STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1773

In the Matter of the Trusteeship Created by The Volusia County Industrial Development Authority relating to the Issuance of $24,035,000 in Volusia County Industrial Development Authority Senior Living Revenue Bonds (Woodland Towers Project), Series 2017.

Filed October 9, 2023
Affirmed
Johnson, Judge

Ramsey County District Court
File No. 62-TR-CV-21-43

Gregg M. Fishbein, Lockridge Grindal Nauen PLLP, Minneapolis, Minnesota (for appellant Preston Hollow Community Capital, LLC)

James F. Killian, Jason Reed, Jevon C. Bindman, Maslon LLP, Minneapolis, Minnesota (for respondent U.S. Bank Trust Company National Association)

Eric R. Sherman, Dorsey & Whitney LLP, Minneapolis, Minnesota (for respondents Phorcys Opportunities I, LLC and Birch Creek Credit Value Fund, LP)

Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Halbrooks, Judge.*

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Volusia County, Florida, issued three series of bonds to finance the acquisition and renovation of a senior-living facility. After the onset of the COVID-19 pandemic, the

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

facility did not generate enough revenue to make the agreed-upon regular payments to bondholders. The facility was sold for a loss. The district court determined that the proceeds of the sale must be distributed to first-tier bondholders before second-tier bondholders and to second-tier bondholders before third-tier bondholders. On appeal, a third-tier bondholder argues that the district court should have distributed the sale proceeds to all bondholders on a *pro rata* basis. We conclude that the district court properly interpreted the governing agreements by giving first-tier bondholders priority over second-tier bondholders and second-tier bondholders priority over third-tier bondholders. Therefore, we affirm.

FACTS

Woodland Towers is a senior-living facility in DeLand, Florida, which is located in Volusia County. The facility, which was built in 1986 and expanded in 1996, consists of two towers with a total of 194 units. In October 2017, the facility was licensed to provide assisted-living services in 175 units, of which 170 were occupied.

In 2017, the Volusia County Industrial Development Authority (the development authority) issued bonds with a par value of $24,035,000 to facilitate the purchase and renovation of the facility. The development authority issued a bond prospectus (known to the parties as the "official statement"), which describes the facility and its history, the bonds that would be issued to fund the purchase and renovation of the facility, the entities who would be purchasing the facility, and the means by which bondholders would be repaid.

The first tier of bonds, the "A-Series bonds" or "senior bonds," had a par value of $10,015,000, with an interest rate of 3.750% or 4.000%, depending on the maturity date. The second tier of bonds, the "B-series bonds," had a par value of $7,020,000, with an interest rate between 3.750% and 4.375%, depending on the maturity date. The third tier of bonds, the "C-series bonds," had a par value of $7,000,000, with an interest rate of 7.250%. The bond prospectus warned that third-tier bonds did not have a credit rating and that the absence of such a rating "could adversely affect the market price and marketability thereof."

The development authority acted as a conduit by lending the proceeds of the bond issue to two Florida companies, AE Woodland Towers Facility LLC and American Eagle Woodland Towers LLC (the borrowers). The sole member of the latter company is American Eagle LifeCare Corporation, a non-profit corporation that owns senior-living facilities in multiple states. The borrowers used the proceeds of the loan to purchase the facility. The borrowers executed a promissory note corresponding to each series of bonds and a mortgage secured by the facility. The borrowers later contracted with Greenbrier Senior Living LLC, a manager of senior-care facilities, to operate the facility.

To facilitate regular payments to bondholders, the development authority created a trust and appointed U.S. Bank as trustee. The borrowers and their agents agreed to use the facility's revenues to make regular payments to the trust, and U.S. Bank agreed to use the funds received by the trust to make regular payments to bondholders. U.S. Bank agreed to do so in a specified order of priority, giving first-tier bondholders priority over second-tier bondholders and second-tier bondholders priority over third-tier bondholders.

These various transactions are governed by multiple contractual agreements between and among the various parties: a trust indenture,[1] a loan agreement, a mortgage and security agreement, and the bonds themselves.

In March 2020, the borrowers failed to make payments to the trust in an amount sufficient to allow U.S Bank to make interest and principal payments to senior bondholders. The borrowers notified the bondholders that the facility's operations were negatively impacted by the COVID-19 pandemic and requested a 180-day forbearance. The borrower's inability to make payments continued until July 2020, when U.S. Bank issued a notice of default. In March 2021, the borrowers and U.S. Bank entered into a forbearance agreement. One provision of the forbearance agreement required the borrowers to engage a broker in an attempt to sell the facility. The broker solicited bids and recommended that the borrowers sell the facility to MED Healthcare Partners LLC, for $17,000,000. In July 2021, the borrowers and U.S. Bank entered into an amended forbearance agreement, which extended the forbearance period to August 2021 to allow the borrowers to complete the proposed sale.

In September 2021, U.S. Bank petitioned the district court for instructions with respect to the trust. In its request for relief, U.S. Bank requested an order authorizing the trustee to, among other things, consent to the proposed sale of the facility, release the borrowers from their mortgage and security agreements, distribute the net sale proceeds

[1]The term "indenture," when used in this context, is "essentially a synonym for contract or agreement," which typically is used in connection with bonds and trusts. *Garner's Dictionary of Legal Usage* 446 (3d ed. 2011).

pursuant to the priority structure specified in the trust indenture, and wind up the administration of the trust.

The district court promptly scheduled a hearing for mid-November 2021. Preston Hollow Community Capital LLC, which had purchased third-tier bonds in the amount of $2,300,000, appeared at the hearing. U.S. Bank and Preston Hollow advised the court that they had agreed that the court should authorize U.S. Bank to approve the sale of the facility but that the court should not yet make any order concerning the distribution of the net proceeds of the sale. In December 2021, the district court filed an order in which it authorized U.S. Bank to consent to the sale of the facility, to release the mortgage and security interests, and to proceed with winding up the trust. The district court ordered U.S. Bank to hold the sale proceeds and not make a distribution of net sale proceeds until further order of the court. Later in December 2021, U.S. Bank, at the direction of senior bondholders, called as due and payable the outstanding principal and interest of the senior bonds.

In January 2022, an attorney representing Preston Hollow filed a notice of appearance. One week later, a notice of appearance was filed by an attorney representing Phorcys Opportunities I LLC and Birch Creek Credit Value Fund LP, which had purchased first-tier, senior bonds valued at $2,566,200 and $1,875,300, respectively. In February 2022, U.S. Bank requested a hearing on the sole remaining issue—a determination of "the appropriate distribution methodology for disbursement of the net sale proceeds"—and informed the court that the parties had agreed that the issue could be resolved on a motion with oral argument.

The district court scheduled a hearing to occur in June 2022. In advance of the hearing, U.S. Bank submitted a memorandum in which it argued that the trust indenture requires the trustee to distribute net sale proceeds by giving first-tier bondholders priority over second-tier bondholders and second-tier bondholders priority over third-tier bondholders. Preston Hollow filed a motion and accompanying memorandum in which it opposed U.S. Bank's proposed method of distribution and argued that U.S. Bank should distribute the net sale proceeds to all bondholders on a *pro rata* basis. Phorcys Opportunities and Birch Creek submitted a memorandum in which they argued in support of U.S. Bank's proposed method of distribution.

In August 2022, the district court filed an order granting U.S. Bank's petition and adopting its proposed distribution methodology. In October 2022, the district court filed a final order in which it ordered U.S. Bank to distribute the net sale proceeds pursuant to "the priority structure specified at section 8.03(b)" of the trust indenture and, after doing so, to cease further administration of the trust. Preston Hollow appeals.

DECISION

Preston Hollow argues that the district court erred by ordering U.S. Bank to distribute the net sale proceeds by giving first-tier bondholders priority over second-tier bondholders and second-tier bondholders priority over third-tier bondholders rather than by distributing the net sale proceeds to all bondholders on a *pro rata* basis.

We begin by noting that the indenture and loan agreement include choice-of-law provisions, which state that Florida law governs. In Minnesota state courts, a choice-of-law provision generally is valid and enforceable. *Milliken & Co. v. Eagle Packaging Co.*,

295 N.W.2d 377, 380 n.1 (Minn. 1980); *U.S. Bank Nat. Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 429 (Minn. App. 2000). No party has argued that the choice-of-law provisions in this case are invalid or unenforceable. Thus, we will apply Florida law in resolving the parties' dispute.

Under Florida law, a court "should give effect to the plain and ordinary meaning of" the terms used in a contract. *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. Dist. Ct. App. 2004); *see also Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 132 (Fla. 2000). If the terms of a contract are unambiguous, "the parties' intent must be gleaned from the four corners of the document." *Crawford v. Barker*, 64 So. 3d 1246, 1255 (Fla. 2011); *Emerald Pointe Prop. Owners' Ass'n, Inc. v. Commercial Constr. Indus., Inc.*, 978 So. 2d 873, 877 (Fla. Dist. Ct. App. 2008). A court should interpret a contractual provision in conjunction with other provisions in the contract. *Royal Oak Landing Homeowner's Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. Dist. Ct. App. 1993). "Where contractual terms are clear and unambiguous, the court is bound by the plain meaning of those terms." *Emerald Pointe*, 978 So. 2d at 877.

A.

The district court analyzed the disputed issue in three steps. First, the district court identified the contractual provisions that determine when a default has occurred. Second, the district court identified the contractual provisions that determine the remedies that the trustee may pursue in response to a default. Third, the district court identified the contractual provisions that determine how the trustee must distribute funds held by the trust

in light of the trustee's response to a default. The contractual provisions on which the district court relied are as follows.

First, section 8.01 of the indenture determines when a default has occurred with respect to each tier of bonds. Section 8.01(a) provides that a senior-bond default occurs if there is a "failure to make payment of the principal or redemption price of any Senior Bond" or a "failure to make payment of interest on any Senior Bond." Section 8.01(a) further provides that a senior-bond default "shall constitute an Event of Default *only with respect to the Senior Bonds*." (Emphasis added.) In a corresponding manner, sections 8.01(b) and 8.01(c) provide that a second-tier or third-tier default occurs if there is a failure to make payment of the principal or interest on those bonds. But sections 8.01(b) and 8.01(c) make clear that a failure to pay principal or interest on either of those bonds is a default "only with respect to" that tier. Similarly, section 7.1 of the loan agreement states that a default occurs if any one of seven events occurs. The first type of default, described in section 7.1(a), is as follows:

> Failure by the Borrowers to pay when due the amounts required to be paid under this Agreement or the Notes when the same shall become due and payable in accordance with the terms of this Agreement or the Notes, including a failure to repay any amounts which have been previously paid but are recovered, attached or enjoined pursuant to any insolvency, receivership, liquidation or similar proceedings; provided, however, that *no Default shall exist for failure to pay the Third Tier Note so long as any Senior Bonds or Second Tier Bonds are Outstanding; and provided, further, that no Default shall exist for failure to pay the Second Tier Note so long as any Senior Bonds are Outstanding*. (Emphasis added.)

Second, section 8.02 of the indenture determines the remedies that the trustee may pursue in response to a default. Section 8.02(a) provides that the trustee may take various actions, including the commencement of a lawsuit "to protect and enforce . . . the rights of the Senior Owners." The same section provides that the trustee *shall* take such actions "upon the written request of the Owners of not less than 25% in Principal Amount of the Outstanding Senior Bonds." Section 8.02(a) further provides that, "so long as Senior Bonds are Outstanding, the Trustee in so acting under this Section 8.02(a) shall act solely for the benefit" of the holders of senior bonds. Section 8.02(b) provides for an alternative remedy in the event of a senior-bond default. That section provides that, upon the request of the owners of 25 percent or more of senior bonds, the trustee "shall declare all Outstanding Bonds of all Series due and payable and shall commence foreclosure proceedings against the Mortgaged Property."

Third, section 8.03 of the indenture determines how the trustee must distribute funds held by the trust after the trustee responds to a default. Section 8.03 applies if the available funds are insufficient to pay interest and principal on the senior bonds after the trustee has given notice of a senior-bond default. In that event, the available funds "shall, subject to section 8.07 hereof, be applied" as provided in section 8.03. Under section 8.03(a), "If the principal of all the Senior Bonds has *not* become or been declared due and payable," the available funds shall be applied in this order of priority: (1) interest due on senior bonds, (2) principal due on senior bonds, (3) interest due on second-tier bonds, (4) principal due on second-tier bonds, (5) interest due on third-tier bonds, and (6) principal due on third-tier bonds. Alternatively, under section 8.03(b), "If the principal of all the Senior Bonds

has become or been declared due and payable," the available funds shall be paid to the holders of senior bonds, without regard for the difference between interest and principal, and then to the holders of second-tier bonds in a similar manner, and then to the holders of third-tier bonds in a similar manner.

Section 8.07 of the indenture (which is referenced in section 8.03) provides that

> any proceeds received by the Trustee from the foreclosure of the lien on the Mortgaged Property shall be applied to the payment of the principal and interest then due and unpaid upon the Bonds of all Series then Outstanding, *without preference or priority* of principal over interest or interest over principal, or of any installment of interest over any other installment of interest, or *of any Bond of any Series over any other Bond of any Series, ratably*, according to the amounts due respectively for principal and interest, to the persons entitled thereto without any discrimination or privilege. (Emphasis added.)

As it happened, U.S. Bank gave notice of default by referring to section 8.01(a) of the indenture. The owners of approximately 27 percent of the outstanding senior bonds requested that the trustee release its lien on the project and consent to the project's sale, which required U.S. Bank to pursue the remedy authorized by section 8.02(a) and, thereby, "act solely for the benefit" of the holders of senior bonds. U.S. Bank sought and received an order authorizing the distribution of net sale proceeds pursuant to section 8.03 of the indenture, which requires distribution of funds by bondholder priority, *i.e.*, by giving first-tier bondholders priority over second-tier bondholders and second-tier bondholders priority over third-tier bondholders. The district court reasoned that section 8.03 governs because "section 8.03, by its terms covers 'funds derived from actions taken in connection under a senior-bonds event of default'" and because such a default "has occurred and the net sale

proceeds are funds derived from the actions of U.S. Bank (and others) in connection with that default."

B.

Preston Hollow argues that, for three reasons, the district court erred by concluding that section 8.03 of the indenture governs the distribution of the net sale proceeds.

First, Preston Hollows contends that section 8.03 applies only to the distribution of funds that are received on a periodic basis from the operation of the facility, not to funds that are received upon a sale of the facility. Preston Hollow explains that section 8.03 "contemplate[s] only periodic distribution of funds (*i.e.*, project revenues)" that are "insufficient to satisfy" the scheduled bond payments.

Preston Hollow's narrow reading of section 8.03 is inconsistent with the plain language of that provision. Section 8.03 does not expressly state that it applies only to the periodic distribution of funds and does not expressly refer to "project revenues." Rather, section 8.03 plainly states that, if a senior-bond default has occurred, the trustee is required to distribute funds on a priority basis, with the holders of senior bonds receiving highest priority. Preston Hollow's contention also is inconsistent with Florida caselaw, which provides that a court "may not rewrite or add to the terms of a written agreement." *See Corwin v. Cristal Mizner's Preserve Ltd. P'ship*, 812 So. 2d 534, 536 (Fla. Dist. Ct. App. 2002).

Preston Hollow's contention is further undermined by the fact that section 5.04 of the indenture, which governs the distribution of revenues derived from normal operations, uses the term "all Project Revenues." The use of that term in section 5.04 and the absence

of the term in section 8.03 indicate that the parties did not intend for section 8.03 to be limited in its application to the periodic distributions of revenues from normal operations. *See Kel Homes, LLC v. Burris*, 933 So. 2d 699, 702 (Fla. Dist. Ct. App. 2006) (stating that use of "different language in different contractual provisions strongly implies that a different meaning was intended").

Second, Preston Hollow contends that section 8.03 does not apply because of a parenthetical phrase within the section. The parenthetical, which is italicized below, states:

> In the event that the funds held by the Trustee shall be insufficient for the payment of principal of and interest then due on the Senior Bonds after a Senior Bonds Event of Default (*other than funds held for the payment or redemption of particular Senior Bonds which have theretofore become due at maturity or by call for redemption*) . . . .

Preston Hollow asserts that, because the senior bonds have become due and payable, the net sales proceeds are "funds held for the payment or redemption" of the senior bonds and, thus, not subject to section 8.03.

Preston Hollow's contention fails to account for the word "theretofore," which indicates that the funds contemplated by the parenthetical became due *before* the senior-bond default. *See American Heritage Dictionary* 1806 (5th ed. 2018) (defining "theretofore" as "until that time; before that"). In addition, the parenthetical applies only to funds that became due "at maturity" or "by call for redemption." There were no such funds because the bonds were due to mature no earlier than July 1, 2023, and no party has cited evidence that any bondholder sought to redeem bonds before maturity or before the notice of default.

Third, Preston Hollow contends that, after the district court filed its December 2021 order, the holders of senior bonds improperly manipulated the distribution of net sale proceeds by directing the trustee to make outstanding senior-bond interest and principal due and payable. In response, U.S Bank contends that the applicable remedy was determined by the notice of default that was given in July 2020, not by the acceleration that occurred in December 2021. This contention appears to be inconsistent with the district court's final order, which directed the trustee to distribute net sale proceeds pursuant to "the priority structure specified at section 8.03(b)" of the trust indenture.

But U.S Bank also contends, apparently in the alternative, that even if the acceleration of repayment of the senior bonds were to determine the remedy, the acceleration would have no impact on holders of third-tier bonds. U.S Bank explains that an acceleration would implicate section 8.03(b) of the indenture instead of section 8.03(a) and that the only difference between the two provisions is that section 8.03(a) gives senior-bond interest priority over senior-bond principal (and operates similarly with respect to second-tier and third-tier bonds) whereas section 8.03(b) makes no distinction between interest and principal within each tier. This contention is borne out by the plain language of section 8.03. The difference between section 8.03(a) and section 8.03(b) is a matter of priority of interest over principal within each bond tier, not priority of one tier over another tier. Under either section 8.03(a) or section 8.03(b), the trustee is required to distribute net sale proceeds to holders of senior bonds before holders of second-tier bonds and to holders of second-tier bonds before holders of third-tier bonds.

C.

Preston Hollow also argues that the district court erred on the ground that two other contractual provisions govern the distribution of net sale proceeds in lieu of section 8.03 of the indenture.

First, Preston Hollow contends that section 8.07 of the indenture should apply. As discussed above, section 8.07 directs the trustee to distribute proceeds derived "from a foreclosure of the lien . . . without preference or priority . . . of any Bond of any Series over any other Bond of any Series." Preston Hollow acknowledges that a judicial foreclosure did not occur. But Preston Hollow asserts that the indenture "does not specifically define 'foreclosure' or describe how or when 'any proceeds received by the Trustee from the foreclosure' . . . are to be derived." Preston Hollow reasons that "[c]ommon sense and industry practice suggest that section 8.07 should not be interpreted so narrowly" and that section 8.07 also should apply to "other forms of post-default and post-acceleration forced liquidation of mortgaged property."

The bond documents do not define the term "foreclosure," but they provide that Florida law applies. In Florida, a party may foreclose on a mortgage only by commencing a judicial proceeding. *See* Fla. Stat. §§ 702.01-.12 (2020) (providing for foreclosure actions); *see also Arsali v. Chase Home Fin. LLC*, 121 So. 3d 511, 517 (Fla. 2013) ("Under Florida law, actions involving foreclosure of property are brought in courts of equity."). It is undisputed that U.S Bank did not commence any such judicial proceeding. Thus, section 8.07 does not apply.

Second, Preston Hollow contends that section 5.9 of the loan agreement applies. Section 5.9 provides that the borrowers "may sell any separate facility constituting a part of the Project," so long as three conditions are satisfied, the third of which is that the net proceeds of such a sale are used to redeem bonds pursuant to section 3.13 of the indenture, which would benefit bond holders in a *pro rata* manner. The district court reasoned that section 5.9 does not apply because it authorizes a sale of only "a part" of the project but not the entire project. The district court also reasoned that the sale of the entire project does not satisfy the second condition in section 5.9, which requires a minimum debt-service-coverage ratio to ensure that the remaining portion of the project would generate sufficient revenue to make payments on the outstanding bonds.

Preston Hollow contends that the district court erred on the ground that the entire facility is "part" of the project. That contention is inconsistent with the plain language of the word "part," which means something less than the whole. *See American Heritage Dictionary* 1284 (5th ed. 2018) (defining "part" to mean "[a] portion, division, piece, or segment of a whole" and "[a]ny of several equal portions or fractions that can constitute a whole or into which a whole can be divided").

Preston Hollow also contends that the district court erred by reasoning that the second condition of section 5.9 is not satisfied because there is no remaining portion of the project to satisfy the required minimum debt-service-coverage ratio and generate revenue for future payments on outstanding bonds. Preston Hollow's only challenge to that part of the order is that the second condition was waived by the forbearance agreements. Preston Hollow does not identify a specific provision of either forbearance agreement that

constitutes a waiver of section 5.9. In fact, the forbearance agreements expressly provide that they "shall not be construed" as a waiver of any of the trustee's rights and remedies.

Preston Hollow contends further that the official statement supports its interpretation of section 5.9 and a *pro rata* distribution of the net sale proceeds. Preston Hollow refers to several definitions in the official statement that purport to require a *pro rata* distribution of net sale proceeds. The official statement, however, is not an agreement between or among the parties; it is merely an informative guide for prospective bondholders. Under Florida law, extrinsic or parol evidence may be considered only if a contract is ambiguous. *J.M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So. 2d 484, 485-86 (Fla. 1957); *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 265 (Fla. Dist. Ct. App. 2011). Because the applicable provisions in the indenture and the loan agreement are unambiguous, the official statement cannot be used to vary their meaning. *See Duval Motors Co.*, 73 So. 3d at 265. In addition, the official statement expressly disclaims any binding effect by stating that "the descriptions and summaries of various documents hereinafter set forth do not purport to be comprehensive or definitive," that one must refer "to each document for the complete details of its terms and conditions," and that all statements in the official statement "are qualified in their entirety by reference to each document."

Thus, the district court did not err by not applying the contractual provisions urged by Preston Hollow, section 8.07 of the indenture and section 5.9 of the loan agreement.

In sum, the district court did not err by ordering that the net sale proceeds of the sale of the facility shall be distributed to first-tier bondholders before second-tier bondholders

and to second-tier bondholders before third-tier bondholders, rather than to all bondholders on a *pro rata* basis.

Affirmed.