S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

WEST MICHIGAN WOODS LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP,	UNPUBLISHED September 20, 2011
Plaintiff-Appellee,	
V	No. 299142 Kalamazoo Circuit Court
CITY OF KALAMAZOO,	LC No. 2009-000453-CH
Defendant-Appellant.	

Before: GLEICHER, P.J., AND HOEKSTRA AND STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment in favor of plaintiff. The judgment in question was entered by Kalamazoo Circuit Court Judge Pamela L. Lightvoet on June 25, 2010, after the parties stipulated to decide the case on the written record and the briefs. We affirm.

In 1987, the Secretary of Housing and Urban Development (HUD) entered into a grant agreement with defendant. Pursuant to the agreement, HUD granted defendant a sum of $3,218,851. According to the preamble of the grant agreement, defendant applied to HUD for funds that were available under the Housing Development Grant (HDG) program "to undertake activities which are consistent with the provisions of [section 17 of the U.S. Housing Act of 1937] and HDG regulations at 24 CFR Part 850." As the trial court described in its opinion, the HDG program allowed HUD to fund new housing developments rather than merely subsidize existing projects through the Section 8 program. Under the HDG program, HUD directly granted funds to a municipality by entering into a formal grant agreement. The municipality then provided the funds to the developer of a project and supervised the project to ensure compliance with federal law and regulations. The relationship between the municipality and the developer was to be created by a contractual agreement between those parties. In this instance, HUD provided funds to defendant, with the grant agreement specifying that the funds were intended for the West Michigan Woods housing development.

Several sections of the grant agreement reference the statutory scheme that was erected in relation to the HDG program. Section 3.01 of the agreement provides that defendant "represents and warrants that it has the legal capacity to assume responsibilities for compliance with all

applicable Federal rules and agrees and undertakes to assume and carry out all such responsibilities in accordance with all the requirements which are or may be established pursuant thereto." Likewise, section 3.02 of the agreement states defendant "shall comply with the HDG regulations, as they may be amended, including the certifications specified therein." Section 4.02 of the grant agreement required defendant to supervise plaintiff's activities to ensure compliance with the HDG program. Section 5.01 of the grant agreement generally stated that defendant was obligated to enter into an agreement with plaintiff and that the agreement had to detail each party's rights and responsibilities. That section provided several specific terms that had to be contained in the agreement. Section 5.01(e), which acted as a catch-all provision, stated that the agreement between plaintiff and defendant could contain "Other terms, not in conflict with HDG requirements, agreed upon by the [plaintiff] and [defendant]."

Section 7.04 of the grant agreement describes the required contents of plaintiff's (referred to as "the owner") evidence of debt. The provision states that the evidence of debt "shall state that . . . the total amount of HDG assistance outstanding shall be repaid to the Grantee [defendant] in the event of a Substantive Violation of specific obligations of the Owner under HUD regulations and the owner grantee agreement." The provision further states that the agreement between defendant and plaintiff shall state that "the amount of HDG to be repaid shall be reduced by ten percent (10%) for each full year in excess of 10 years that intervened between the beginning of the term of the Owner/Grantee Agreement and the substantive violation." In seeming contrast, the provision concludes by stating the evidence of debt "may, at [defendant's] option, include provisions for repayment even when there is no Substantive Violation or debt forgiveness at the end of 20 years." The parties agree that although the grant agreement required the inclusion of those terms regarding reduction of principal in the agreement between the parties, the terms were not included in the subsequently-executed promissory note and mortgage agreement.

The above-quoted portions of the grant agreement that discuss repayment following a substantive violation are consistent with several distinct statutory provisions. 42 USC 1437(o)(d)(7)(B) specifies that the debt that an owner occurs as a result of participating in the HDG program "is payable in the case of any failure to carry out the agreements." Likewise, 24 CFR 850.155 specifies that "The debt shall be repayable in the event of a substantive, uncorrected violation by an owner of the obligations contained in [the applicable federal regulations.]" Finally, 42 USC 1437(o)(d)(7) states that where there is a substantial violation, "The amount of such assistance (and accrued interest) which is required to be repaid shall be reduced by 10 per centum for each full year in excess of 10 years which intervened between the commencement of the period and the violation." In contrast, no statutory provision states that an owner can be required to repay HDG funds despite having never committed a substantial violation. Consequently, plaintiff asserts that because it is undisputed that it never committed a substantial violation, the relevant statutory scheme prevents defendant from collecting any of the funds it provided to plaintiff. In contrast, defendant asserts that while no statutory provision permits it to collect the funds it had loaned under the program, none of the provisions cited by plaintiff expressly forbid repayment.

While the parties disagree regarding whether the debt can lawfully be collected absent a substantial violation, it appears that the parties entered into an agreement in which plaintiff unambiguously agreed to repay the funds it was loaned by defendant. As required by the Grant

Agreement, plaintiff and defendant executed a promissory note and a mortgage agreement. The promissory note expressly states that the loan from defendant to plaintiff would bear no interest for 20 years. 20 years after the closing date, the loan would begin to accrue interest at a rate of 7.5% and payments on the principle would occur in 240 equal installments. While the promissory note stated that "at a minimum, the instrument shall evidence . . . that the HDG is a debt on the Project, which may be called in the event of a Substantive Violation," it did not state that repayment could *only* occur in the wake of a substantial violation. The note stated that any portion of the promissory note that "conflicts with any statute or rule of law . . . shall be deemed severable from this note." Plaintiff argues that repayment absent a substantial violation constitutes a conflict with federal law and that the provisions in question, should they be interpreted as requiring repayment, must be severed from the agreement. In contrast, defendant asserts that the provisions regarding repayment do not conflict with any law and, even if they did, the provision regarding severability was merely "boilerplate" language and should not be permitted to negate the express agreement of the parties.

The promissory note stated that it was to be secured by a mortgage agreement.[1] The mortgage agreement that the parties executed referenced the promissory note and stated that plaintiff agreed to pay defendant the amount stated in the promissory note and would make payments in a manner consistent with the requirements of the promissory note. The mortgage agreement did not state that no payments would be required absent a substantial violation. Section 13 of the mortgage agreement addressed what would happen in the event of a default, which the parties agreed did not occur in this case. That section stated that, in the event of an uncorrected substantial violation, plaintiff would repay to defendant "the amount equal to the total amount of HDG assistance outstanding . . . plus interest." The interest rate that would be applied in such a situation would be "the average yield on outstanding marketable long-term obligations of the United States during the month preceding the date on which the initial grant funds were released" plus two percent. According to defendant, that interest rate would be approximately 12%. That section also stated that "the principal amount to be repaid . . . shall be reduced by 10 percent for each full year in excess of 10 years that intervene between the beginning of the term of the Owner/Grantee Agreement and the violation."

The parties agree that plaintiff did not commit any substantial violations during the 20 year period that followed the execution of the various agreements at issue. As plaintiff neared the end up that 20 year period, it filed a complaint seeking a declaratory judgment stating that it was not required to repay any of the amount loaned by defendant pursuant to the HDG program. After the complaint was filed, each party moved for summary disposition. Each motion was denied, and the parties proceeded to a trial on briefs and documentary evidence. The trial court asked the parties to submit documents that addressed the intent of the parties at the time the

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[1] The mortgage agreement between plaintiff and defendant is actually a second mortgage. The first mortgage was issued by the Michigan State Housing and Development Authority, which also loaned funds to plaintiff for this housing development. Those funds are not at issue in this litigation. However, defendant cites to the first mortgage in support of its argument because that mortgage indicates that plaintiff would repay any funds that were loaned by defendant.

various agreements were entered. Defendant submitted four memos written by its employees at the time that the agreements were being contemplated. Each of the memos contains some reference to the notion that defendant would be repaid without condition. In contrast, plaintiff submitted an affidavit from Robert Lennon, who was its attorney while it was negotiating with defendant. Lennon stated that plaintiff, like himself, was under the belief that the amount of the principal would be reduced by 10% for each year in which there was not a substantial violation. The affidavit implied that plaintiff would not have entered the agreement absent such a provision because it was obligated to rent its units out at a reduced rate in order to participate in the program.

After receiving the briefs and documentary evidence, the trial court issued an opinion. The court began by analyzing the relevant USC and CFR provisions. The court concluded that the laws establishing the HDG program only allowed for a loan to be repaid in the event of a substantial violation of statutory requirements. The court stated that, because it was uncontested that there was no such violation in this instance, it would be improper to require repayments. While the court acknowledged that neither the promissory note nor the mortgage agreement stated that repayment was contingent on the occurrence of a substantial violation; the court found that those documents clearly stated that any provision that was inconsistent with the applicable laws would be severed. The court concluded that the parties did not intend for the funds to be repaid absent a substantial violation. Consequently, the court found in favor of plaintiff. Defendant now appeals as of right.

On appeal, defendant asserts that the trial court erred in interpreting the contractual agreements it entered with plaintiff and in interpreting the relevant statutory provisions. We disagree. Whether the trial court properly interpreted the contractual agreement is a question of law that this Court reviews de novo. *Manuel v Gill*, 481 Mich. 637, 643; 753 NW2d 48 (2008). Likewise, to the extent that this matter involved statutory interpretation, any such issues are also reviewed de novo. *Id.*

"The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto–Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). When interpreting a contract, a court should give meaning to all of its terms. *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). Where the language in a contract is clear and unambiguous, a court is required to interpret the contract and enforce it as it was written. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664–665; 770 NW2d 902 (2009).

Defendant asserts that the promissory note and the mortgage agreement each unambiguously required the loan to be repaid, with repayment commencing 20 years after closing. Defendant acknowledges that the agreements state that, in the event that a provision conflicts with applicable law, the provision shall be severable from the agreement. The trial court relied on that provision in reaching its holding. In arguing that the trial court erred, defendant first argues that the repayment provisions in the promissory note and mortgage do not conflict with federal law and need not be severed. Additionally, defendant asserts that the provision that addresses severability was general boilerplate language and should not be

permitted to overcome the specific language of the parties. We will address each argument in turn.

42 USC 1437(o)(d)(7)(B) specifies that the debt that an owner occurs as a result of participating in the HDG program "is payable in the case of any failure to carry out the agreements." Likewise, 24 CFR 850.155 specifies that "The debt shall be repayable in the event of a substantive, uncorrected violation by an owner of the obligations contained in [the applicable federal regulations.]" In arguing that the repayment provisions in the promissory note and mortgage agreement did not conflict with the above-quoted provisions, defendant insinuates that the statutes merely demonstrate that repayment is appropriate upon the occurrence of a substantial violation and that they do not demonstrate that repayment is inappropriate in all other circumstances. However, as stated by our Supreme Court, "[t]his Court recognizes the maxim expressio unius est exclusio alterius; that the express mention in a statute of one thing implies the exclusion of other similar things." *Bradley v Saranac Community Sch. Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997). By expressly mentioning that funds loaned under the HDG program are "payable in the case of any failure to carry out the agreements," 42 USC 1437(o)(d)(7)(B) implies that the same funds are not payable payment under any other scenarios. Stated differently, if HDG funds were payable regardless of compliance with program guidelines, the above-quoted language from 42 USC 1437(o)(d)(7)(B) and 24 CFR 850.155 would serve no function. Consequently, the repayment structure detailed in the promissory note and effectuated by the mortgage agreement are inconsistent with the governing statutory scheme. Similarly, the program under which these funds were distributed was classified as a grant program, as opposed to a loan program. The term "grant" is generally understood to mean that funds need not be repaid in most circumstances.

Because we conclude that the repayment provisions conflict with applicable law, we must determine whether the provisions may nonetheless be enforced. We note that in its reply brief, defendant appears to acknowledge that its agreement with plaintiff was not permitted to conflict with federal law. However, in its brief on appeal, defendant initially contended that the severability provision in the promissory note was "standard boilerplate" language and that because it is general in nature, it could not overcome the clear intent of the parties regarding repayment. We agree with defendant that the language in the promissory note and the mortgage agreement gives no indication that repayment was contingent on the occurrence of a substantial violation. However, it is equally true that the parties unambiguously expressed their intention to sever *any* provision that conflicted with *any* federal law. When interpreting a contractual agreement, this Court reads all of the terms of the agreements and enforces the plain meaning of those terms. Even if the language in question constitutes "standard boilerplate" language, defendant offers this Court no authority by which it can disregard that provision. Defendant correctly asserts that specific language in a contract controls general language. However, we fail to see how the severability provision can be disregarded as a general provision. If the severability provision is held to be inoperable in this instance, it is unclear under which factual scenario that provision would ever have effect. Therefore, because we conclude that the severability provision is an unambiguous term of the contract that must be enforced, and because we conclude that the repayment structure set forth in the promissory note conflicts with federal law, it follows that the trial court did not err in finding in favor of plaintiff.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens