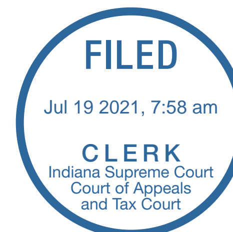
MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Benjamin Frenkel and Auto Dreams USA, LLC,
Appellant-Defendant,

v.

NextGear Capital, Inc.,
Appellee-Plaintiff.

July 19, 2021

Court of Appeals Case No. 20A-CC-2218

Appeal from the Hamilton Superior Court

The Honorable Jonathan M. Brown, Judge

Trial Court Cause No. 29D02-1512-CC-10501

Altice, Judge.

Case Summary

[1] Following a bench trial, Auto Dreams USA, LLC (Auto Dreams) and Benjamin Frenkel (Ben) (collectively, the Frenkel Parties) appeal from the trial court's entry of a money judgment in favor of NextGear Capital, Inc. (NextGear) and against the Frenkel Parties for breach of contract. The Frenkel Parties present two issues for review that we consolidate and restate as whether the trial court clearly erred in determining that Auto Dreams breached the contract, which gave NextGear the right to foreclose on the loan and, without notice to the Frenkel Parties, repossess the collateral.

[2] We affirm.

Facts & Procedural History

[3] Auto Dreams is a car dealership in New Jersey, which was started in 2014 by Ben and his son, Vladislav Frenkel (Vlad). Vlad operated the dealership as the general sales manager, and Ben, as owner, funded the startup costs with his retirement savings.

[4] On September 29, 2014, along with other related loan documents, NextGear entered into a Demand Promissory Note and Loan and Security Agreement (the Note) with Auto Dreams. Pursuant to the Note, NextGear agreed to extend to Auto Dreams a revolving line of credit – known as a floor plan – of up to $250,000, which Auto Dreams would use to purchase vehicles for its inventory. In exchange, Auto Dreams granted NextGear a security interest in all of Auto Dreams' assets "wherever located, including, without limitation, …

all Inventory now owned or hereafter acquired[.]" *Appellants' Appendix Vol. II* at 32. That same day, Ben executed an Individual Guaranty (the Guaranty), pursuant to which he personally guaranteed the payment to NextGear of all obligations and liabilities of Auto Dreams under the Note.

[5] On May 22 and June 16, 2015, the parties executed amendments to the Note for the sole purpose of increasing the credit line, as NextGear eventually became Auto Dreams' exclusive lender. After the second increase, Auto Dreams had a credit line of $1,000,000.

[6] The Note allowed NextGear to conduct random audits of Auto Dreams' inventory to verify the presence of or otherwise account for the vehicles purchased with funds advanced by NextGear. Third-party auditors were used by NextGear to conduct these audits on about a monthly basis. The auditor's goal was to touch each piece of inventory. When vehicles were missing from the lot, the auditor would seek to verify their location and/or sale date and funding status.

[7] One of these independent audits was conducted at Auto Dreams on Thursday, October 15, 2015, by Deborah Gilligan. At the time, eleven vehicles were missing from the lot, and these vehicles accounted for approximately twenty-five percent of the balance of the current advancements made by NextGear. Of these missing vehicles, six had been sold without Auto Dreams having yet paid back NextGear for the advancements and four could not be verified or found by the auditor. Most notably, of the unpaid vehicles, the auditor's report indicated

that two weeks prior one had been sold for about $12,000 cash and another had been sold for nearly $75,000 through retail financing.

[8] On the same day as the audit, Auto Dreams requested from NextGear the release of titles to twelve vehicles, which included all six of the unpaid vehicles and three of the unverified/not found vehicles from the audit. NextGear released the titles pursuant to Section 5(r) of the Note[1] with a Title Release Letter issued that same day, advising that NextGear would declare a maturity event and initiate an ACH payment[2] for all liabilities related to the titles not returned within seven days. There is no indication that NextGear had received and/or reviewed the audit from Gilligan before issuing the Title Release Letter.

[9] The morning after the audit, Megan Moore of NextGear sent an email to Vlad inquiring about the six sold vehicles for which NextGear had not received payment. Moore provided Vlad with a list of these vehicles that were "showing sold" on the audit and asked him "when funding will happen." *Id*. at 206.

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[1] Section 5(r) provides:

> Borrower may request from Lender, for a legitimate business purpose, the Title to a Unit of Lender Financed Inventory, but Lender reserves the right to grant or deny such request in its sole discretion. In the event Lender grants any such request, any Title provided to Borrower or to any other Person on Borrower's behalf, must be returned to Lender by the close of business on the seventh (7th) day after the date of Lender's release of such Title.

Exhibits Vol. IV at 61.

[2] ACH is an industry term that stands for Automated Clearing House, an electronic network for financial transactions in the United States. As part of the loan documents in this case, Auto Dreams executed an ACH Authorization and Request, which permitted NextGear to initiate certain electronic debits from Auto Dreams' bank account.

Miriam Corey, the NextGear account executive assigned to Auto Dreams, was copied on the email.

[10] Corey became concerned after reviewing the audit and having received a phone call from Vlad in which Vlad implied that he had made a "mistake by selling [] cars out of trust" and was "in over his head." *Exhibits Vol. V* at 73. On the morning of Tuesday, October 20, 2015, before visiting Auto Dreams in person, Corey made the following notes regarding the account:

> Took off ACH Friday bc dealer was waiting on titles, they did not come in Monday as expected to and he is in a cash flow issue due to lack of sales last few weeks/his wife had baby last week and he fell behind. I will visit this morning, to collect 6 BOS for PFC units and find out if any owned inventory/titles to do work around and plan to get caught up. May start liquidating at auction based upon today's results.

Exhibits Vol. IV at 168. Corey then spent most of the day at the dealership with Vlad and Ben. She reviewed the bill of sale (BOS) and financing documents[3] for all unpaid vehicles. These records, according to Corey, "revealed quite a big problem." *Exhibits Vol. V* at 55. That is, she discovered that "a considerable number of vehicles were already funded previously" and "[t]he money was already gone, which put [NextGear] in a more severe position" than if funding was still pending. *Id*. at 106-07.

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[3] The financing documents provided Corey with the funding notice, the funding date, and a copy of the wire transfer of funds into Auto Dreams' bank account for each sold and funded vehicle.

[11] Corey's notes from her October 20 visit provided in part:

> Spent all day at the dealership with owner, son, and GM. The following units are sold out of trust: 163, 158, 214, 245, 259, 241, 150, 153, 248, 258. Dealer does not have funds to pay these units as he has used them for business operating expenses and to pay down curtailments that have come due. I pulled the BOSs and dates are mostly a month old. About $180k in sold units here. This is from the most recent audit on 10/15. The most recent sales are on the following units which all appear recent: 257, 162, 182, 245, 264, 195, 256. Dealer claimed to be able to pay those as soon as funding came in btw today and Friday. I had him pull up the dealer track information on those units. Some were pending funding and were being funded today and should be in his account tomorrow. I relayed this to Mike Vitt so we can try and attempt payments not to be dispersed to dealer…. Dealer willing to give me titles to 3 owned units but we cannot do the work around….
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> Account is now in default status and we will be securing our inventory.

Exhibits Vol. IV at 167. The ten units listed as sold out of trust (SOT) were vehicles that had been sold by Auto Dreams and for which Auto Dreams had received payment yet had not paid NextGear. Instead of paying NextGear, Auto Dreams had "put the money into the business." *Exhibits Vol. V* at 49. Ben and Vlad expressed to Corey their intentions of correcting the situation and paying off the SOT vehicles – "to get up to date" – but indicated that they did not know how quickly that could happen. *Id*. at 152.

[12] The decision to place the Auto Dreams account in default was made upon Corey's consultation with Julia Mosser, her superior and a member of the NextGear risk team.[4] Mosser instructed Corey to repossess inventory from the lot that same day. The repossessed vehicles were eventually liquidated by NextGear in November after Auto Dreams failed to fully cooperate with NextGear and pay for all of the SOT vehicles. Auto Dreams chose not to pay despite, according to Vlad, "100 percent" having had the ability to pay NextGear "the day after the lot was swept." *Transcript Vol. II* at 146, 145.

[13] On December 21, 2015, NextGear filed suit against the Frenkel Parties for breach of contract and breach of guaranty. The Frenkel Parties filed a counterclaim against NextGear alleging breach of contract, unjust enrichment, conversion, and tortious interference with contractual and business relationships.

[14] After a number of delays, the matter proceeded to a bench trial on March 9 and 11, 2020. The trial court heard testimony from Vlad, Ben, and Lucas Hancock, the Senior Director of Risk for NextGear. Corey's deposition was also admitted into evidence, along with several other exhibits. Among other things, Hancock testified that the October 15 audit of Auto Dreams' lot revealed a "big red flag." *Id*. at 19. In particular, he noted that two weeks prior to the audit

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[4] Corey explained: "I collected all the data, presented it to my boss, who had then made th[e] determination that she wanted to default based on the risk factors and being too far out of trust on too many cars for too much outstanding balance and not knowing when they'd be able to be up to date." *Id*. at 150.

Auto Dreams had made two sales for which it had not paid NextGear – one sale was a cash sale and the other was for nearly $75,000, which was not likely to involve sub-prime financing. Further, in addressing the discoveries noted by Corey during her October 20 visit to the lot, Hancock testified:

> Well, it's alarming. It's alarming any time we have sold out of trust inventory…
>
> So what raised a red flag to me were the comments sold out of trust, the amount of inventory that was sold out of trust, the fact that it stated that the borrower had spent the money on other operating expenses, and that the bill of sale dates were mostly a month old…. It just means that it's been sold out of trust for a longer period of time. And most likely those funds are gone, and more importantly, if the funds are gone and the car is gone, it's a loss.

Id. at 31, 33. Hancock testified that NextGear was "absolutely unable to reconcile" the audit by finding the SOT vehicles or recovering the funds. *Id*. at 64. Hancock explained that while prior audits also revealed missing units, this audit showed a "big jump" in SOT units – from about $30,000 to $130,000 in one month. *Id*. at 246. Hancock noted that had the Frenkel Parties worked with NextGear and paid off the SOT units, the repossessed inventory could have been returned to them. Instead, the inventory was liquidated at auction about a month later.

[15] For their part, Ben and Vlad argued that NextGear acted too fast in defaulting Auto Dreams and repossessing the vehicles. Pointing to the Title Release Letter, they believed that they had until October 22 to satisfy the SOT units.

Vlad testified that he did not disagree with the content of the audit, only NextGear's reaction to it. He also testified that the funds could have been paid to NextGear for all of the missing vehicles at the time the lot was swept but that he and his father "decided not to" because, according to Vlad, NextGear had stolen over $350,000 in inventory from them at that point. *Id*. at 181.

[16] At the conclusion of the trial, the court took the matter under advisement and asked the parties to submit post-trial briefs, which they did. Thereafter, on September 14, 2020, the trial court issued a detailed order in which it entered judgment in favor of NextGear on its complaint and against the Frenkel Parties on their counterclaim. The court awarded damages to NextGear in the amount of $588,507.05. The Frenkel Parties filed a motion to correct error, which was summarily denied by the trial court on November 6, 2020. The Frenkel Parties now appeal.[5] Additional information will be provided below as needed.

Standard of Review

[17] On appeal of claims tried by the court without a jury, we "shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). "In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or

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[5] We note that the Frenkel Parties have abandoned their counterclaim on appeal. Moreover, they do not challenge the calculation of damages as an issue on appeal.

the findings fail to support the judgment." *Anderson v. Ivy*, 955 N.E.2d 795, 800 (Ind. Ct. App. 2011), *trans. denied*. We will not reweigh the evidence and will consider only the evidence favorable to the trial court's judgment. *Id*. We do not, however, defer to the trial court's conclusions of law, which are evaluated on appeal de novo. *Id*. "To determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made." *Wolfe v. Agro*, 163 N.E.3d 913, 922 (Ind. Ct. App. 2021), *trans. denied*.

Discussion & Decision

[18] We begin by addressing the inappropriate statement of facts provided by the Frenkel Parties. Ind. Appellate Rule 46(A)(6)(b) requires this section of an appellant's brief to be "stated with the standard of review appropriate to the judgment or order being appealed." Further, it is well established that statement of facts sections should not include argument. *See*, *e.g.*, *Minix v. Canarecci*, 956 N.E.2d 62, 66 n.2 (Ind. Ct. App. 2011) (reminding appellate counsel that "the statement of facts should be devoid of argument), *trans. denied*.

[19] We find the Frenkel Parties' statement of facts to be "transparent attempts to discredit the judgment or the opponent's argument" and clearly not intended to convey the facts in a light most favorable to the judgment. *Schaefer v. Kumar*, 804 N.E.2d 184, 196 n.13 (Ind. Ct. App. 2004), *trans. denied*. One such example is their (mis)representation that the eleven vehicles not in stock at the time of the audit "were all approved sales awaiting funding from the bank". *Appellants'*

Brief at 6. On the contrary, the evidence established that one of these was a cash sale that took place two weeks before the audit. Moreover, Corey's deposition testimony and her notes from her visit five days after the audit reveal that Auto Dreams had ten vehicles that had been sold and fully funded, yet Vlad chose to put the funds back into the business rather than pay the obligations to NextGear. Additionally, the Frenkel Parties include in their statement of facts improper argument regarding the effect of the Title Release Letter. There are more examples of mischaracterized facts and argument, but we will leave it at these.

[20] Turning to the merits, the Frenkel Parties' arguments on appeal boil down to two assertions: 1) NextGear wrongfully defaulted Auto Dreams because the contractual provisions were conflicting and past business practices of the parties established that "it was not unusual for vehicles in the various stages of sale to be off the lot", *id*. at 11, and 2) the Title Release Letter gave Auto Dreams seven days to cure the default. We are not persuaded by either of these arguments.

[21] Relevant for our purposes, Section 4 of the Note required Auto Dreams:

> (b) To keep Lender Financed Inventory at Borrower's Place of Business and not to remove any Lender Financed Inventory from such place for a period exceeding twenty-four (24) hours, unless previously authorized in writing by Lender….

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> (f) To hold all amounts received from the sale of any Unit of Lender Financed Inventory in the form as received in trust for the sole benefit of and for Lender, and to remit such funds satisfying all amounts due Lender and owing by Borrower for such Unit of Lender Financed Inventory, in each case within twenty-four (24) hours of Borrower's receipt of such funds (or receipt of such funds by any Affiliate of Borrower).

Appellants' Appendix at 33. Further, Section 5 of the Note provided in part:

> CREDIT TERMS AND CONDITIONS. Borrower understands and agrees to the following terms … and acknowledges that any failure by Borrower to adhere to any such terms … shall result in Lender having the right (in addition to any other right that Lender may have), in its sole discretion and without notice to Borrower, to declare a Maturity Event with respect to all related Advances:
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> ***
>
> (f) Borrower shall pay all Liabilities, without notice, that concern to a Floorplan Advance for any Unit of Lender Financed Inventory on or before the Maturity Date….
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> ***
>
> (o) …. Upon the sale of any Unit of Lender Financed Inventory, Borrower shall hold the proceeds from such sale in trust for the benefit of Lender, and Borrower shall pay to Lender, in accordance with this Note and the other Loan Documents, an amount equal to the unpaid balance of the Liabilities relating to such Unit of Lender Financed Inventory.

(p) Borrower shall allow Lender and its Representatives to access Borrower's books and records at Borrower's Place of Business and such other places as any Lender Financed Inventory may be located, in order to conduct audits ….

(q) Each Unit of Lender Financed Inventory must be physically verified at the time of any audit conducted by or on behalf of Lender to be at Borrower's Place of Business, or such other place as Lender may authorize….

(r) Borrower may request from Lender, for a legitimate business purpose, the Title to a Unit of Lender Financed Inventory, but Lender reserves the right to grant or deny such request in its sole discretion. In the event Lender grants any such request, any Title provided to Borrower … must be returned to Lender by the close of business on the seventh (7th) day after the date of Lender's release of such Title.

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(z) Borrower waives demand, presentment, notice of dishonor, protest, and notice of protest, and expressly agrees that this Note and all payments coming due under it … may be extended or modified from time to time without in any way affecting Borrower's liability under this Note or any other Loan Documents. Borrower and Guarantors understand that Lender may, at any time and without notice to Borrower, with or without cause, demand that this Note immediately be paid in full. The demand nature of this Note does not limit Lender's election of remedies upon an Event of Default by Borrower, and Borrower and Guarantors acknowledge that upon Lender's declaration of an occurrence of an Event of Default, all Liabilities under this Note and the other Loan Documents shall automatically accelerate and Lender may, at any time without notice to Borrower, demand immediate payment of all Liabilities

> … and take such further action as may be contemplated under Section 7 or otherwise permitted by Law or in equity. Borrower shall have the right to pay all Liabilities in full at any time.
>
> (aa) Notwithstanding Section 4(f), upon any disposition of a Unit of Lender Financed Inventory, whether by sale or otherwise, or the receipt by Borrower (or any other Person on behalf of Borrower) of full or partial payment by or on behalf of the purchaser of such Unit of Lender Financed Inventory, Lender may, without notice to Borrower and in Lender's sole discretion, declare a Maturity Event with respect to the related Floorplan Advance.

Id. at 35-38.

[22] Section 6 of the Note provides a lengthy list of Events of Default of which we note only a few. The list includes when the Borrower (or Guarantor) breaches any provision or fails to perform any of its obligations, undertakings, or covenants under the Note, including any obligation to repay any liability when due or upon demand. Additionally, under subsection (k) of Section 6, Lender had the right to declare an Event of Default whenever it "in good faith deems itself insecure for any reason." *Id*. at 39.

[23] Upon default, Section 7 allowed Lender (that is, NextGear) to, "at its option and without notice to Borrower, exercise any or all" of certain listed rights, including demanding immediate payment and repossessing any and all collateral. *Id*.

[24] The Note is clear.[6] Section 4(b) required Lender Financed Inventory to be kept on Auto Dreams' lot and not be removed therefrom for more than twenty-four hours without prior written authorization. There was no dispute that the vehicles listed as missing on the October 15 audit were Lender Financed Inventory. Further, the audit revealed that six of the missing vehicles had been sold on dates ranging from October 1 to October 10, one having been sold for cash on October 1 without remittance of funds to NextGear. Corey then confirmed during her visit to the lot on October 20 that multiple units had been SOT weeks prior with Auto Dreams putting the money from these sales back into the business rather than paying NextGear.

[25] Without any citation to the record to support their fanciful characterization of the facts, the Frenkel Parties assert that Section 4(b) does not apply. Specifically, they argue the following:

> There is no dispute that NextGear had previously authorized removal of any such vehicles in writing. Any motor vehicle that was not on the Auto Dreams lot were in the process of being sold. Each motor vehicle had a Bill of Sale, which was provided to [Corey], had deposits paid, and were in the process of being funded, as the dealer worked with bank to obtain financing. In addition, all motor vehicles had been equipped with GPS sensors, so they could easily be located.

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[6] "When a contract is clear and unambiguous, the language will be given its plain meaning." *Dorfman Prop. Mgmt. v. Edwards*, 106 N.E.3d 495, 498 (Ind. Ct. App. 2018).

Appellants' Brief at 10. We reject this blatant request for us to reweigh the evidence. The evidence favorable to the judgment supports a finding that several units of Vendor Financed Inventory had been sold by Auto Dreams in early October and, thus, had been off the lot for well over twenty-four hours without prior written permission from NextGear. Further, Corey discovered that Auto Dreams had retained the funds from these sales rather than paying NextGear for the related advances, which constituted a clear violation of Section 4(f) – requiring Auto Dreams to hold sale proceeds in trust for NextGear and to remit such funds to satisfy all amounts due within twenty-four hours of receipt.[7] Indeed, Auto Dreams' defaults under the Note were plentiful and raised a number of red flags for NextGear which in good faith found itself insecure following the audit and Corey's subsequent investigation.

[26] Additionally, we find unavailing the Frenkel Parties' suggestion that past business practices precluded NextGear from declaring a default under these circumstances. Aside from the fact that the Note had a nonwaiver provision under Section 16 of the Note,[8] the results of the October 15 audit were different

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[7] The Frenkel Parties' undeveloped assertion that subsections (b) and (f) of Section 4 of the Note are conflicting is without merit. The former addresses circumstances in which vehicles are removed from the lot for more than twenty-four hours without prior written permission, and the latter requires Auto Dreams to hold in trust and remit payment to NextGear within twenty-four hours of receiving funding from a sale. These provisions are not in conflict. Moreover, as the trial court recognized, Section 5(aa) of the Note gave NextGear broad ability, notwithstanding Section 4(f), to immediately declare a Maturity Event upon any disposition – sale or otherwise – of Lender Financed Inventory. In other words, NextGear was not required to wait until Auto Dreams received funds from the sale before declaring a Maturity Event.

[8] "Nonwaiver clauses generally are enforced in Indiana." *Johnson v. Dawson*, 856 N.E.2d 769, 774 (Ind. Ct. App. 2006). The Frenkel Parties provide no argument as to why this general rule would not apply in this instance.

from prior audits of Auto Dreams' lot. The court explained in its order: "However, evidence was presented that when prior audits showed a small number of vehicles 'Not in Stock', NextGear was subsequently – and timely – able to verify the whereabouts of those vehicles, OR Auto Dreams simply paid off the missing vehicles immediately following the audit." *Appellants' Appendix* at 124. Such was not the case with the October 15 audit and Corey's investigation, which revealed a significant increase in and aging of SOT units and an inability for Auto Dreams to immediately pay off the SOT units. Moreover, contrary to the Frenkel Parties' suggestion on appeal, Hancock did not testify that he would have handled the default differently or that he disagreed with the decision to default Auto Dreams. He simply indicated that had the Frenkel Parties paid for the SOT units – which they did not do – NextGear would have likely returned the repossessed vehicles to the lot.

[27] Finally, we address the import of the Title Release Letter. The record establishes that Auto Dreams sought the release of twelve titles from NextGear on the day of the independent audit, October 15. NextGear, apparently unaware of the audit results, granted the title release request pursuant to Section 5(r) of the Note and issued the Title Release Letter that same afternoon.[9] Of the twelve titles requested, nine of them were for vehicles listed as missing – six

[9] The trial court found in its order that the Title Release Letter was "generated automatically" upon Auto Dreams' online request. *Appellants' Appendix* at 128. We agree with the Frenkel Parties that the letter was not so generated, but we find the import of the trial court's finding to be that the request was granted by NextGear as a matter of course without awareness of the audit, which is supported by the evidence.

sold earlier that month or three not found/verified. Upon visiting Auto Dreams five days later, on October 20, Corey concluded that there were ten SOT vehicles, meaning Auto Dreams had sold the vehicles but not paid what was due to NextGear (that is, Auto Dreams had not held the sale proceeds in trust for NextGear as required by Section 5(o) of the Note and had not remitted payment to NextGear within twenty-four hours as required by Section 4(f)). All nine vehicles that were listed both as missing on the audit and included in the Title Release Letter were on Corey's SOT list, including the vehicle sold for *cash* on October 1.

[28] We reject the Frenkel Parties' assertion that the Title Release Letter gave Auto Dreams seven days "to cure any purported default." *Appellants' Reply Brief* at 4. Section 5(r) of the Note permitted Auto Dreams to request titles from NextGear *for a legitimate business purpose*, not for the purpose of delaying default under other provisions of the Note that had already occurred. Further, the Title Release Letter simply granted Auto Dreams temporary possession of the titles and indicated that if the titles were not returned within seven days, payment for all liabilities for the related vehicles would be initiated automatically. The Title Release Letter did not act to forestall any other finding of default or declaration of a maturity event under other provisions of the Note. Indeed, when Corey determined that Auto Dreams had sold units weeks earlier and obtained funding for the sales without repaying NextGear as required by the Note, NextGear was well within its right to declare a default on October 20 and clearly had a good-faith basis for deeming itself insecure at that point.

NextGear was not required under the Note or by the Title Release Letter to wait until October 22 to act upon Auto Dreams' default.[10]

[29] In sum, we conclude that Auto Dreams defaulted under the clear terms of the Note. While the Frenkel Parties may have believed that the Title Release Letter gave them a seven-day reprieve to remedy the missing vehicles revealed in the audit, it did not. NextGear acted within the terms of the Note when it took quick action to protect its collateral and remedy the default. Thereafter, the Frenkel Parties chose not to pay their obligations under the Note and the Guaranty, which resulted in liquidation of the repossessed vehicles. The Frenkel Parties have failed to establish on appeal that the trial court's judgment in favor of NextGear was clearly erroneous.

[30] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.

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[10] We note that the Frenkel parties make a passing argument that NextGear breached the contract by terminating the ACH agreement and failing to initiate an automatic withdraw from Auto Dreams' bank account to satisfy the balance owed for the SOT vehicles. The evidence favorable to the judgment, however, reveals that Auto Dreams had insufficient funds to pay what was due when the default was declared. Further, the Frenkel Parties had other means, such as wire transfer, to pay the debt to NextGear, but they refused to do so because they believed NextGear had been unfair to them.