[Nos. B142310, B143705. Second Dist., Div. Three. Feb. 10, 2003]

SUMMIT INDUSTRIES OF NEVADA, INC. et al., Plaintiffs and Respondents,
v.
LOS ANGELES COMMUNITY DEVELOPMENT BANK, Defendant and Appellant.

(Los Angeles County Super. Ct. No. VC027696).

Caldwell, Leslie, Newcombe & Pettit, David Pettit, Mary Newcombe; Greines, Martin, Stein & Richland and Robin Meadow for Defendant and Appellant.

Robert S. Lewin and James D. White for Plaintiffs and Respondents.

INTRODUCTION

KITCHING, J.

*1 Appellant and defendant Los Angeles Community Development Bank (LACDB or the bank) appeals the trial court's judgment in favor of plaintiffs and respondents Summit Industries of Nevada, Inc. (Summit) and its president and sole shareholder, Lindsey Austin (Austin), in the amount of $11.7 million. Finding the parties had entered into an implied workout agreement, the trial court determined LACDB was not justified in declaring default and foreclosing on its loan to Summit in the amount of $2.5 million. The trial court awarded Summit over $7.2 million for the total loss of Summit's business and assets, prejudgment interest in excess of $2 million and $2.4 million as attorney fees. We reverse the judgment of the trial court, as well as the order awarding Summit and Austin attorney fees and costs.

Pursuant to controlling authority (Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 261 Cal.Rptr. 735 (hereafter Price)), the trial court erred by determining that the parties had entered into an implied workout agreement based upon a course of conduct. LACDB was legally justified in declaring default and accelerating the loan. In addition, Summit breached the parties' loan agreement by not ensuring that after LACDB funded the loan, LACDB would receive first lien position on Summit's account receivables formerly held by Summit's previous financing company, Pine Cobble. We therefore instruct the trial court to enter judgment in favor of LACDB on plaintiffs' complaint.

FACTUAL AND PROCEDURAL BACKGROUND

1. Los Angeles Community Development Bank

Following the 1992 Los Angeles riots, the City of Los Angeles established LACDB as a nonprofit, public benefit corporation, the purpose of which was to create jobs for residents of an impoverished area in South Central Los Angeles, known as the Empowerment Zone (the Zone.)

To qualify for a LACDB loan, a borrower had to agree to locate in the Zone and create jobs there. The borrower also had to show it was unable to obtain a loan from a traditional private lending source.

2. Summit and Austin

Austin, a sophisticated and experienced businessman was, at all relevant times, the president, chief operating officer and sole shareholder of Summit, which was in the business of manufacturing stone counter tops and related bathroom and kitchen items. Summit sold its products to home improvement stores among others. Summit's manufacturing plant, Industrias Sandelos, S.A. de C.V. (Sandelos), was located in Tijuana, Mexico. Summit's California facility was located in Santa Fe Springs.

3. Summit's Financing

Prior to obtaining financing from LACDB, a factoring company called Pine Cobble financed Summit. Summit assigned Pine Cobble its account receivables in return for Pine Cobble paying to Summit a percentage of the amount owing on the invoices.

In 1996, Pine Cobble requested that Summit pay its obligations to Pine Cobble. Summit, therefore, needed a new lender to pay off Pine Cobble. Don Perry, Pine Cobble's senior vice president introduced Austin to Marv West, an LACDB loan officer. Austin informed West that Summit was willing to locate in the Zone. West told Austin, however, that Summit would need a turn-down letter from a bank. Pine Cobble then sent Summit a letter terminating their relationship because of Pine Cobble's “unsustainable concentration of exposure to Summit.”

*2 In June 1997, LACDB conditionally approved Summit's request for a $2.5 million loan to repay Summit's debts to Pine Cobble. By August, Summit and Pine Cobble disputed the total amount owed Pine Cobble. In addition, LACDB discovered unresolved tax liens against Austin. By early September, these problems were resolved. As to the tax liens, Summit agreed to provide LACDB with a letter of credit to be issued by Founders National Bank (Founders), which was to hold $456,000 of the loan proceeds as security for the letter of credit.

4. The September 5, 1997 Loan Agreement

On September 5, 1997, Summit and LACDB entered into a written “Business Loan Agreement” (the loan agreement) pursuant to which LACDB agreed to loan Summit $2.5 million “to fully repay the Pine Cobble Loan.” Austin, provided a written guarantee securing the loan.

The loan agreement required Summit to provide LACDB with clear title and first lien position on all of Summit's assets, including the account receivables held by Pine Cobble once LACDB, on behalf of Summit, paid Pine Cobble for its account receivable financing extended to Summit.FN1 Specifically, section 3.3 of the loan agreement provided: “Borrower shall have provided to Lender ... each of the following duly executed documents: (a) the Pine Cobble Release ...,” which section 1.39 of the loan agreement defined as: “that certain waiver and release agreement, in form and content acceptable to [LACDB], pursuant to which Pine Cobble agrees that it shall accept the proceeds of the Loan as full satisfaction of the outstanding balance of the

Pine Cobble Loan, and that upon receipt of said proceeds, Pine Cobble ... shall fully release the Pine Cobble Security Interest FN2 and all claims against [Summit] with respect to the Pine Cobble Loan."

FN1. Section 2.6 of the loan agreement, entitled "Security and Guaranty," provided in pertinent part: "As security for the repayment by Borrower of all Indebtedness, Borrower shall cause the execution and delivery to Lender, prior to the Closing Date, of the Related Documents to create a first priority lien on all of Borrower's Assets...."

FN2. Section 1.40 of the loan agreement defined "Pine Cobble Security Interest" as "the first priority security interest held by Pine Cobble in certain of [Summit's] Assets as security for the repayment of the Pine Cobble Loan."

Likewise, section 3.5 of the loan agreement required that Summit "shall have provided in form and substance satisfactory to [LACDB] proof that: (a) any and all Security Interests FN3 in the Collateral FN4 have been released (or, with respect to the Pine Cobble Security Interest, will be released upon Pine Cobble's receipt of the proceeds of the Loan)...."

FN3. Section 1.45 of the loan agreement defined "Security Interests" to mean and include "without limitation any type of collateral security, whether in the form of a lien, charge, mortgage, deed of trust, assignment, pledge, chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever, whether created by law, contract, or otherwise."

FN4. Section 1.13 of the loan agreement defined "Collateral" as "without limitation all property and assets granted as collateral security for the Loan, whether real or personal property, whether granted directly or indirectly, whether granted now or in the future, and whether granted in the form of a security interest, mortgage, deed of trust, assignment, pledge, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien, charge, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever, whether created by law, contract, or otherwise."

Moreover, pursuant to section 4.7 of the loan agreement, Summit represented and warranted that "no other event has occurred which may materially adversely affect [Summit's] ... assets ... or any of [Summit's] assets...." Similarly, section 4.9 of the loan agreement provided: "[Summit] has not entered into or granted any security agreement, or permitted the filing or attachment of any Security Interest on or affecting any of the Collateral that would be prior or that may in any way be superior to [LACDB's] Security Interests and rights in and to the Collateral, except as disclosed to and acknowledged by [LACDB] in writing."

Finally, the loan agreement provided that certain events would constitute events of default. For instance, section 9.5, entitled "Defective Collateralization," provided that it shall be an event of default if there is a "failure of the Security Agreement to create a valid and perfected Security Interest[ ] at any time and for any reason." Likewise section 9.10, entitled "Adverse Change," provided that it shall be an event of default if "[a] material adverse change occurs in the ... assets ... of [Summit], or [LACDB] in its sole judgment believes the prospect of payment or performance of the Indebtedness is Impaired.” Section 9 .12, entitled “Sale of Collateral,” provided it shall be an event of default if there is a “sale, transfer, hypothecation, assignment or encumbrance, whether voluntary, involuntary or by operation of law, without [LACDB's] prior written consent, of all or any part of or interest in any personal or real property collateral required hereby.” Lastly, section 9.13, entitled “Insecurity,” provided that the existence of “any event or condition which [LACDB] in good faith believes impairs, or is substantially likely to impair, the prospect of payment or performance by [Summit] of its obligations ...” shall constitute an event of default. Regarding payment delinquencies, Summit had no right to cure and was not entitled to a notice of default.

*3 Summit further agreed that “[o]n or before the Closing Date, Borrower shall have leased, purchased or otherwise procured the use of a warehouse in the Empowerment Zone, which, when operational, shall be used as [Summit's] principal warehouse in Southern California.” In addition, the agreement provided that “[a]t all times until the outstanding balance of the Indebtedness has been repaid in full, [Summit's] principal Southern California warehouse shall be the warehouse located in the Empowerment Zone.”

Summit further agreed to “[c]reate a minimum of 71 new full time jobs.... A minimum of 36 of these new positions shall be made available to residents of the Empowerment Zone. Such jobs shall be filled by no later than the second anniversary of the disbursement of the Loan proceeds.”

The loan agreement also contained an integration clause: “This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.” Lastly, the loan agreement provided that LACDB “shall not be deemed to have waived any right under this Agreement[,] unless such waiver is given in writing and signed by [LACDB]. No delay or omission on the part of [LACDB] in exercising any right shall operate as a waiver of such right or any other right. A waiver by [LACDB] of a provision of this Agreement shall not prejudice or constitute a waiver of [LACDB's] right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by [LACDB], action or inaction by [LACDB], nor any course of dealing between [LACDB] and [Summit], or between [LACDB] and Guarantors, shall constitute a waiver of any of [LACDB's] rights or of any obligations of [LACDB] or of Guarantors as to any future transactions.”

5. The Loan Is Funded

The loan funded on September 9, 1997. In accordance with instructions signed by Austin, the loan proceeds were disbursed as follows: (1) $1,279,360 to Pine Cobble; (2) $470,640 to Founders to issue the letter of credit to LACDB to cover the Austin tax liens (which funds Founders subsequently returned to LACDB); (3) $711,500 to Summit; and (4) $38,500 to LACDB for fees and expenses. After paying Pine Cobble, Austin testified that LACDB was to be in “first position on a blankets [sic] UCC-1 filing on everything.”

6. Problems Develop with the Loan

After the loan proceeds were disbursed, Pine Cobble asserted the amount disbursed to it ($1,279,360) was insufficient to satisfy Summit's debt, and Summit owed another $780,000. In addition, LACDB learned that Pine Cobble's assignment to LACDB of its security interest in Summit's existing account receivables was ineffective because Pine Cobble had previously assigned its rights in the account receivables to Capital Factors (Capital).FN5

FN5. Throughout the remainder of the opinion, this incident shall be referred to as the Pine Cobble assignment. Neither LACDB nor Summit pursued legal action against Pine Cobble for its sale of Summit's account receivables. Apparently, sometime in the fall of 1997, Pine Cobble went out of business.

*4 During this time frame, Austin testified that all three lenders, LACDB, Pine Cobble and Capital, began calling Summit's customers and suppliers demanding payment on the same outstanding invoices. Austin testified that as a result Summit's customers developed concerns about Summit, and Summit's orders started to decline, the big customers did not place orders, and because Summit did not have factor financing, Summit was left with no working capital.

7. The Parties Settle the Loan Disputes

In November 1997, the parties entered into a settlement agreement and a “First Amendment to Business Loan Agreement” (the amendment), which ratified the original disbursement of the loan proceeds with one exception. The sum of $470,640, originally disbursed to Founders for the letter of credit as security for the tax liens against Austin, was disbursed to Capital “as full payment of all outstanding debts owing by Summit to Pine Cobble, and in consideration of Capital's termination of its Security Interest in the Existing Accounts Receivable.” Capital then released its security interest in Summit's account receivables and executed a letter of instruction to Summit's customers, in a form approved by Summit, advising them to make payment to LACDB. Summit granted LACDB a security interest in its existing and future accounts receivable. FN6

FN6. On appeal, Summit claims that the settlement agreement and amendment were forced upon it by LACDB. As noted above in section 6 of the Factual and Procedural Background, Summit also claims it lost business during the fall of 1997 because of the Pine Cobble assignment. However, the day the settlement agreement was signed, Austin, on behalf of Summit, wrote West at LACDB to inform him that Summit's October sales were 16 percent up from the previous year, it had hired 14 employees in the Zone and that “[a]ll in all business and opportunities for Summit Industries are looking better and better everyday and all of this is due to the dedication of the staff of the Los Angeles Community Development Bank and the mission in which it stands.”

Austin testified that at this time LACDB demanded Summit allow it to retain $160,000 from the anticipated payments on the account receivables while it sorted out the accounting problems created by the assignment of the receivables to Capital. LACDB claimed it retained $160,000 as security against the potential IRS claims against Austin.FN7

FN7. Sometime after the litigation was filed, the bank applied the $160,000 against the amount due and owing on Summit's loan.

8. Summit Is in Default

Six months after the loan funded, Summit had not secured a warehouse in the Zone. In addition, Summit was a month late with its January 1998, payment and failed to make the February, March or April payments.

On March 19, 1998, LACDB sent Summit a formal notice of default, identifying three defaults: (1) Summit's delinquent payments; (2) Summit's failure to provide quarterly financial statements prepared by certified public accountants; and (3) Summit's failure to locate its headquarters in the Zone.

At trial, Austin blamed Summit's delinquencies upon a slow-down of orders in January 1998, and a shortage of cash, all stemming from the Pine Cobble assignment. West from LACDB testified he told Austin at this time that he hoped LACDB would work with Summit to restructure the loan if Summit got into the Zone. West also testified, however, that Summit had to become current on the loan before the bank would consider restructuring.

9. LACDB and Summit Attempt to Resolve the Defaults

Sometime during April 1998, Vincent Pitts in LACDB's Loan Administration Department became responsible for the Summit loan. By April 30, 1998, Summit was delinquent in the amount of approximately $173,000. On that date, Summit submitted four checks totaling $43,584 with instructions to deposit one check each week.

*5 On May 27, 1998, Austin met with LACDB representatives, including West and Pitts. They discussed Summit's plans to obtain account receivable financing to become current on the loan. LACDB was willing to subordinate its senior lien on Summit's account receivables, as long as the proceeds went to cure Summit's delinquencies. Austin indicated it would be “extremely easy” to obtain account receivable financing by June 15, 1998. At trial, Austin testified that Pitts agreed to provide Austin with a draft subordination agreement to provide to prospective account receivable financiers. LACDB's chief financial officer, Gordon LeJeune, testified that Austin began asking for a subordination agreement from April on.

On June 2, 1998, Pitts wrote to Austin confirming Austin's commitments to obtain account receivable financing by June 15, 1998, make the loan current by June 30, 1998, and provide quarterly Employment Development Department (EDD) reports to LACDB. By letter dated June 4, 1998, Austin wrote to LACDB stating that he would not make the loan current by June 30, 1998, but that he could hopefully pay $86,000 of the $129,000 due and owing. Austin also agreed to provide the EDD reports to verify employment of individuals in the Zone. Lastly, Austin expressed his commitment to continue looking for a building in the Zone.

On June 19, 1998, Austin wrote Pitts asking for a subordination agreement, stating that during the May 27 meeting, Pitts had agreed to provide one. Austin informed Pitts that he had three account receivable lenders ready to fund a loan three weeks from when Pitts provided him with a subordination agreement. That same day, Austin sent Pitts a letter identifying another accounts receivable lender, National Factoring, along with their proposed terms and a blank application form. There is no evidence that Summit ever completed the National Factoring application or that it provided LACDB with a commitment letter from any account receivable lenders.

At trial, LACDB chief financial officer LeJeune testified, however, that LACDB did not provide blanket subordination agreements, which he understood Austin was requesting, because the bank would have had no idea as to the terms and conditions of the loan to which it would be subordinate. LeJeune testified that in his 24 years of banking he had never seen such a blanket agreement to subordinate and the bank could be cited by regulators for providing such an agreement. West testified that when LACDB was considering subordinating to another lender, the borrower would choose the lender, negotiate the terms, and present a proposal to LACDB, at which point LACDB could provide a proposed subordination agreement. West admitted, however, that the Bank had a preprinted standard subordination agreement. In any event, Summit never obtained account receivable financing.

In June, Summit paid $20,000 towards the loan. Summit, however, was not located in the Zone. On June 29, 1998, Austin met with LACDB's chief credit officer, Stephen Pastor, who told Austin that LACDB would default Summit if it had not moved into the Zone by July 11. Austin promised he would accomplish this task. According to Austin, Pastor stated at that time that if Summit got into the Zone, LACDB would work with the money issue.

*6 On July 1, Austin sent LACDB 11 checks totaling $33,000 to be deposited one check each day. On July 15, 1998, Austin promised to send a $30,000 payment the next day. Apparently, only one check for $3,000 was ever deposited. The remaining $27,000 was unaccounted for.

10. Summit Leases a Facility in the Zone

Austin found a suitable facility in the Zone on Mesnager Street in Los Angeles, and signed a lease on July 7, 1998. Summit invested $65,000 in the building by the end of July.

At trial, chief credit officer Pastor testified he inspected the Mesnager facility on July 20. Based upon his inspection, Pastor concluded at that time that there was a “high probability” that Summit had satisfied the Zone requirement. Pastor also testified that if Summit had been in the Zone by August 5, 1998, Summit would have cured the Zone requirement default outlined in the March 19, 1998 notice of default. Pastor also testified that he believed at that time that had Summit satisfied the Zone requirement, LACDB would have worked with Summit to resolve the financial issues.

11. LACDB Declares Default and Accelerates the Loan

On August 1, Summit was in default in the amount of $211,446.12. On August 5, 1998, LACDB issued a notice of default and acceleration of the loan solely on the basis of Summit's delinquent payments. At trial, Austin testified that other than the November 1997 settlement agreement and amendment to the original agreement, there were no other written agreements amending or altering the terms of the original loan agreement. Austin also acknowledged LACDB never agreed to any forbearance. As provided in the original loan agreement, Austin testified at trial that Summit did not have the right to cure monetary defaults.

12. Litigation Is Initiated and a Receiver Is Appointed

On August 27, 1998, Summit and Austin filed suit against LACDB. By their second amended complaint, plaintiffs alleged five causes of action: breach of contract, fraud, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and negligence. FN8 Among other allegations, plaintiffs claimed: (1) LACDB negligently failed to run a UCC lien search which would have disclosed the Pine Cobble assignment; (2) LACDB wrongfully called Summit's customers after the Pine Cobble assignment was discovered which caused the customers to refuse to conduct further business with Summit with the alleged result that Summit was unable to operate for six weeks, lost collection revenues and cancelled contracts; (3) LACDB wrongfully demanded in the spring of 1998 that Summit immediately open a facility and create jobs in the Zone even though the bank had waived this requirement and the agreement gave Summit two years to open in the Zone; and (4) LACDB wrongfully declared default in August 1998 even though it had $160,000 of Summit's money, had waived timeliness of payments, and Summit had made substantial payments to avoid a default.

FN8. On October 4, 1999, the trial court granted LACDB's motion for summary judgment as to plaintiffs' second and third causes of action for fraud and intentional interference with economic relations, respectively.

*7 The bank filed a cross-complaint against Summit and Austin for, among other causes of action, breach of contract and promissory note, breach of guarantee, and fraud. In September 1998, the trial court appointed a receiver to take possession and control of Summit's operations. In May 1999, Summit's Mexico-based assets were sold for $60,000. Summit claims those assets were worth $7.5 million. Summit's other assets were sold for less than $20,000. The receiver's fees were in excess of $100,000.

Over Summit's objections, in December 2000, the trial court granted the receiver's motion for approval of its final accounting, determining that “[a]ll of the Receiver's actions appear to have been proper and in the bests interests of this receivership estate and in compliance with this court's orders.” Although appealable (Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal.App.3d 230, 233, 183 Cal.Rptr. 766), neither Summit nor Austin appealed the order granting the receiver's motion for approval of its final accounting.

13. The Trial Court's Statement of Decision

After a month long bench trial, on June 12, 2000, without citing any statutory or appellate authority, the trial court issued a 23-page written statement of decision finding LACDB liable to both Summit and Austin solely for breach of contract and dismissing LACDB's cross-claims.FN9 The trial court concluded LACDB's foreclosure of Summit was not justified and the bank breached the original loan agreement.

FN9. Having found LACDB liable for breach of contract, the trial court declared this finding mooted plaintiffs' other causes of action.

In finding the bank liable, the trial court made a critical distinction between traditional commercial banks and LACDB, based upon LACDB's status as a non-commercial lender which provided loans only to borrowers who were turned down for loans by traditional commercial lenders. The trial court stated: “That a borrower makes three timely payments, one late payment, and then fails to make the next two monthly payments justifies a notice of default and acceleration of the loan pursuant to a standard loan contract in its simple recitation cannot be disputed. The general rule that a lender owes no duty of care to a borrower unless the lender actively participates in the borrower's business as a general statement is correct. These clear concepts urged by the Bank obviously do not effect early resolution here.” FN10 The court explained: “Plainly, the risk element involved is obvious immediately and certainly exceeds what the usual commercial bank encounters in its lending operations. This circumstance suggests that these loans are such as may require a particular hands on administration from their initiation.” FN11

FN10. During trial, defendant made a motion for judgment pursuant to Code of Civil Procedure section 631.8. In denying defendant's motion, the trial court commented that “this [case] is different than the Bank of America making a loan and the borrower doesn't pay back.... [¶] ... If it wasn't different, we wouldn't even be here. I mean the lender of loans, the borrower fails to repay, he's done.”

FN11. The trial court further explained: “These loans to obviously high risk borrowers, and this loan in particular are often the type that almost at inception fall into the category described under the Bank's Credit Guidelines as ‘Risk Asset Workouts.’ “ The court then quoted the Credit Guidelines: “ ‘Workouts' are loan or investment transactions which require special handling due to the identification of increased risk factors and a heightened potential for loss. The management of Workout situations is an integral and active part of the risk management process. [¶] The mission, when managing a Workout situation is two fold. Broadly stated, it is to minimize LACDB's loss. Within the context, however, whenever possible the objective is the rehabilitation of troubled businesses and their return to performing status. Workout situations are more than mere collection efforts. Loans/investments are aggressively managed based upon informed measures of the industry, company management and the specific financial condition of the borrower. Loan officers must maintain a positive, objective, proactive, and highly professional approach to problem-solving, which is designed to protect or restore jeopardized loan or investment assets in an efficient and cost effective manner.”

The court found the Pine Cobble assignment led to Summit's February and March 1998 delinquent payments, which the trial court characterized as a “technical default.” The court explained that following the February and March 1998 delinquencies, “[t]he failure to immediately proceed with loan acceleration and the efforts of some of the Bank's personnel ... demonstrate[d] an element of forbearance that [was] part of ... a Risk Asset Workout [or] an attempt to rehabilitate a troubled business.” Having determined that the parties had entered into an “undeclared” workout mode, which the trial court found was an “adjunct to the written loan contracts ... from which certain reasonable obligations follow[ed]” the trial court concluded the parties' new “workout mode” included an implied duty of good faith and fair dealing. The court also explained that once it had entered into the undeclared workout mode, LACDB's liability was dependent upon whether it acted “fairly, reasonably, as well as prudently, in order to avoid harm to the borrower.”

*8 The court found that LACDB breached its duty of good faith and fair dealing in several respects, by: (1) failing to accurately define the condition of being located in the Zone; (2) agreeing to subordinate and then failing to respond to Summit's efforts to obtain account receivables financing in May and June 1998; (3) acting in a heavy handed manner by using Summit's money to solve the problem created by LACDB because it failed to conduct a UCC search before funding (the Pine Cobble assignment); (4) failing to cooperate in good faith with reasonable workout solutions proposed by Summit; and (5) failing to fully fund the loan and provide the consideration to Summit contemplated by the contract.

The trial court also found that Summit's failure to make timely payments commencing in February 1998 was legally excused because of LACDB's role in the Pine Cobble assignment. In addition, the trial court found that because Summit had not located a warehouse in the Zone when the Agreement was signed, which the bank knew, the bank waived this Zone requirement. Finally, the trial court found “[t]he bank is legally and equitably responsible for the result of its actions in seeking and obtaining the appointment of a receiver.”

As for damages, the trial court determined “[t]he Bank's conduct directly caused the total loss of Summit's business and its assets[,]” the fair value of which the trial court determined to be $7,238,047. The court found LACDB was not entitled to an offset in the amount of the loan because it was a result of the bank's own actions that Summit's assets were not recovered from Mexico. The court awarded prejudgment interest from the date of the original loan agreement, September 5, 1997, in the amount of $2,004,536.93. The trial court also awarded plaintiffs attorney fees in the amount of $2,421,000. Defendant filed timely notices of appeal from the trial court's judgment and the award of attorney fees.

ISSUES PRESENTED

The primary issue on appeal is whether LACDB was justified in declaring default and accelerating the loan. Resolving this issue requires us to address: (1) whether LACDB is subject to a higher standard of duty than a traditional private commercial lender; (2) whether LACDB has any liability for the Pine Cobble assignment; and (3) whether the parties had entered into an implied workout mode or agreement before LACDB declared default and accelerated the loan.

STANDARD OF REVIEW

We review de novo the trial court's determination of questions of law. For instance, “[t]he existence of a duty is a question of law for the court.” (Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 674, 25 Cal.Rptr.2d 137, 863 P.2d 207, superseded by statute with respect to the standard adopted for summary judgment as reflected in Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 767-768, 107 Cal.Rptr.2d 617, 23 P.3d 1143.) In addition, this case involves the interpretation of the original loan agreement and the November 1997 amendment to the loan agreement. “Where the meaning of writings is in dispute, ‘in the absence of conflicting evidence, the question is one of law, and ... the reviewing court will give the writing its own independent interpretation....' [Citations]." (Stratton v. First Nat. Life Ins. Co. (1989) 210 Cal.App.3d 1071, 1084, 258 Cal.Rptr. 721.)

DISCUSSION

1. LACDB's Duty of Care

*9 The trial court erroneously and without any supporting authority imposed upon LACDB a higher duty or standard of care than that imposed upon a traditional private lending institution. In response to defendant's motion for judgment pursuant to Code of Civil Procedure section 631.8, the trial court remarked that this case was in fact different than a case involving a lending institution like Bank of America. The trial court opined that had the defendant been Bank of America, plaintiffs would have been liable for failure to repay the debt owed.

Then, in its written statement of decision finding LACDB liable to plaintiffs for breach of contract, the trial court reiterated this theme, finding inapplicable the general rule that a lender owes no duty of care to a borrower unless the lender actively participates in the borrower's business. The trial court explained that LACDB's loans "require[d] a particular hands on administration from their initiation" because of the increased risk element associated with the loans.

The trial court erred. Plaintiffs have provided no authority for adopting a different standard of care depending upon whether a lender is a private lender like Bank of American or a public benefit non-profit lender like LACDB. In addition, plaintiffs have provided no authority that because a lender makes riskier loans, it should be subjected to a more stringent standard of care.

"[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (Nymark v. Heart Fed. Savings & Loan Assn. . (1991) 231 Cal.App.3d 1089, 1096, 283 Cal.Rptr. 53.) In addition, "[t]he relationship between a lending institution and its borrower-client is not fiduciary in nature. [Citation.] A commercial lender is entitled to pursue its own economic interests in a loan transaction. [Citation.]" (Id. at p. 1093, fn. 1, 283 Cal.Rptr. 53.)

A duty of care can only be found when a lender "actively participates" in the financed enterprise "beyond the domain of the usual money lender. [Citations.]" (Nymark v. Heart Fed. Savings & Loan Assn., supra, 231 Cal.App.3d at p. 1096, 283 Cal.Rptr. 53.) " 'Normal supervision of the enterprise by the lender for the protection of its security interest in loan collateral is not "active participation" [in the financed enterprise beyond that of the ordinary role of a lender in a loan transaction].' " (Id. at p. 1097, 283 Cal.Rptr. 53.) Extensive control and shared profits are two factors which can support a finding that a lender has actively participated in the borrower's business. (Wagner v. Benson (1980) 101 Cal.App.3d 27, 35, 161 Cal.Rptr. 516.)

In this case, there is no evidence LACDB actively participated in Summit's business. There is no evidence that LACDB engaged in extensive control of Summit or that it shared in Summit's profits. The trial court, therefore, erred by placing upon LACDB a higher duty of care.

2. The Pine Cobble Assignment

*10 In its statement of decision, the trial court determined the Pine Cobble assignment was a result of LACDB's negligence “in failing to follow its own established guidelines to conduct a UCC search BEFORE funding.” The trial court also concluded that the Pine Coble assignment (and the subsequent settlement) and LACDB's role in the whole affair led to Summit's payment delinquencies in February and March 1998 and ultimately to the creation of the implied workout agreement. In this regard, the trial court erred.

The loan agreement squarely placed the burden and duty on Summit to ensure that, when the loan funded and Pine Cobble was paid, LACDB would receive first lien position with respect to Summit's account receivables, which were held by Pine Cobble. Summit breached this duty. LACDB had no duty, contractual or otherwise, to ensure that when the loan funded and Pine Cobble was paid that it was provided with first lien position on Summit's account receivables held by Pine Cobble.

As quoted above, sections 3.3 and 3.5 of the loan agreement provided it was solely Summit's duty to provide LACDB with a release from Pine Cobble of its interests in Summit's account receivables. Pursuant to section 4.7 of the agreement, Summit also warranted that no event had occurred which may have materially adversely affected Summit's assets, such as Pine Cobble's assignment of its interests in Summit's account receivables. Likewise, section 4.9 of the agreement provided that Summit would not permit the creation of any security interest which would be prior to or superior to LACDB's security interests in Summit's collateral, including its account receivables.

In addition, section 9.5 of the loan agreement provided that Summit was in default if there was a failure of LACDB's security interest at any time or for any reason. Likewise, section 9.12 provided that Summit was in default if there was a sale or assignment, without the bank's prior written consent, of any of the collateral under the agreement. Finally, section 9.13 provided that Summit would be in default if there were any event or condition which LACDB believed was substantially likely to impair Summit's performance of its obligations under the agreement.

Thus, Summit breached the loan agreement by not ensuring that when Pine Cobble was paid, LACDB received first lien position with respect to the account receivables which were held by Pine Cobble. Subject to Summit's right to cure (§ 9.14), pursuant to section 10 of the loan agreement, LACDB had the right to accelerate and foreclose the loan upon this event of default.

Summit suggests that LACDB should be liable for its failure to run a UCC search the day the loan funded because in failing to do so, LACDB violated its own internal guidelines. There is no evidence that LACDB's internal requirement to run a UCC search was for anything other than its own protection. In this regard, the Nymark case, provides a useful analogy. There, homeowners sued a bank for negligence in appraising their property in connection with an application for a home loan. The court affirmed summary judgment for the bank, finding the bank had no duty to the homeowners in preparing the appraisal because the purpose of the appraisal was to protect the lender by satisfying it that the collateral was adequate security for the loan. (Nymark v. Heart Fed. Savings & Loan Assn., supra, 231 Cal.App.3d at p. 1092, 283 Cal.Rptr. 53.) In the present case, the loan agreement did not require LACDB to run a UCC search. In addition, plaintiffs have cited no authority which places the burden on LACDB to run a UCC search. Thus, we reject the argument that LACDB may be somehow liable for the Pine Cobble assignment because it did not follow its own internal guidelines.

*11 At oral argument, Summit asserted this court should disregard the unambiguous provisions of the loan agreement, claiming that because LACDB controlled the timing of the funding of the loan, it was a practical impossibility for Summit to conduct a UCC search and ensure that LACDB received first lien position on Summit's account receivables held by Pine Cobble after Pine Cobble was paid. In other words, Summit claimed that only LACDB could have prevented the Pine Cobble assignment.

We reject this argument. This court will not nullify the parties' express contractual provisions and re-write their contract to place a new burden and duty on the bank. Summit has provided no authority to support its theory of practical impossibility. Moreover, Summit's theory of practical impossibility is contradicted by the record. On the day the loan funded, September 9, 1997, Austin signed written loan instructions directing how the loan proceeds were to be disbursed. Thus, Summit and Austin knew the loan was going to be funded on September 9, and could have run a UCC search to ensure that Summit would be able to provide LACDB with first lien position on Summit's account receivables held by Pine Cobble after Pine Cobble was paid.

In conclusion, Summit breached the loan agreement by not ensuring that when LACDB funded the loan LACDB would receive first lien position on Summit's account receivables formerly held by Pine Cobble. The trial court erred by concluding that LACDB was responsible for the problems created by the Pine Cobble assignment.

3. The Implied Workout Mode and Corresponding Implied Duty of Good Faith and Fair Dealing

The trial court also erred when it determined that “[t]he evidence ... strongly suggests that when Summit failed to make the February and March, 1998 monthly payments, the parties had realistically entered a Workout mode, though undeclared.” FN12 Having found that an implied workout agreement had been created by the parties' course of conduct, the trial court then imposed upon LACDB a duty to act in accordance with its own internal workout guidelines, quoted above at footnote 11, “as an attempt to rehabilitate a troubled business.” In addition, having found the existence of an implied workout agreement, the trial court imposed upon LACDB an implied duty of good faith and fair dealing as part of the workout agreement.

FN12. In response to defendant's motion for a new trial, the trial court acknowledged that the implied workout theory of liability was innovative and potentially not supported by existing authorities, stating: “It was a workout. And I also know that it appears and maybe it will be shown that I fashioned a whole new remedy that, that didn't maybe exist before. [¶] I did the best I could, realizing all the time that I was almost into new grounds....”

The trial court erred in finding the existence of a workout agreement because it was directly inconsistent with the terms of the parties' express written agreement. In addition, the trial court erred by using the implied workout agreement to impose upon LACDB a duty of good faith and fair dealing as part of the workout agreement.

a. The Workout Mode

The trial court based its finding of an implied workout agreement upon the parties' course of conduct, concluding that LACDB's actions were “indicative of reasonable Workout intentions, which might be reasonably perceived by Summit.” The conduct relied upon by the trial court to find the implied workout agreement included: (1) the Pine Cobble assignment and its aftermath; (2) LACDB's decision not to foreclose following Summit's failure to make payments in February and March 1998; (3) LACDB's alleged promise to subordinate and failure to subsequently provide a subordination agreement; FN13 and (4) the oral assurances by LACDB chief credit officer Pastor that if Summit located in the Zone by the end of July 1998, LACDB would work with Summit to resolve the monetary delinquencies.

FN13. As to LACDB's alleged failure to provide a draft subordination agreement, the trial court commented in its statement of decision that: “A workout mode per the Bank's Guidelines would reasonably require a response to Austin's letters ... [requesting a subordination agreement], wherein Austin presented National Factoring Service as a potential funder of Summit's accounts receivable.”

*12 The case of Price, supra, 213 Cal.App.3d 465, 261 Cal.Rptr. 735 rejects the notion that a workout agreement may be implied based upon the parties' conduct or oral assurances when such an implied workout agreement is in direct contravention to the express terms of a written agreement.

Like Summit, in Price, the plaintiffs needed new financing to pay off their prior lender, which refused to extend them any further credit. Wells Fargo agreed to extend the plaintiffs three loans secured by promissory notes in the total amount of approximately $370,000. According to the plaintiffs, they were surprised by the maturity date, believing they had five years, instead of eight months, to repay the loan. The bank representative orally assured them the notes would be renegotiated. The maturity date passed without the plaintiffs making a single principal payment. The bank sent the plaintiffs a notice of default, and again the plaintiffs contacted Wells Fargo to restructure the loans. The bank agreed to delay foreclosure, but the plaintiffs were unable to make payments pursuant to the newly agreed payment schedule. The bank initiated foreclosure proceedings, but agreed to forbear a trustee's sale if the plaintiffs made payments pursuant to a second revised payment schedule. The plaintiffs failed to meet this schedule and one month later the bank scheduled a trustee's sale of the borrower's assets. Selling substantial assets at tremendous discounts, the plaintiffs were finally able to pay the amount owed Wells Fargo.

The plaintiffs sued Wells Fargo for fraud and breach of the covenant of good faith and fair dealing, among other causes. The plaintiffs claimed the bank breached the contractual duty of good faith and fair dealing “by taking a ‘hard line’ in repayment negotiations” (Price, supra, 213 Cal.App.3d at p. 479, 261 Cal.Rptr. 735) and argued that the bank was not justified in noticing a trustee's sale after accepting a $90,000 payment. The court affirmed summary judgment for the bank, explaining: “The necessary implication of [the Price's] argument is that the bank owed them a duty of reasonable forbearance in enforcing its creditor's remedies.” (Ibid.) The court squarely rejected this theory, which it found to be unsupported by any authority: “Contracts are enforceable at law according to their terms. The covenant of good faith and fair dealing ... does not impose any affirmative duty of moderation in the enforcement of legal rights.” (Ibid.)

Price is squarely on point. Like Summit, in Price, the borrowers were in substantial default on payments. Like LACDB, Wells Fargo attempted to help the borrowers resolve the financial difficulties. Then, when those attempts failed, like LACDB, Wells Fargo exercised its right to foreclose. In addition, like Summit, the borrowers in Price made substantial efforts to comply with the terms of the loan by making a $90,000 payment one month prior to foreclosure. Summit also made substantial payments prior to the August 1998 foreclosure and, in fact, had found a suitable location in the Zone and spent $65,000 in preparation of occupying the facility.FN14

FN14. The evidence also indicates Summit made a $43,584 payment in late April, a $20,000 payment in June, and a $36,000 total payment in July 1998.

*13 In addition, in another analogous case, the Ninth Circuit Court of Appeals in U.S. v. Grayson (9th Cir.1989) 879 F.2d 620, applying California law, affirmed summary judgment for the defendant lender, the Commerce Department's Economic Development Agency. The Ninth Circuit held that the plaintiffs could not establish that the lender waived its right to accelerate the loan based upon a course of dealing. The terms of the note specifically provided that delay or failure of the lender to exercise its right to accelerate the loan could not be construed as a waiver. The court held: “Under California law, the terms of the note prevail over any course of dealing between the parties or any usage of trade which might otherwise supplement or qualify the terms of an agreement.” (Id. at p. 624.)

In this case, none of LACDB's conduct, considered separately or together as a course of dealing, can constitute the basis for an implied workout agreement. The original loan agreement and the November 1997 amendment govern the rights and duties of the parties. The original agreement contained an integration clause to the effect that the original agreement constituted the entire agreement of the parties and could only be altered or amended by a writing signed by the party to be bound.

In addition, the original agreement contained a detailed waiver clause to the effect that LACDB would not be deemed to have waived any rights absent a written document signed by LACDB. The loan agreement provided that no prior waivers, action or inaction by LACDB or any course of dealing, would be considered a waiver of LACDB's rights or obligations. The agreement also provided that even if LACDB waived a right in the past, that waiver would not prejudice or constitute a waiver of LACDB's right in the future to demand strict compliance with that provision or any other provision of the agreement.

The finding of the existence of a workout mode or agreement is directly contrary to these express contractual provisions. The trial court found that the Pine Cobble assignment led to Summit's failure to make its February and March 1998 payments. As explained above, the Pine Cobble assignment was not the bank's fault. The agreement unambiguously placed the burden on Summit to provide LACDB with first lien position on Summit's account receivables held by Pine Cobble after Pine Cobble was paid.

As for LACDB's decision not to accelerate the loan after Summit failed to make the February and March 1998 payments, the Price case and the express written terms of the parties' agreement preclude a finding of waiver as to the bank's rights to subsequently foreclose and accelerate the loan. The same analysis applies to LACDB's oral commitment to subordinate to an account receivables financing company, as well as the oral assurances that LACDB would work with Summit to resolve the monetary delinquencies if Summit moved into the Zone by the end of July 1998.

Significantly, at trial, Austin conceded that other than the November 1997 amendment, there were no written agreements altering or amending the terms of the original loan agreement. In addition, Austin acknowledged that LACDB never agreed to any forbearance and that Summit did not have the right to cure monetary defaults.

*14 The trial court's finding of an implied workout mode contravenes the principles enunciated in Price, which held there is no duty of reasonable forbearance in enforcing contractual creditor remedies. In addition, the trial court's finding of an implied workout agreement was directly contrary to the express terms of the original loan agreement.

b. The Implied Covenant of Good Faith and Fair Dealing Cannot Impose upon a Party Duties Beyond Those to Which the Parties Agreed

Having erroneously found the existence of an implied workout agreement, the trial court compounded its error by determining that LACDB was subject to an implied duty of good faith and fair dealing as part of the implied workout situation.

It is well-settled that “[t]he covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made.” (Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 349, 100 Cal.Rptr.2d 352, 8 P.3d 1089, original italics.) “The covenant thus cannot ‘ “be endowed with an existence independent of its contractual underpinnings.” ‘ [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (Id. at pp. 349-350, 100 Cal.Rptr.2d 352, 8 P.3d 1089.)

In addition, the Supreme Court explained in Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 373, 6 Cal.Rptr.2d 467, 826 P.2d 710, that the purpose of the implied covenant of good faith and fair dealing is “ ‘to protect the express covenants or promises of the contract.’ “ The Carma court observed that “[i]t is universally recognized the scope of conduct prohibited by the covenant of good faith [and fair dealing] is circumscribed by the purposes and express terms of the contract.” Lastly, in Carma, the Supreme Court commented: “We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms.” (Id. at p. 374, 6 Cal.Rptr.2d 467, 826 P.2d 710.)

This is precisely what the trial court did. It prohibited LACDB from doing what it was expressly permitted to do by the original loan agreement foreclose upon delinquent payments. The trial court imposed liability upon LACDB for exercising its express contractual rights to declare default and accelerate the loan. The trial court's application of the covenant in the case served to frustrate LACDB from receiving the benefits of the agreement it actually made.

In addition, the trial court used the covenant to impose contractual obligations upon LACDB beyond those found in the original loan agreement or the November 1997 amendment. For instance, the court found that LACDB breached its duty of good faith and fair dealing by: (1) not accurately defining the condition of being in the Zone; (2) agreeing to subordinate and failing to respond to Summit's efforts to obtain account receivables financing; (3) using Summit's money to solve the problem created by LACDB because it failed to conduct a UCC search before funding (the Pine Cobble assignment); (4) not cooperating in good faith with reasonable workout solutions proposed by Summit; and (5) failing “to fully fund the loan and provide the consideration to Summit contemplated by the contract.”

*15 The trial court erred by imposing upon LACDB the above-identified contractual obligations, which were not terms of the original loan agreement. In addition, the trial court erred by finding that LACDB breached the above-identified additional contractual obligations.

First, the original loan document unambiguously defined being in the Zone, which required Summit on the closing date to have a warehouse in the Zone. In addition, pursuant to the loan agreement's detailed waiver provision, the fact that LACDB closed and funded the loan before Summit had actually leased or purchased a warehouse cannot constitute a waiver of LACDB's right to demand future compliance with the Zone requirement. In any event, LACDB did not default Summit for not being in the Zone. The August 5, 1998 notice of default was premised solely upon Summit's payment delinquencies. Thus, LACDB's purported failure to define being in the Zone was not a breach of the implied covenant of good faith and fair dealing.

Second, pursuant to the original loan documents, LACDB was under no duty to subordinate to an account receivables lender. Pursuant to Price, supra, 213 Cal.App.3d 465, 261 Cal.Rptr. 735, even if LACDB orally agreed to subordinate, it was nevertheless within its rights to declare default based upon Summit's payment delinquencies. Thus, even if it agreed to, the failure of LACDB to provide a draft subordination agreement cannot constitute a violation of the covenant of good faith and fair dealing.

Third, the Pine Cobble assignment and the problems it created were not created by LACDB. The original loan agreements unambiguously placed the burden on Summit to provide clear title on its account receivables to LACDB. In addition, the funds LACDB used to resolve this problem were originally to have been disbursed to Founders National Bank to secure a letter of credit to cover alleged tax liens against Austin. Summit was never to have received that money. Thus, LACDB's failure to run a UCC search the day of funding was not a violation of the covenant of good faith and fair dealing.

Fourth, pursuant to Price, supra, 213 Cal.App.3d 465, 261 Cal.Rptr. 735, LACDB had no duty to participate in workout solutions proposed by Summit. It was well within its contractual rights to declare default and accelerate the loan.

Fifth and finally, the loan was fully funded according to Summit's explicit instructions signed by Austin. Summit, therefore, received all of the consideration contemplated by the original loan agreement and disbursement. The payment of $470,640 to Capital Factors, which was originally disbursed to Founders National Bank to secure the letter of credit against tax liens imposed upon Austin, was caused by Summit's failure to provide to LACDB with first lien position on its account receivables formerly held by Pine Cobble. In addition, while LACDB retained $160,000 following the Pine Cobble assignment, LACDB was to have had a letter of credit in the amount of $470,640 as security against Austin's tax liens. LACDB did not violate the terms of the original loan agreement or the implied covenant of good faith and fair dealing by settling the Pine Cobble assignment problems and keeping less than half of the amount originally intended as security against Austin's tax liens. Lastly, Summit claims the bank wrongfully failed to apply the $160,000 against Summit's delinquencies in August 1998 before declaring default and accelerating the loan. However, had the original disbursement not been altered by Summit's failure to provide LACDB with clear title on its account receivables, there was no provision in the original loan agreement requiring LACDB to apply the original tax lien security amount of $470,640 against any delinquencies. Similarly, LACDB was not obligated to apply the $160,000 against any payment delinquencies on the loan.

4. The Appointment of a Receiver

*16 Summit also claims LACDB is liable for the appointment of a receiver, which, according to Summit, led to the loss of more than $7 million of Summit's business assets located in Mexico. However, as noted above, LACDB was well within its rights to declare default and accelerate the loan. Summit has provided no authority for the proposition that a lender who is justified in foreclosing on a loan cannot seek the appointment of a receiver.

In addition, although appealable, Summit did not appeal the trial court's order granting the receiver's motion for approval of its final accounting. Thus, under Aviation Brake Systems, Ltd. v. Voorhis, supra, 133 Cal.App.3d 230, 183 Cal.Rptr. 766 because the order approving the receiver's accounting is now final, and any matters relating to the receiver's actions should have been litigated and appealed when the receiver filed its motion, Summit may not now collaterally attack the receiver's final accounting in this appeal.

In conclusion, LACDB did not breach any contractual provisions. The finding of an implied workout situation was erroneous. Summit was not excused from performance by Civil Code section 1511. LACDB was, therefore, justified in declaring default and accelerating the loan. Accordingly, we reverse the trial court's determination that LACDB was liable to Summit and Austin for breach of contract.

5. Plaintiffs' Remaining Causes of Action

Plaintiffs tried the following causes of action against defendant: breach of contract, negligent interference with prospective economic advantage, negligence, breach of fiduciary duty, constructive fraud and conversion. FN15 After a lengthy bench trial, the trial court determined that LACDB was liable to Summit and Austin for breach of contract. According to the trial court, this determination rendered moot plaintiffs' other causes of action. Above, however, we determined that LACDB was justified in declaring default and accelerating the loan, and is, therefore, not liable to plaintiffs for breach of contract.

FN15. During trial, the trial court partially granted plaintiffs' motion to amend, and permitted plaintiffs to assert claims for breach of fiduciary duty, constructive fraud and conversion.

Thus, because the trial court found that plaintiffs' other causes of action were moot, we requested supplemental briefing from the parties as to whether any issues must be remanded in light of our determination that LACDB is not liable for breach of contract. In other words, did plaintiffs present sufficient evidence to prevail on any of their alternative causes of action?

Normally, “[w]hen the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence.” (McCoy v. Hearst Corp. (1991) 227 Cal.App.3d 1657, 1661, 278 Cal.Rptr. 596.) Plaintiffs were provided a full and complete opportunity in which to prove their case against the bank. We conclude that plaintiffs cannot prevail on any of their alternative causes of action against defendant.

We briefly examine each of plaintiffs' remaining causes of action.

a. Negligent Interference with Prospective Economic Advantage

*17 Plaintiffs alleged that LACDB disrupted Summit's business relations with its suppliers (not its customers) by contacting the suppliers and questioning them about amounts owed by Summit and whether or not Summit paid its bills on time. Plaintiffs alleged the suppliers tightened their credit terms which decreased Summit's cash flow, making it substantially more difficult for Summit to meet its obligations to LACDB. Summit alleged such activities exceeded the scope of a traditional money lender and directly interfered with Summit's business.

In its supplemental briefing, however, plaintiffs do not recite any evidence supporting their theory that defendant negligently interfered with Summit's prospective economic advantage. Plaintiffs make no offer as to which of their suppliers LACDB contacted, nor what communications passed between LACDB and Summit's suppliers. Nor do plaintiffs articulate any theory as to how plaintiffs were allegedly injured pursuant to LACDB's alleged communications with Summit's suppliers.FN16

FN16. In their supplemental briefing, without any citation to the record, plaintiffs assert the following supports remand: “No reasonable person could contend that LACDB is acting in good faith, or within the normal scope and practice of commercial lenders, when LACDB uses Summit's confidential customer and supplier lists to contact those persons and to lie to them regarding its right to receive priority payment. This evidence was substantial, and the trial court found, that these actions caused independent and substantial loss of income when the customers ceased placing orders and the suppliers no longer advanced credit terms and began demanding COD.” (Emphasis in original.)

“ ‘Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion.’ [Citation.]” (Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal.App.4th 1249, 1258, 116 Cal.Rptr.2d 358.) At trial plaintiffs were afforded a full and fair opportunity to prove LACDB's liability for negligent interference with prospective economic advantage. On appeal, plaintiffs have been provided a full and fair opportunity to show this court whether this action must be remanded for further proceedings as to whether LACDB is liable for negligent interference with prospective economic advantage. Plaintiffs have not referenced any facts, nor any witness testimony, which could provide the basis for LACDB's liability for this tort.

In any event, defendant did provide this court with record citations to the evidence regarding LACDB's contact with Summit's suppliers. After reviewing this evidence in a light most favorable to Summit, we find that plaintiffs have failed to show that the bank's contact with Summit's one supplier, Plastic Materials, Inc., caused Summit any harm. For example, Plastic Materials did not cancel its relationship with Summit because of the bank's phone calls. Moreover, after the relationship between Summit and Plastic Materials terminated, Summit found another vendor.

We, therefore, conclude plaintiffs have failed to show that LACDB is liable for the alleged negligent interference with economic advantage.

b. Negligence

Plaintiffs alleged that LACDB negligently failed to run a UCC search regarding the Pine Cobble assignment. In addition, plaintiffs alleged that following the Pine Cobble assignment, LACDB then called Summit's customers and suppliers and falsely claimed to be in first lien position on Summit's account receivables held by Pine Cobble prior to the Pine Cobble assignment. Plaintiffs alleged this caused Summit to shut down for six weeks and lose $700,000 in collection revenues and $1.5 million in cancelled contracts. Summit also contends that LACDB's failure to take physical possession of the account receivable papers after Capital Factors released its interests in Summit's account receivables (formerly held by Pine Cobble) constituted negligence, or a failure to mitigate damages.

*18 Above, we determined that LACDB is not liable to plaintiffs for failure to run a UCC search when the loan funded. In addition, we have also determined that LACDB is not liable for allegedly contacting Summit's suppliers.

In their supplemental briefing, plaintiffs have failed to point to any evidence that LACDB ever contacted Summit's customers or what was allegedly stated during these conversations. Plaintiffs do not inform this court which customers were called, who at LACDB called the customers, what was stated during the communications, whether LACDB stated anything untrue, or whether the customers stopped placing orders because the customer received a call from an LACDB representative.

Again, LACDB, on the other hand, has provided the court with record citations to the evidence regarding LACDB's alleged communications with Summit's customers following the discovery of the Pine Cobble assignment. All of this evidence consists of Austin's hearsay testimony that certain of Summit's unidentified customers had been contacted by three entities, including the bank, demanding payment on the account receivables formerly held by Pine Cobble. Austin's hearsay testimony is an insufficient basis upon which to determine LACDB could be liable in negligence for contacting Summit's customer's following the Pine Cobble assignment. Summit did not call any of its customers as witnesses. There is simply no evidence that LACDB ever made any false statements to Summit's customers, or wrongfully claimed to be in first lien position on the account receivables formerly held by Pine Cobble.

Plaintiffs also alleged that LACDB acted negligently by not taking physical possession of the account receivable papers following the settlement of the Pine Cobble assignment. Plaintiffs claim they suffered damage by reason of the bank's failure and this action must be remanded on this issue. Plaintiffs had their chance to prove this theory of liability during trial and to show how much was owed by Summit's customers on the account receivables. In its supplemental briefing as to whether any issues must be remanded, plaintiffs have not articulated any evidence that LACDB failed to collect or how much the bank failed to collect.FN17 Plaintiffs had a full and fair opportunity to provide this issue at trial. Based upon the lack of evidence recited in their supplemental brief, we conclude that plaintiffs simply abandoned this issue at trial. We will not give plaintiffs a second bite at the apple. (McCoy v. Hearst Corp., supra, 227 Cal.App.3d at p. 1661, 278 Cal.Rptr. 596.)

FN17. In its supplemental briefing, Summit devotes one paragraph to the issue of LACDB's failure to take physical possession of the account receivable papers: “The Settlement Agreement (Exhibit 214) required LACDB to collect on the account receivables that it was to receive from Capital Factors, and to account to Summit for its collections. (See ¶ 3, particularly ¶ 3(f).) Summit was independently damaged by LACDB's failure to do so.”

Finally, because LACDB did not actively participate in Summit's business, it owed no duty of care to plaintiffs and, thus, it is not liable for negligence. (Nymark v. Heart Fed. Savings & Loan Assn., supra, 231 Cal.App.3d at p. 1096, 283 Cal.Rptr. 53[“[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. [Citations.] Thus, for example, a lender has no duty to disclose its knowledge that the borrower's intended use of the loan proceeds represents an unsafe investment. [Citation.] ... ‘Liability to a borrower for negligence arises only when the lender “actively participates” in the financed enterprise “beyond the domain of the usual money lender.” ‘ “ (Fn.omitted.)])

*19 We, therefore, conclude that plaintiffs have failed to show that LACDB is liable to plaintiffs for negligence.

c. Breach of Fiduciary Duty

Following the Pine Cobble assignment, LACDB retained $160,000 of Summit's account receivables. Before LACDB declared default and accelerated the loan, LACDB did not apply the $160,000 to cure Summit's payment delinquencies. Instead, after LACDB declared default and accelerated the loan, and after the litigation was filed, LACDB applied the $160,000 against the amount due and owing on the loan. Plaintiffs alleged this use of the $160,000 constituted a breach of its fiduciary duties to Summit.

At the outset, Summit has failed to articulate the basis for claiming that LACDB owed any fiduciary duties to Summit. As explained by the Court of Appeal in Price, supra, 213 Cal.App.3d 465, 261 Cal.Rptr. 735, normally a bank and its loan customers do not have a fiduciary relationship. (Id. at pp. 476-477, 261 Cal.Rptr. 735.) FN18

FN18. See also Nymark v. Heart Fed. Savings & Loan Assn., supra, 231 Cal.App.3d at page 1093, footnote 1, 283 Cal.Rptr. 53: “The relationship between a lending institution and its borrower-client is not fiduciary in nature. [Citation.] A commercial lender is entitled to pursue its own economic interests in a loan transaction. [Citation.] This right is inconsistent with the obligations of a fiduciary which require that the fiduciary knowingly agree to subordinate its interests to act on behalf of and for the benefit of another. [Citation.]”

In addition, as explained above, the original loan agreement between LACDB and Summit provided that LACDB was to receive a letter of credit in the amount of $470,640 as security against potential tax liens against Austin. To resolve the problems created by the Pine Cobble assignment (for which LACDB was not liable), LACDB agreed that the $470,640 would be disbursed to Capital Factors in consideration for Capital's termination of its security interest in Summit's account receivables formerly held by Pine Cobble. LACDB then kept $160,000 of the account receivables, less than half of the original amount intended as security against the potential IRS liens against Austin.

Plaintiffs have provided no authority to support the proposition that a bank breaches fiduciary duties to a borrower when the bank uses its own security collateral (i.e., the $470,640 amount) to resolve problems (i.e., the Pine Cobble assignment) created by the borrower's breach of the loan agreement.

In addition, following the Pine Cobble assignment, plaintiffs and LACDB entered into a written settlement agreement, pursuant to which LACDB was expressly entitled to withhold $250,000 of Summit's account receivables in a holding account to be collateral against any IRS liens against Austin. The bank, however, retained only $160,000 of that amount. Plaintiffs have provided no authority for the proposition that a bank breaches a fiduciary obligation to a borrower when the bank retains certain funds it is expressly permitted to retain pursuant to a written loan agreement.

Finally, the original loan agreement contained no provision requiring LACDB to apply the $470,640 amount against any payment delinquencies. Likewise, there was no such requirement regarding the $160,000. We, therefore, conclude that plaintiffs have failed to show LACDB is liable to plaintiffs for breach of fiduciary duty.

d. Conversion

Summit alleged the following acts constituted conversion: (1) wrongfully taking control of Summit's assets; (2) failing to return the above-referenced $160,000 to Summit, once Summit was out of business; (3) failing to apply the $160,000 to cure Summit's payment delinquencies; and (4) applying the $160,000 against the amounts due and owing on the loan without securing an IRS release against Austin.

*20 Above, we determined that LACDB was justified in declaring default and accelerating the loan and was not liable to plaintiffs for breach of contract. LACDB then applied to the court for the appointment of a receiver, which took control of Summit's assets. Summit has provided no authority for the proposition that a lender which is justified in foreclosing on a loan cannot seek the appointment of a receiver. We therefore conclude that LACDB is not liable for conversion for seeking the appointment of a receiver to take control of Summit's assets.

As noted above, the bank was under no obligation to apply the original tax lien security amount of $470,640 against any payment delinquencies. Likewise, there was no such contractual requirement regarding the $160,000. Moreover, plaintiffs have not shown that before LACDB foreclosed on the loan, the IRS had released its tax liens against Austin. Thus, at no time before LACDB declared default and accelerated the loan was Summit even entitled to receive the $160,000. Then, after foreclosing on the loan, LACDB credited the $160,000 towards Summit's delinquencies on the loan. Plaintiffs have provided no authority for the proposition that when a lender uses a borrower's collateral securing a loan as a credit against amounts due and owing on the loan after the borrower defaults, that the lender can be liable for conversion.

We, therefore, conclude that plaintiffs have failed to show LACDB is liable to plaintiffs for conversion.

e. Constructive Fraud

During trial, the trial court granted Summit's motion to amend its complaint to allege a cause of action for constructive fraud. Summit's motion to amend, however, did not articulate any facts supporting this cause of action. Summit never filed a third amended complaint stating the basis for this cause of action. In addition, in plaintiffs' supplemental briefing as to whether any issues remain to be remanded, plaintiffs did not articulate a single theory or any evidence supporting this cause of action. We therefore have no opportunity to address this cause of action, and deem it abandoned. (Berger v. Godden (1985) 163 Cal.App.3d 1113, 1119-1120, 210 Cal.Rptr. 109.)

In conclusion, in their supplemental briefing, plaintiffs have failed to show they can prevail on any of their alternative causes of action. For the most part, plaintiffs have ignored our invitation to show us what facts they proved at trial upon which they could prevail on their remaining causes of action. The evidence provided is insufficient as a matter of law to support plaintiffs' remaining causes of action. In addition, plaintiffs have made no assertion that there is any newly discovered evidence justifying a new trial. Therefore, we instruct the trial court to reverse its judgment and enter a new judgment in favor of defendant on plaintiffs' complaint.

6. LACDB's Cross-Complaint

The trial court also entered judgment in favor of cross-defendants, Summit and Austin, on LACDB's cross-complaint. Based upon the foregoing, we reverse the trial court's finding in favor of plaintiffs on defendants' cross-complaint.

*21 In its supplemental briefing, LACDB informed this court of its belief that Summit is now defunct and Austin is judgment proof. Based upon this understanding, LACDB informed the court that should the court direct the trial court to enter judgment for LACDB on plaintiffs' complaint, it will dismiss its cross-complaint against Summit and LACDB.

Therefore, because we are directing entry of judgment for LACDB on plaintiffs' complaint, and based upon the bank's representation that it will dismiss its cross-complaint, we have no occasion to determine whether the action must be remanded for a new trial on the bank's cross-complaint against Summit and Austin. We also have no occasion to address the merits of Summit's and Austin's affirmative defenses to LACDB's cross-complaint.

DISPOSITION

The judgment is reversed as well as the order awarding attorney fees and costs to Summit and Austin. The trial court is instructed to enter a new judgment in favor of defendant LACDB on plaintiffs' complaint.

Defendant and appellant LACDB is to recover its costs on appeal.

We concur: CROSKEY, Acting P.J., and ALDRICH, J.