This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1335

In the Matter of the Trusteeship under the Indenture of Trust, dated as of September 1, 1996, between the City of Newburgh Industrial Development Agency and Wells Fargo Bank, National Association as Successor Trustee.

Filed April 19, 2021
Affirmed
Frisch, Judge

Hennepin County District Court
File No. 27-TR-CV-19-74

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Considered and decided by Frisch, Presiding Judge; Florey, Judge; and Smith, John, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that the district court abused its discretion by instructing the trustee to distribute excess funds to a development company because the company abandoned the leased property and because appellant is the company's successor. We affirm.

FACTS

The facts of this case are largely undisputed. Appellant City of Newburgh Industrial Development Agency (the IDA) is the fee owner of a property (the Facility) located in Newburgh, Orange County, New York. In 1996, the IDA issued industrial development revenue bonds (the Bonds) in the amount of $5.7 million to finance the Gemma Development Company's acquisition and renovation of the Facility. The Bonds were payable from, and secured by, funds generated by the Facility. The Bonds had a maturity date of March 20, 2018.

The IDA created a trust (the Trust) via an indenture of trust (the Indenture) dated September 1, 1996, for the purpose of receiving funds and paying the Bonds. Respondent Wells Fargo Bank, National Association (Trustee), is the successor trustee of the Trust. In a concurrent lease agreement (the Lease) dated September 1, 1996, the IDA leased the Facility to Gemma. The Lease required Gemma to "pay or cause to be paid basic rent for the Facility on or before each monthly Bond Payment Date directly to the Trustee, in an amount equal to the Debt Service Payment becoming due and payable on the Bond on such Bond Payment Date." Gemma then sublet the Facility to Orange County via a sublease agreement (the Sublease). Pursuant to an assignment of rents, rent under the Sublease was payable "directly from Sublessee [Orange County] to the Trustee."

As security for the Bonds, the Trustee held: (1) a mortgage on the Facility; (2) an assignment of the IDA's rights under the Lease except for "Unassigned Rights"; (3) an assignment of Gemma's rights under the Sublease; and (4) a guarantee from Gemma.

Article IV, section 4.08 of the Indenture provided:

> After payment in full of the principal or Redemption Price of and interest on all the Bonds (or after provision for the payment thereof has been made in accordance with Article VI of this Indenture) and after payment in full of the fees, charges and expenses of the Trustee (including reasonable attorneys' fees), and any Paying Agents and all other amounts required to be paid hereunder, and the fees, charges and expenses of the Issuer and all other amounts required to be paid under the Lease Agreement, all amounts remaining in any Fund established pursuant to Section 4.01 hereof otherwise held by the Trustee and by any additional Paying Agent for the account of the Issuer or the Company hereunder or under the Lease Agreement shall be paid to the Company [(Gemma and its successors and assigns)].

Article XI, section 11.5 of the Lease meanwhile provided:

> After payment in full of the principal of, premium, if any, and interest on the Bonds and the payment of all fees, charges, expenses and other amounts required to be paid under the Bond Documents, all amounts on deposit with the Trustee for the account of the Issuer [(the IDA)] and the Company [(Gemma)] under the Bond Documents (except for amounts attributable to Unassigned Rights) shall belong to and be paid to the Company [(Gemma and its successors and assigns)] by the Trustee as an overpayment of rent, and neither the Trustee nor the Owners of the Bonds shall have any rights hereunder, except those that shall have theretofore vested.

We will refer to this remainder as the "net remaining balance." The Lease required Gemma to purchase the Facility from the IDA upon the expiration or termination of the Lease.

In 2006, Gemma received a loan from respondent M&T Bank Corporation in exchange for a mortgage on the Facility and an assignment of rents and leases. Gemma defaulted on loan payments, and in 2008, M&T initiated foreclosure proceedings. In 2010, Gemma abandoned the Facility, but Orange County continued making monthly rent payments directly to the Trustee. In December 2011, M&T obtained a judgment of foreclosure, but it never executed on the sale.

The Bonds matured and the Lease terminated by its terms on March 20, 2018. The Trustee paid the Bondholders. On April 30, 2019, the Trustee filed a petition in district court pursuant to what is now Minn. Stat. § 501C.0202(24) (2020) seeking an order directing the Trustee's distribution of $351,507.37 in remaining funds. On May 1, 2019, the district court scheduled the matter for July 10, 2019. The IDA's counsel sent the Trustee a "claim" to the net remaining balance based on: (1) $182,000 in rents mistakenly paid by Orange County to Gemma in 2010, (2) a $750 transaction fee, and (3) $30,000 in attorney fees. But no interested party filed a proper objection, so the district court afforded the interested parties more time to file objections. On July 11, 2019, the Trustee emailed Gemma's president and CEO—Thomas Carchietta—regarding the extension. Carchietta responded, indicating that "[t]here appear[s] to be no supporting documentation to [the IDA's] claim" and that "[t]his appears to be [an] issue between M&T Bank as Trustee and the IDA not [Gemma]." On July 15, 2019, the IDA filed an objection repeating its claims to the separate amounts of $182,000, $750, and $30,000.

On September 30, 2019, the Trustee filed an amended petition regarding the disposition of the reduced net remaining balance of $325,935.19. The IDA and M&T filed separate objections and claimed the right to disbursement of the net remaining balance. M&T claimed it was entitled to the funds based on its mortgage and assignment of rents with Gemma. The IDA meanwhile argued that, because the net remaining balance was generated by Orange County's rent payments, the IDA was entitled to the funds. It also argued, in part:

> Section 4.08 of the Indenture provides that after payment in full of the Bonds and after payment in full of the fees, charges, and expenses of the Trustee, all amounts remaining in any Fund shall be paid to Gemma, which has abandoned the Facility to the IDA. Thus, the Remaining Funds are rents that have already been collected and are in possession of the Trustee as agent for the IDA, which, by reason of Gemma's abandonment of the Facility and the IDA's fee ownership of the Facility, is the successor to Gemma.

On April 24, 2020, the district court issued its order for the distribution of the net remaining balance. The district court concluded that the Trustee was entitled to its fees and expenses and that neither M&T nor the IDA were entitled to the net remaining balance. The district court rejected the IDA's previous claims based upon the $182,000 in unpaid rents, the $750 transaction fee, and the $30,000 in attorney fees. The district court also rejected the IDA's assertion that it was entitled to the net remaining balance as Gemma's "successor." It noted that the Indenture and Lease identified Gemma as the proper recipient for any net remaining balance. The district court authorized the Trustee to pay its reasonable fees and expenses and ordered it to distribute the net remaining balance to Gemma.

The IDA moved for amended findings of fact and conclusions of law, clarifying that it had abandoned its claims in response to the original petition and contending that it was entitled to the net remaining balance as Gemma's successor. The IDA argued that it was Gemma's successor because Gemma abandoned the property without consummating the purchase of the Facility, thereby surrendering its rights under the Lease and any interest in the net remaining balance to the IDA. It also argued that Carchietta's email disclaimed any interest of Gemma in the net remaining balance and that ordering the distribution to Gemma was inequitable.

The district court denied the IDA's motion. It explained that "[t]he terms successors and assigns are commonly used in the context of corporate mergers and acquisitions transactions or transactions involving the sale of the assets of an entity." It reasoned that, in the context of the Bond Documents, the phrase referred "to the circumstances of a transaction involving the sale of Gemma or the sale of Gemma's assets . . . . [T]he parties agree Gemma is a corporation that has not been dissolved and Gemma's assets have not been sold. Thus, the IDA is not Gemma's successor or assign." The district court likewise concluded that the IDA was not Gemma's successor in interest. It explained that the term meant "[s]omeone who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." The district court concluded that, because Gemma's right to the net remaining balance was not premised on its ownership of the Facility, the IDA's fee-theory asserted a different right.

This appeal follows.[1]

DECISION

The district court concluded that Gemma was entitled to the net remaining balance pursuant to the clear language of the Indenture and Lease and because the IDA was not Gemma's successor. The IDA acknowledges that the Indenture and Lease identify "Gemma . . . and its successors and assigns" as the "Company" entitled to the net remaining balance. But the IDA argues that it became Gemma's successor upon either Gemma's abandonment of the Facility in 2010 or upon the expiration of the Lease in 2018.

Pursuant to Minn. Stat. § 501C.0202(24), "A judicial proceeding involving a trust may relate to . . . instruct[ing] the trustee regarding any matter involving the trust's administration or the discharge of the trustee's duties, including a request for instructions and an action to declare rights." Pursuant to Minn. Stat. § 501C.0204, subd. 1 (2020), "Upon the hearing of a petition under the district court's in rem jurisdiction, the court shall make an order it considers appropriate." We review the district court's exercise of its equitable discretion in deciding a section 501C.0202 petition for an abuse of discretion. *In re Foley Trust*, 671 N.W.2d 206, 209 (Minn. App. 2003). The construction of a trust instrument raises a question of law we review de novo. *Id.*

"The meaning and legal effect of the terms of a trust are determined by . . . the law of the jurisdiction designated in the terms of the trust unless the application of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most

[1] M&T did not appeal the district court's order, and the IDA is the sole participating party in this appeal.

significant relationship to the matter at issue." Minn. Stat. § 501C.0107(a)(1) (2020). The IDA acknowledges that New York law applies. "[I]nterpretation of indenture provisions is a matter of basic contract law," and construction of an indenture is "subject to the rule that a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Cortlandt St. Recovery Corp. v. Bonderman*, 96 N.E.3d 191, 198 (N.Y. 2018) (quotation omitted). Instruments executed contemporaneously and in relation to the same subject matter must be construed together. *Nau v. Vulcan Rail & Constr. Co.*, 36 N.E.2d 106, 110 (N.Y. 1941).

Neither the Indenture nor the Lease define the term "successor." But "it is a common practice of New York courts to refer to dictionaries to determine the plain and ordinary meaning of the words in a contract." *Violet Realty, Inc. v. Amigone, Sanchez & Mattrey, LLP*, 123 N.Y.S.3d 384, 387 (N.Y. App. Div. 2020). "Successor" is defined as *either*: (1) "[s]omeone who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor"; *or* (2) "A corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation."[2] *Black's Law Dictionary* 1732 (11th ed. 2019).

The IDA insists that it became Gemma's "successor" because Gemma's 2010 abandonment of the Facility resulted in a termination of the tenancy and a surrender of "all rights under the Lease" to the IDA as fee holder of the Facility. Relatedly, the IDA

[2] The IDA contends that the district court construed the term "successor" too narrowly by applying only the second definition. We may assume for the sake of this appeal that the broader definition of "successor" applies because Gemma's arguments still fail.

contends that "Gemma's 2010 abandonment of the [Facility] (and surrender of its lease) and the IDA's permitting [Orange County] to remain in possession worked a termination of the IDA-Gemma [L]ease and resulted in a direct lease between the IDA and [Orange County]." *See Rhinelander Real Estate Co. v. Cammeyer*, 190 N.Y.S. 516, 518-19 (N.Y. App. Term 1921) ("[U]pon surrender of his lease by the main lessor the undertenant becomes the immediate tenant of the original lessor and the interest and the terms of the subtenant of the lessee continued as if no surrender had been made." (quotation omitted)).

We doubt that Gemma's abandonment of the Facility resulted in the automatic termination and surrender of the Lease. "A surrender by operation of law occurs when the parties to a lease *both* do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated." *Riverside Research Inst. v. KMGA, Inc.*, 497 N.E.2d 669, 670 (N.Y. 1986) (emphasis added). "A surrender by operation of law is inferred from the parties' conduct, where not only must the tenant abandon the premises, but *the landlord must accept the premises as a surrender*." *Ford Coyle Props., Inc. v. 3029 Ave. V Realty, LLC,* 881 N.Y.S.2d 146, 147 (N.Y. App. Div. 2009) (emphasis added). Further, the Lease provided:

> Except as provided in Section 10.2 and 5.6 hereof, the leasehold estate created hereby shall terminate at 12 midnight on March 20, 2018 or on such earlier date as the Bonds are paid in full or as may be permitted by Section 11.1 hereof and provision for full payment has been made in accordance with Section 11.2 hereof; provided, however, that *in no event shall this Lease Agreement be terminated until all the Bonds shall have been paid in full or provision for such full payment shall have been made*.

(Emphasis added.) The relevant exceptions concerned: (1) the IDA's option, upon an event of default, to terminate the Lease upon 10 days' written notice to Gemma; and (2) Gemma's option to terminate the Lease early upon sufficient payment for the Bonds, fees, expenses, and charges. The record contains no indication that any precondition to early termination occurred or that the IDA undertook any action effecting a surrender by operation of law in response to Gemma's abandonment. Instead, counsel conceded at oral argument that the IDA took "no affirmative action when Gemma abandoned [the Facility]."

The IDA's theory that "Gemma's 2010 abandonment . . . worked a termination of the IDA-Gemma [L]ease" is also inconsistent with its twice-repeated assertion that the Lease terminated approximately eight years later, in 2018. In its brief to this court, the IDA asserted that "[p]ursuant to Section 5.2(b) of the Lease, the *Lease and the Leasehold estate terminated on March 20, 2018*." And at oral argument, counsel claimed that the Lease "actually terminated by operation of law when the Bonds were paid . . . in March of 2018. It terminated by operation of law."

Additionally, neither the Indenture nor the Lease conditioned Gemma's entitlement to the net remaining balance on either: (1) the nonexistence of any event of default, or (2) Gemma's ongoing occupancy of the Facility. Instead, the only preconditions to the disbursement of the net remaining balance were the payments of the Bonds, fees, charges, and expenses.

The IDA briefly suggests that Gemma lost any interest when the Bonds matured and the Lease expired on its own terms on March 30, 2018. But the Indenture and Lease contemplated that the Bonds would mature, triggering (1) the termination of the leasehold estate and the payment of the Bonds in full, and *then* (2) the payment of the net remaining balance.

The IDA also claims that Gemma was not entitled to the net remaining balance because it failed to ultimately purchase the Facility, arguing:

> The provision in Section 4.08 of the Indenture stating that excess funds [should] be paid to Gemma is part of the overall Indenture/Lease structure providing that, once the bonds are paid off, the Lease would terminate and Gemma would acquire fee title to the real estate. As fee owner, Gemma would then be entitled to the excess proceeds. Those terms were implicit conditions for the entitlement to the excess funds under Section 4.08 and therefore Gemma, having abandoned the property and having failed to acquire the fee title, cannot claim the excess funds.

Although "particular words should be considered . . . in the light of the obligation as a whole and the intention of the parties," *Cortlandt*, 96 N.E.3d at 198, nothing indicates that Gemma's eventual purchase of the Facility was fundamental to the Indenture or Lease. Instead, the plain and unambiguous terms of section 4.08 of the Indenture and section 11.5 of the Lease set forth specific preconditions to payment, all of which were satisfied and none of which were Gemma's purchase of the Facility. We therefore agree with the district court's conclusion that "Gemma's right to the [n]et [r]emaining [b]alance comes from the clear language of the Bond Documents[] and not from its role as the contemplated future owner of the Facility."

The IDA also argues that Carchietta expressly disclaimed Gemma's interest in the net remaining balance in his July 11, 2019 email correspondence. But Carchietta's email concerned Gemma's claims for $182,000 in rents, a $750 transaction fee, and $30,000 in attorney fees—claims that the IDA later abandoned. Further, the IDA claimed those amounts were owed pursuant to separate terms of the Bond documents and therefore were not amounts intended to be paid to Gemma pursuant to section 4.08 of the Indenture and section 11.5 of the Lease.

Last, the IDA contends that "the equities . . . most assuredly" support the IDA's position "rather than a ruling that would result in an unearned windfall for Gemma." But we fail to discern how the district court's decision is inequitable, least of all to the IDA, given that: (1) the district court applied the plain and unambiguous language of the Indenture and Lease, (2) the IDA took no action upon Gemma's abandonment, (3) Gemma remained liable for underpayment of rent pursuant to a guaranty,[3] (4) Orange County continued paying rent to the Trustee, and (5) the Bonds were paid in full and on time. We also observe that the IDA retains ownership of the Facility, a circumstance that would not exist if Gemma purchased the Facility for $1 at the end of the Lease term in 2018.

Because we conclude that the district court properly read the relevant provisions of the documents, and because the district court's decision was consistent with its reading of those documents, we discern no abuse of discretion by the district court and affirm the order instructing the Trustee regarding the distribution of the net remaining balance.

Affirmed.

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[3] The IDA conceded at oral argument that, if Orange County had defaulted on its rental obligations, the Trustee could have enforced its rights under the guarantee against Gemma.