisted of urging others to conduct an audit. He did not explain why he would have been acting "out of order" had he tried to collect from FVE during his term of employment. Nor did he explain why he could not have tried to collect money from FVE between October 1998 and June 1999, other than to state his desire for additional compensation. The mere fact that plaintiff refused to pay defendant more money for work he was obligated to do under the guaranty agreement does not prove that plaintiff interfered with defendant's release from the guaranty.

The evidence before the trial court included the testimony of Cox and Stents who conceded that defendant urged them to audit FVE, but added that the companies had competing priorities at the time. This evidence supports the conclusion that business decisions, not bad faith, caused plaintiff to delay implementation of defendant's suggestions. The trial court heard unrebutted evidence from Cox that conducting a full audit of FVE in the time frame urged by

defendant would not have been cost-effective. With this evidence before it, the trial court's judgment in plaintiff's favor was not against the manifest weight of the evidence.

Nor did the trial court err in enforcing the terms of the guaranty agreement. The meaning of a guaranty contract is a matter of law. Cohen v. Continental Illinois National Bank & Trust Co. of Chicago, 248 Ill. App. 3d 188, 192, 618 N.E.2d 1060 (1993). Questions of law are reviewed *de novo*. Dean Management, Inc. v. TBS Construction, Inc., 339 Ill. App. 3d 263, 269, 790 N.E.2d 934 (2003). Guaranty contracts are to be strictly construed in favor of the guarantor. T.C.T. Building Partnership v. Tandy Corp., 323 Ill. App. 3d 114, 118, 751 N.E.2d 135 (2001) "A guarantor's liability is determined from the guarantee contract, which is interpreted by the general principles of contract construction." Cohen, 248 Ill. App. 3d at 192. Even where there are broad statements of guarantor liability, an unambiguous contract must be enforced as written. Cohen, 248 Ill. App. 3d at 192.

Here, the terms of the guaranty agreement were not ambiguous. Defendant guaranteed "unconditionally" to pay plaintiff up to $250,000, unless defendant: (i) fully performed all of his duties under the employment agreement, in the opinion of Meier or Hendricks; and (ii) took all reasonable steps requested by plaintiff to collect the sums due from FVE. The guaranty agreement provided that Meier or Hendricks would decide whether defendant's performance was satisfactory by, at the latest, June 17, 1999. The record shows that plaintiff notified defendant of his failure to meet the requirements in a letter dated June 21, 1999. The letter used the exact language of the agreement, stating that defendant had failed to take "all reasonable steps requested by [plaintiff]" in the collection of sums from FVE. The agreement did contain broad

statements of guarantor liability, such as the nonspecific phrase "all reasonable steps," but the agreement was unambiguous and must be enforced as written. See Cohen, 248 Ill. App. 3d at 192. Even when we construe the guaranty agreement in the light most favorable to defendant, the evidence does not support the conclusion that defendant fulfilled either his employment or guaranty agreement. Defendant admits that he refused to approach FVE when Cox asked him to do so. It is undisputed that defendant said he would perform the work for additional compensation, but compensation was not a part of the guaranty agreement. The inference apparent from the agreement is that defendant's release from the $250,000 guaranty would compensate his efforts. The evidence supports the conclusion that defendant breached the guaranty agreement and became responsible for the amount of the guaranty.

Defendant relies on McHenry State Bank v. Y & A Trucking, Inc., 117 Ill. App. 3d 629, 633, 454 N.E.2d 345 (1983), to argue that he should be discharged *pro tanto* from his guaranty obligation because plaintiff deprived him of the opportunity to protect himself during the term of his employment contract. In McHenry, the appellate court reversed the trial court's grant of summary judgment to the plaintiff, a lender. The court found it was commercially unreasonable for the plaintiff to fail to inform the guarantor of its discovery that the collateral for the loan, a tractor, had a faulty title. McHenry, 117 Ill. App. 3d at 631. This case is distinguishable. The evidence here did not show that plaintiff knew or suspected the funds due from FVE were uncollectible. Defendant's conclusion that plaintiff failed to act promptly enough on his recommendation to audit FVE, without more, does not show that the plaintiff took commercially unreasonable actions or withheld information about FVE from defendant.

Defendant also relies on Morris v. Columbia National Bank, 79 B.R. 777, 785 (N.D. Ill. 1987), where the federal district court held that inaction by a lender that increases the risk of a guarantor's default may violate the covenant of good faith and fair dealing and release the guarantor to the extent of his injury. See Barrett v. Shanks, 382 Ill. 434, 440, 47 N.E.2d 481 (1943) ("if [the person to whom the guaranty is made] fails to do an act enjoined upon him and such omission injures the guarantor, the latter is discharged to the extent of such injury"). The court in Morris was unable to decide on the facts before it whether the implied covenant of good faith and fair dealing was broken by inaction on the lender's part and remanded the cause to the bankruptcy court for a hearing. Morris, 79 B.R. at 786. The Morris court also found that the record was "not devoid of facts which might indicate bad faith" and instructed the bankruptcy court on remand to determine whether the lender's conduct was reasonable in light of the facts known to the lender and the lender's obligations to the guarantor. Morris, 79 B.R. at 785-86.

Here, there was no evidence of bad faith other than defendant's bald contention that plaintiff prevented him from approaching FVE. Defendant offered no witnesses or documents to support his claim. To the contrary, the testimony of Cox and Stents supported the conclusion that plaintiff asked defendant to assist in collecting the FVE accounts within the time frame established in the guaranty agreement, but defendant refused without additional compensation. Remand for an evidentiary hearing is unnecessary here where the record is devoid of evidence of bad faith. The judgment of the circuit court is affirmed.

Affirmed.

CAHILL, P.J., with BURKE and McBRIDE, JJ., concurring.