AFFIRM and Opinion Filed April 24, 2025

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-24-00915-CV

EXPORTTEK, INC. AND WESTERNTECH, INC., Appellants
V.
VISTA BANK, Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-23-07889

MEMORANDUM OPINION

Before Justices Smith, Kennedy, and Lewis
Opinion by Justice Kennedy

Exporttek, Inc. and Westerntech, Inc. (collectively "Borrowers") sued Vista Bank ("Bank") for breach of contract. The trial court rendered summary judgment in favor of Bank. In three issues, Borrowers assert the trial court erred in implicitly denying their motion to continue the hearing on Bank's motion for summary judgment and in granting Bank's motion for summary judgment because Bank breached the Loan Agreement by (1) accelerating payment on the Promissory Note without affording Borrowers an opportunity to cure and (2) wrongfully denying them access to a Delayed Draw Account. We affirm the trial court's May 9, 2024

order granting Bank summary judgment. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

In October 2020, Bank loaned $20,785,250 to Borrowers through the Main Street Lending Program. In connection therewith, Borrowers entered into a Loan Agreement with Bank and executed a Promissory Note ("Note").[1] Pursuant to the Loan Agreement, Borrowers were required to pay balances owed on their existing debts at other banking institutions, totaling $10,301,584.81, and maintain all of their deposit accounts with Bank.[2] In addition, Bank and Borrowers established a Delayed Draw Account into which $4,390,000 of the loan proceeds were deposited. Borrowers could not access this account until they satisfied certain conditions as set forth in the Loan Agreement.[3]

[1] The Loan Agreement contained standard entire-agreement and no-waiver provisions.

[2] Section 4.14. of the Loan Agreement provided:

> Deposit Accounts. Borrowers shall maintain all of [their] Accounts with [Bank] and shall not maintain any Accounts with another banking institution without the prior written consent of [Bank].

[3] More particularly, section 4.04(b) of the Loan Agreement provided:

> Contemporaneously with the execution hereof, Borrower[s] [have] established with [Bank] a delayed draw account, which will be initially funded with a portion of the proceeds of the Loan, in the aggregate amount of $4,390,000 (the "Delayed Draw Account") which amount shall remain in the Delayed Draw Account until the earlier to occur of (i) the Maturity Date or (ii) after [Bank] received evidence satisfactory to it that Borrower[s] [have] (x) a minimum Debt Service Coverage Ratio of no less than 1.4x for the prior four quarter period as of June 30, 2022, or (y) satisfies the Liquid Asset Requirements as of June 30, 2022; provided, however, in all instances no funds shall be released if an Event of Default has occurred and is continuing.

On or about July 8, 2022, Borrowers requested that Bank release the funds in the Delayed Draw Account. Bank reviewed Borrowers' internal financial statements to determine whether Borrowers met the requirements for access to same. During that review, Bank discovered that Borrowers were maintaining multiple deposit accounts outside of Bank, including over $8,300,000 at Comerica Bank, in violation of section 4.14 of the Loan Agreement. Bank denied Borrowers' request to release the Delayed Draw Account funds and, on July 18, 2022, sent Borrowers a notice of default stating Borrowers were in default for the following reason:

> Failure to hold all of your bank accounts at Vista Bank pursuant to Section 4.14 of the Loan Agreement. Section 4.14. states, "Borrower shall maintain all of its Accounts with Lender and shall not maintain any Accounts with another banking institution without the prior written consent of Lender."

Shortly thereafter, Bank met with Borrowers, and Borrowers requested that Bank waive the default and release the funds in the Delayed Draw Account. Bank declined to do so.

From July 25, 2022, to August 16, 2022, Borrowers sent Bank weekly updates outlining their efforts to transfer all of their accounts from other banks to Bank. Borrowers immediately reached out to multiple banks to obtain a loan to refinance their debt with Bank. On August 9, 2022, Borrowers accepted a term sheet with BMO Harris Bank to refinance the loan. In September 2022, Borrower's loan with Bank was paid off and Bank gave Borrowers credit for the Delayed Draw Account.

On June 13, 2023, Borrowers filed suit against Bank asserting it breached the Loan Agreement by immediately declaring they were in default of the Loan Agreement and demanding payment in full, and by refusing to allow them to draw funds from the Delayed Draw Account.[4] The trial court signed an Agreed Scheduling Order setting the case for trial on May 6, 2024, with a discovery deadline of April 7, 2024. On February 23, 2024, Bank filed a traditional motion for summary judgment urging Borrowers' breach of contract claims fail as a matter of law because Bank did not call or accelerate the loan, Bank did not prevent Borrowers from curing the default, and Borrowers were not entitled to draw on the Delayed Draw Account because they were in default under the Loan Agreement. Bank supported its motion for summary judgment with the Loan Agreement; the declaration of Landon Willess, Bank's Chief Lending Officer; the July 18, 2022 notice of default; and various emails between Borrowers and Bank regarding Borrowers' financials and migrating accounts at other banking institutions to Bank, and between Borrowers and other financial institutions regarding refinancing the loan. Borrowers filed their response to the motion for summary judgment four days before the then-scheduled hearing of April 5, 2024. Borrowers' response did not address their assertion Bank breached the Loan Agreement by failing to release funds from the Delayed Draw Account. With respect to Borrowers' claim Bank breached the Loan Agreement by allegedly

[4] Borrowers initially also asserted a claim for unjust enrichment. They dropped that claim after Bank filed a Rule 91a motion to dismiss.

accelerating payment on the Note and not allowing Borrowers to cure, Borrowers argued, "There is a question of material fact as to whether actions taken by Vista Bank in 2020, with full knowledge of the existence of [Borrowers' other] accounts, amount to written consent." Alternatively, Borrowers requested a continuance of the summary judgment hearing on the basis that "the motion for summary judgment addresses complex fact issues about what [Bank] knew and when" and that Borrowers "intend to serve [Bank] with written discovery" before the April 7, 2024 discovery deadline. In response to Bank's motion for summary judgment, Borrowers relied on the pleadings on file in the case; their own answers to Bank's Interrogatories; and the declaration of Jamil Ashour, Borrowers' President and Chief Executive Officer, stating he believed, based on his communications with Landon Willess and Bank's attorney, that Bank was accelerating the loan.[5] In addition, Borrowers attached an incomplete and unauthenticated Dallas Business Journal article titled "How Vista Bank benefited from relief program" to its response.[6] On April 2, 2024, Bank filed a reply to Borrowers' response. Bank included an

[5] Pleadings are not competent summary judgment evidence, even if sworn or verified. *Sher v. Fun Travel World, Inc.*, 118 S.W.3d 500, 502 (Tex. App.—Dallas 2003, no pet.) (citing *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995)). In addition, generally, a party cannot rely on its own answer to an interrogatory as summary judgment evidence. *See* TEX. R. CIV. P. 197.3 (answers to interrogatories may be used only against the responding party); *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000) (per curiam); *Watson v. Henderson*, No. 05-08-01158-CV, 2010 WL 175082, at *3 (Tex. App.—Dallas Jan. 20, 2010, pet. denied) (mem. op.).

[6] While it is not entirely clear why Borrowers attached this article, or its relevance to their breach of contract claims, they highlighted a portion of the article stating, "The lending program has also provided Vista Bank with a windfall of fee income. The bank sold 95% of the loans to the Boston Fed and received servicing fees for the loans."

objection to the Dallas Business Journal article in same.[7] On April 4, 2024, Borrowers filed a surreply to Bank's reply.[8] On April 9, 2024, Borrowers filed a motion for continuance of the May 6, 2024 trial setting. The trial court heard Bank's motion for summary judgment on April 12, 2024.[9] On May 9, 2024, the trial court entered an order granting Bank summary judgment without specifying the grounds therefor. Borrowers filed a motion for reconsideration, which the trial court denied on July 29, 2024. This appeal followed.

DISCUSSION

I. Continuance

In their first issue, Borrowers assert the trial court erred in denying their motion to continue the hearing on Bank's motion for summary judgment. Bank responds urging Borrowers failed to preserve this complaint and, nevertheless, the trial court did not abuse its discretion by not granting Borrowers a continuance.

[7] Documents must be authenticated before a court may consider the documents to be competent summary judgment evidence. TEX. R. CIV. P. 166a(c); *In re Estate of Guerrero*, 465 S.W.3d 693, 703 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (en banc).

[8] The surreply references a declaration of Jamil Ashour, but the declaration is not attached to the surreply that is part of the appellate record. The surreply is not verified.

[9] Three days after the summary judgment hearing, Borrowers filed a first amended response to the motion and motion for continuance. There is no indication in the record that Borrowers sought and obtained leave to file the untimely response. In addition, there is no indication in the record that the trial court considered same. Accordingly, we do not consider the amended response and motion, or any documents attached thereto, on appeal. *See WTFO, Inc. v. Braithwait*, 899 S.W.2d 709, 721 (Tex. App.—Dallas 1995, no writ) (when nothing in record indicates court granted leave to file late response, we presume court did not consider same). In addition, we do not consider Borrowers' First Amended Motion for Continuance of Trial and Motion to Amend Scheduling Order. That motion addressed the trial setting of May 6, 2024, not the summary judgment hearing, and was rendered moot by the granting of summary judgment. In addition, no ruling on that motion appears in the record.

A. Preservation of Complaint

As a prerequisite to presenting a complaint for appellate review, the record must show the complaint was made to the trial court by a timely request, objection, or motion and the trial court (1) ruled on the request, objection, or motion, either expressly or impliedly, or (2) refused to rule on the request, objection, or motion and the complaining party objected to the refusal. TEX. R. APP. P. 33.1(a). A party who fails to obtain a ruling on a motion for continuance fails to preserve error for appeal. *Hightower v. Baylor Univ. Med. Ctr.*, 251 S.W.3d 218, 224 (Tex. App.—Dallas 2008, pet. struck).

While Borrowers included in the prayer in their response to Bank's motion for summary judgment a request that the court enter an order continuing the hearing on the motion for a reasonable time to allow Borrowers to complete discovery, they have failed to establish on appeal that they obtained a ruling on same or that the trial court refused to rule on same. Thus, they have failed to preserve this complaint for appeal. *Id.* And even assuming the trial court impliedly denied their request, *see* TEX. R. APP. P. 33.1(a)(2)(A) (permitting an implied ruling on request, objection, or motion to preserve error); *Williams v. Bank One, Tex., N.A.*, 15 S.W.3d 110, 114–15 (Tex. App.—Waco 1999, no pet.) (holding that trial court impliedly ruled on motion for continuance filed two days before summary judgment hearing by granting motion for summary judgment), for the reasons set forth herein, we conclude that it did not abuse its discretion.

B. Standard of Review

We review the trial court's decision to grant or deny a motion for continuance of a summary judgment hearing for an abuse of discretion. *Cooper v. Circle Ten Council Boy Scouts of Am.*, 254 S.W.3d 689, 696 (Tex. App.—Dallas 2008, no pet.) (citing *Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996)). "A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002).

C. Rule 252 Requirements

A party contending that he has not had an adequate opportunity for discovery before a summary judgment hearing must file either an affidavit explaining his need for additional discovery or a verified motion for continuance. *Tenneco*, 925 S.W.2d at 647; *see also* TEX. R. CIV. P. 166a(g), 251, 252. The affidavit must describe the evidence sought, explain its materiality, and set forth facts showing the due diligence used to obtain the evidence prior to the hearing.[10] *Cooper*, 254 S.W.3d at 696. In

[10] Rule 252 requires that if a party applies for continuance to conduct discovery:

> the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; that such testimony cannot be procured from any other source; and, if it be for the absence of a witness, he shall state the name and residence of the witness, and what he expects to prove by him; and also state that the continuance is not sought for delay only, but that justice may be done; provided that, on a first application for a continuance, it shall not be necessary to show that the absent testimony cannot be procured from any other source.

TEX. R. CIV. P. 252.

deciding whether the trial court abused its discretion by denying a motion for continuance, we consider factors such as the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004).

With respect to discovery, in their response to the motion for summary judgment, which includes a declaration by Borrower's counsel that every statement in the response is within his personal knowledge and is true and correct, Borrowers asserted:

- The discovery has not expired.
- The discovery date expires on April 7, 2024.
- The motion for summary judgment addresses complex fact issues about what Defendant[] knew and when[,] which can only be resolved through further discovery.
- Plaintiff[s] intend to serve Defendant with written discovery prior to end of discovery deadline.
- Plaintiffs seek an amendment to the scheduling order to extend the time of the discovery to allow Plaintiffs to take the deposition of Defendant's officer, Landon Willes[s].
- Specifically, the actions of the bank in the fast changing COVID regulatory climate while fast tracking loans for a "windfall" to clients requires serious investigation as to what Vista Bank was doing and whether they punished []Plaintiff[s] for Vista Bank's hasty decisions.

With respect to the declaration of Jamil Ashour, attached to Borrowers' response requesting a continuance of the summary judgment hearing, the only reference to discovery is in paragraph 22 thereto, which states:

> Vista Bank['s] reasons for acceleration are completely separate from the issues raised in the agreements and assurances made by bank

> personnel will demonstrate this, discovery including interrogatories and deposition will [sic] who actions and statements by the bank that are waiver and/or severance of provisions which the bank now claims as rationale.

These general and conclusory assertions do not satisfy the requirements of Rule 252. At best, Borrowers provided a vague description of the discovery they sought. Further, Borrowers failed to establish the materiality of any proposed discovery. Borrowers' claims are for breach of contract and the contract at issue contained entire-agreement and no-waiver provisions. Motivations are not germane to the resolution of Borrowers' breach of contract claims. Moreover, Borrowers did not provide any information regarding the diligence on their part in obtaining discovery prior to the hearing. *See Lee v. Haynes & Boone, L.L.P.*, 129 S.W.3d 192, 198 (Tex. App.—Dallas 2004, pet. denied). In fact, the record reflects Borrowers filed suit on June 13, 2023. Thus, the case had been pending for over nine months at the time Borrowers filed their response to the motion for summary judgment requesting a continuance of the hearing. In addition, an agreed scheduling order contained a discovery deadline of April 7, 2024. Borrowers waited until six days before that deadline to assert they needed additional time to conduct discovery. Furthermore, the record shows the hearing on the motion for summary judgment was held 49 days after the motion was filed. And generally, it is not an abuse of discretion to deny a motion for continuance when the party has received the twenty-one days' notice required by rule 166a(c). *Id.*

On the record before us, we cannot conclude that the trial court abused its discretion by not continuing the hearing on Bank's motion for summary judgment. *See Oglesby v. Richland Trace Owners Ass'n, Inc.*, No. 05-19-01457-CV, 2021 WL 3412451, at *3 (Tex. App.—Dallas Aug. 4, 2021, no pet.) (mem. op.) (no abuse of discretion in denying continuance when appellant did not explain the materiality of the discovery sought and how it was anticipated to impact the elements at issue and did not state or show that due diligence was exercised in procuring discovery from appellee during the four months the case had been on file); *see also MacKenzie v. Farmers Tex. Cnty. Mut. Ins. Co.*, No. 05-20-00214-CV, 2022 WL 951028, at *7 (Tex. App.—Dallas Mar. 30, 2022, pet. denied) (mem. op.) (no abuse of discretion in denying motion for continuance when case had been on file for over a year and appellant's affidavit did not describe the substance of evidence sought or its materiality and did not explain diligence in seeking evidence). We resolve Borrowers' first issue against them.

II. Summary Judgment

In their second and third issues, Borrowers assert Bank breached the Loan Agreement by accelerating the Note without providing Borrowers an opportunity to cure their default and by refusing to release funds from the Delayed Draw Account.

A. Standard of Review

Because summary judgment is a question of law, we review a trial court's summary judgment decision de novo. *See Provident Life & Accident Ins. Co. v.*

Knott, 128 S.W.3d 211, 215 (Tex. 2003); *Hightower*, 251 S.W.3d at 221. The standard of review for a traditional summary judgment motion pursuant to Texas Rule of Civil Procedure 166a(c) is threefold: (1) the movant must show that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed, material fact issue precluding summary judgment, the court must take evidence favorable to the nonmovant as true; and (3) the court must indulge every reasonable inference in favor of the nonmovant and resolve any doubts in the nonmovant's favor. TEX. R. CIV. P. 166a(c); *Pustejovsky v. Rapid–Am. Corp.*, 35 S.W.3d 643, 645–46 (Tex. 2000); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985) (plurality op.).

A defendant moving for summary judgment must either (1) disprove at least one element of the plaintiff's theory of recovery or (2) plead and conclusively establish each essential element of an affirmative defense. *Biaggi v. Patrizio Rest. Inc.*, 149 S.W.3d 300, 303 (Tex. App.—Dallas 2004, pet. denied). Here, Borrowers' theory of recovery was breach of contract. The essential elements of a breach of contract claim are: (1) the existence of a valid contract; (2) Plaintiff performed or tendered performance under the contract; (3) Defendant breached the contract; and (4) Plaintiff suffered damages as a result of Defendant's breach. *Sharifi v. Steen Auto., L.L.C.*, 370 S.W.3d 126, 140 (Tex. App.—Dallas 2012, no pet.). Bank's motion for summary judgment focused on the essential element of breach.

B. Borrowers' Claim Bank Breached the Agreement by Accelerating the Loan and Demanding Payment on Note

The issue of whether there has been an acceleration of payments under a note usually arises in the context of whether the statute of limitations bars an action by the noteholder. *See, e.g.*, *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001) (acceleration requires two acts: (1) notice of intent to accelerate, and (2) notice of acceleration); *Burney v. Citigroup Glob. Mkts. Realty Corp.*, 244 S.W.3d 900, 903 (Tex. App.—Dallas 2008, no pet.) (same). Here, we are faced with an assertion Bank accelerated payment without affording Borrowers an opportunity to cure their default under the agreement. This assertion necessarily implies a cure provision applies to a section 4.14. default.[11]

In support of its motion for summary judgment on Borrowers' claim Bank breached the Loan Agreement by accelerating the Note, Bank presented the Loan Agreement, which required any notice, demand or request be in writing, and its July 18, 2022 notice advising Borrowers that they were in default of the Loan Agreement for the following reason:

> Failure to hold all of your bank accounts at Vista Bank pursuant to Section 4.14 of the Loan Agreement. Section 4.14. states, "Borrower shall maintain all of its Accounts with Lender and shall not maintain any Accounts with another banking institution without the prior written consent of Lender."

[11] Article VII, section (b) provided for a 30-day grace period for certain events of default with an additional 30-day extension under certain circumstances.

The notice further provided:

> Vista Bank reserves the right to take any and all actions necessary to protect its interest under the Loan Agreement and its failure to take, or delay in taking, such actions does not constitute a waiver of its rights under the Loan Agreement.

That notice did not accelerate payment under the Note and did not demand immediate payment of same. *See, e.g.*, *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233–34 (Tex. 1982) (lender's notice informing borrower that his failure to cure the breach notice may result in acceleration of sums secured by the Deed of Trust was insufficient to give notice lender intended to accelerate the note); *see also Sarasota, Inc. v. Ballew*, No. 03-00-00258-CV, 2001 WL 194031, at *3 (Tex. App.—Austin Feb. 28, 2001, pet. denied) (not designated for publication) (default notice providing that lender "intends" to exercise its right to foreclose on property "indicates movement toward acceleration and foreclosure" but is "neither unequivocal nor sufficient alone" to express intent to accelerate when the letter "does not mention acceleration" or "state unequivocally that acceleration will occur or when it will occur"). Thus, Bank satisfied its initial summary judgment burden with respect to Borrowers' acceleration theory as a basis for breach of the Loan Agreement, and the burden shifted to Borrowers to produce evidence raising a fact issue. *See Centequ Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) ("Once the defendant produces sufficient evidence to establish the right to summary judgment, the plaintiff must present evidence sufficient to raise a fact issue.").

Borrowers failed to produce evidence raising a fact issue. Their responses to interrogatories are not competent summary judgment evidence. *See* TEX. R. CIV. P. 197.3 (answers to interrogatories may be used only against the responding party); *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000); *Watson v. Henderson*, No. 05-08-01158-CV, 2010 WL 175082, at *3 (Tex. App.—Dallas Jan. 20, 2010, pet. denied) (mem. op.). Moreover, Borrowers' representative Jamil Ashour's declaration concerning conversations he had with Landon Willess and Bank's attorney and his subjective beliefs about Bank's motivation for enforcing section 4.14 of the Loan Agreement and about acceleration do not create a fact issue regarding whether Bank accelerated the Note and demanded immediate payment.[12] *See, e.g.*, *Lee*, 129 S.W.3d at 197 (subjective belief regarding reason for discharge was a mere conclusion and not competent summary judgment evidence); *Tabak v. First City Bank-Fondren S.*, No. 01-92-01007-CV, 1993 WL 30580, at *2 (Tex. App.—Houston [1st Dist.] Feb. 11, 1993, no writ) (not designated for publication) ("We find no cases, and the appellant cites none, that permit a noteholder to communicate an effective notice of acceleration with no written communication.").

[12] Jamil Ashour's declarations: Landon Willess indicated that swift refinancing and prompt termination of the loan was preferred and that in addition to asserting a default under section 4.14 of the Loan Agreement Bank would be seeking further grounds to terminate the agreement; Bank's counsel indicated that the transfers of the accounts from other banking institutions to Bank would not cure the default because Bank was getting a lot of pressure from the Boston Fed; and Landon Willess made comments about Bank not being sophisticated enough to handle Borrowers' growing business and Borrowers would be better served by a larger bank in Dallas do not create a fact issue as to whether Bank accelerated the Note and demanded immediate payment. None of the alleged statements reference an acceleration of the Note or a demand for immediate payment. Moreover, these alleged verbal conversations could not effect an acceleration of the Note as all notices and demands had to be in writing.

Besides, none of the alleged statements by Landon Willess or Bank's attorney include an assertion Bank was accelerating the Note. Moreover, the Loan Agreement provided that any notice be in writing. Here, the operative writing is the July 18, 2022 Notice of Default Under Loan Agreement No. 81542. And that notice did not demand immediate payment of the loan, and it did not give notice of an intent to accelerate the Note. Because Bank met its summary judgment burden with respect to Borrowers' claim it breached the Loan Agreement by accelerating payment of the Note without affording Borrowers an opportunity to cure and because Borrowers failed to present competent summary judgment evidence raising a genuine issue of fact to preclude summary judgment, we conclude the trial court did not err in granting Bank summary judgment on this claim. Because Borrowers' assertion regarding being afforded an opportunity to cure the default is premised on Borrowers' assertion Bank accelerated payment of the Note, which we have resolved against Borrowers, we need not address that assertion. TEX. R. APP. P. 47.1. We overrule Borrowers' second issue.

C. Borrowers' Claim Bank Breached the Loan Agreement by Refusing to Release Funds from the Delayed Draw Account

Section 4.04 of the Loan Agreement governed Borrowers' right to withdraw funds from the Delayed Draw Account. Section 4.04(a) stated, **"[T]HE FUNDS IN THE DELAYED DRAW ACCOUNT ARE BEING HELD AT AN ACCOUNT AT [BANK] UNTIL THE CONDITIONS RELATED TO BORROWERS[']**

OPERATIONS ARE MET." The conditions were set forth, in part, in section 4.04(b):

> Contemporaneously with the execution hereof, Borrower has established with lender a delayed draw account, which will be initially funded with a portion of the proceeds of the Loan, in the aggregate amount of $4,390,000.00 (the "Delayed Draw Account") which amount shall remain in the Delayed Draw Account until the earlier to occur of (1) the Maturity Date or (2) after [Bank] receives evidence satisfactory to it that Borrower has (x) a minimum Debt Service Coverage Ratio of no less than 1.4 for the prior four quarter period as of June 30, 2022, or (y) satisfies the Liquid Asset Requirements as of June 30, 2022; *provided, however,* in all instance *no funds shall be released if an Event of Default has occurred and is continuing*.

(emphasis added). Among the Events of Default under the Loan Agreement was "[t]he failure of any Person other than [Bank] to punctually and promptly perform any covenant, agreement, obligation or condition contained herein." One of those covenants was section 4.14 of the Loan Agreement, which required Borrowers to maintain all of their accounts with Bank and not to maintain accounts at any other banking institution without the prior written consent of Bank.

The summary judgment evidence established Borrowers attempted to access funds in the Delayed Draw Account in July 2022. At that time, and at all times thereafter until Borrowers refinanced the loan and the Loan Agreement was terminated, Borrowers were in default of section 4.14 of the Loan Agreement for failing to maintain all of their accounts at Bank and maintaining accounts at other banking institutions. Accordingly, Borrowers were not entitled to access the funds

in the Delayed Draw Account and Bank did not breach the Loan Agreement by denying their request for access to same. We overrule Borrowers' third issue.

CONCLUSION

We affirm the trial court's May 9, 2024 Order Granting Vista Bank's Traditional Motion for Summary Judgment.

/Nancy Kennedy/
NANCY KENNEDY
JUSTICE

Lewis, J., concurring.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EXPORTTEK, INC. AND WESTERNTECH, INC., Appellants	On Appeal from the 44th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-23-07889.
No. 05-24-00915-CV V.	Opinion delivered by Justice Kennedy. Justices Smith and Lewis participating.
VISTA BANK, Appellee	

In accordance with this Court's opinion of this date, the trial court's May 9, 2024 Order Granting Vista Bank's Traditional Motion for Summary Judgment is **AFFIRMED**.

It is **ORDERED** that appellee VISTA BANK recover its costs of this appeal from appellant EXPORTTEK, INC. AND WESTERNTECH, INC.

Judgment entered this 24th day of April 2025.