IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 10, 2014 Session

CITY OF GATLINBURG v. STUART H. KAPLOW ET AL.

Appeal from the Chancery Court for Sevier County
No. 12-7-311 Telford E. Forgety, Jr., Chancellor

No. E2013-01941-COA-R3-CV-FILED-MAY 27, 2014

This case presents issues regarding the interpretation and enforceability of an agreed order entered into between the parties before the Gatlinburg Board of Appeals and Adjustments (the "Board"). Defendant, Stuart H. Kaplow, leases certain real property improved with rental units from defendant, Maury R. Greenstein, which property is located within the City of Gatlinburg. The City of Gatlinburg (the "City"), through its building official, issued notices of condemnation to the defendants regarding certain units on this property and informed the defendants that the units would be demolished if repairs were not made. The defendants appealed to the Board. During those proceedings, the parties entered into an agreement with respect to the property and memorialized this agreement in the form of a written order, which was signed by the defendants and their counsel. A few months later, the City filed the instant action, seeking a declaration that (1) the defendants' further attempts to appeal to the Board were void and ineffectual pursuant to the terms of the agreed order and (2) the defendants had materially breached the agreed order such that the City had no obligation to issue building permits. Following a bench trial, the trial court found that the defendants had materially breached the terms of the agreed order. The court also found that the defendants had forfeited their right to further appeal to the Board. The court therefore ruled that the City could demolish the condemned units and impose a lien against the real property for the demolition and cleaning costs. Defendants have appealed. Discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., C.J., and D. MICHAEL SWINEY, J., joined.

Arthur G. Seymour, Jr., and Matthew A. Grossman, Knoxville, Tennessee, for the appellants, Stuart H. Kaplow and Maury R. Greenstein.

James H. Ripley, Sevierville, Tennessee, for the appellee, City of Gatlinburg.

OPINION

I. Factual and Procedural Background

Mr. Kaplow leases certain real property, improved with rental units, from Mr. Greenstein. The units were built during the 1940s and were formerly operated as a motel. This property is located at 426 Ski Mountain Road in Gatlinburg, Tennessee, and is within the municipal limits of the City of Gatlinburg. On March 23, 2011, Deputy Building Official Jay Horner issued a notice of condemnation with respect to certain units on the property, finding those units to be in violation of the International Property Maintenance Code ("IPMC").[1] Among the problems identified were raw sewage leaking from underneath the buildings, bed bug and vermin infestation, sagging structural members, structural failure of the flooring system, and unsecured electrical panels.

No repairs regarding the violations were undertaken by the defendants. On February 17, 2012, nearly one year following the notice of condemnation, Mr. Horner issued a notice to the defendants that the units would be demolished by the City unless the defendants immediately removed them. A few days later, on February 24, 2012, another notice of condemnation was issued by Mr. Horner concerning additional units.

The defendants appealed these notices to the Board. During the proceedings before the Board, the parties reached an agreement, which was memorialized in a written order drafted by the defendants' counsel. This order was signed by the defendants, their counsel, and counsel for the City. It was also approved and signed by the Board's chair. Relevant to the issues presented in this appeal, the order states, *inter alia*:

> 7) The City and the Appellants expressly agree that they shall be bound by this Order and that neither the City, nor either of the Appellants, shall make any further administrative appeal from this Order or petition any court for a writ of certiorari with respect to the entry of this Order, though the parties are not barred from seeking appropriate remedies with respect to questions involving the parties' performance of the

[1]The City adopted the IPMC on September 19, 2006, and later adopted the International Building Code ("IBC") on December 18, 2007.

obligations imposed by this Order and the enforcement of this Order.

8) The Property is presently in violation of certain provisions of the Code as more fully set forth in the Notice.

9) Appellants, subject to the conditions more fully set forth herein, are entitled to undertake repairs with respect to the portions of the Property so as to bring them in compliance with the Code with respect to the violations of the Code set forth in the Notices.

10) By the consent of the City and the Appellants, which is signified by their signatures and signatures of counsel, this Order shall be deemed to govern contractual rights and liabilities among the Appellants and the City.

The order next sets forth a detailed schedule with deadlines for the submission of plans by the defendants and response time by the City. The primary goals of the order were the issuance of building permits and appropriate repairs being made to the units to bring them in compliance with the IPMC. The order specifically states that submitted plans must be obtained from a licensed architect and licensed structural and mechanical engineers. Finally, the order expressly provides:

> [U]pon failure of the Appellants to carry out this Order on the schedule set forth herein, the City shall have the right to enter upon the Property and remove or demolish the structure, clean the lot, and remove all debris, and the amount of said costs shall be a lien against the Property.

The defendants submitted plans to Mr. Horner by the May 1, 2012 deadline, but Mr. Horner found the plans to be insufficient. Consequently, Mr. Horner promptly notified the defendants that the plans were lacking the structural details necessary for the issuance of a building permit and were not in compliance with the IBC or the IPMC. Specifically, Mr. Horner noted the following deficiencies:

- The engineers and architect did not state that the plans were in compliance with the IBC;
- The architectural and structural plans did not include details regarding methods of repair or materials to be used;
- More specific information was required regarding the method of mold and mildew removal or vapor retardant;
- Calculations were needed regarding the sizing of water heaters and

number of potential tenants;

- Detailed information was necessary regarding the bracing and repair of sewer lines;
- There was no structural detail given for the repair of the floor joists for units 8-19;
- Certified documents were needed declaring units 51-54 structurally sound, and/or detailed plans were needed regarding specific repair methods to be utilized to ensure those units were safe;
- Details were needed regarding the roof repair for units 51-54;
- Structural details were needed regarding the foundation replacement and/or repair of Building "A"; and
- Detailed sprinkler plans were necessary as required by the IBC.

The defendants in turn submitted a revised set of plans. Mr. Horner testified, however, that these revised plans were also deficient and were not signed or stamped by the architect. He explained that a building permit could not be issued based upon the revised plans. On June 6, 2012, Mr. Horner again notified the defendants of the inadequacy of the plans. No additional plans were submitted. Counsel for the City then sent a letter to the defendants' counsel on June 20, 2012, advising that the defendants were in violation of the terms of the agreed order and that demolition of the buildings would begin after June 27, 2012.

The defendants filed suit on June 25, 2012, seeking injunctive relief to prevent demolition. The court denied injunctive relief, and the defendants voluntarily nonsuited that action. The defendants then filed an application for appeal to the Board, seeking the issuance of building permits. At that point, the City filed the instant declaratory judgment action, asserting that the terms of the agreed order should be enforced and that the defendants should be foreclosed from filing any further appeals pursuant to that order. The City also sought a declaration that defendants had materially breached the agreed order and that the City had no obligation to issue building permits.

Following a bench trial, the trial court found that the defendants had materially breached the terms of the agreed order. The court also found that, pursuant to the agreed order, the defendants had forfeited their right to further appeal to the Board. The court therefore ruled that the City could demolish the condemned units and charge a lien against the property for the demolition and cleaning costs. The defendants have timely appealed.

II. Issues Presented

The defendants present the following issues for our review, which we have

restated slightly:

1. Whether the trial court erred in holding that the agreed order at issue waived the defendants' right to further administrative appeal of the building official's denial of building permits.

2. Whether the trial court erred in determining that a justiciable issue existed for the adjudication of a declaratory judgment with respect to the denial of building permits.

III. Standard of Review

Our standard of review is *de novo* with a presumption of correctness as to the trial court's findings of fact unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *McCarty v. McCarty*, 863 S.W.2d 716, 719 (Tenn. Ct. App. 1992). No presumption of correctness attaches to the trial court's legal conclusions. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

We review issues of contract interpretation *de novo*. *See Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013). As this Court has previously explained:

> In resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 889-90 (Tenn. 2002) (citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties "is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." *Planters Gin Co.*, 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998); *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. *Planters Gin Co.*, 78 S.W.3d at 890. The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." *Id.* (quoting 17 Am.Jur.2d, *Contracts*, §

245).

Kafozi v. Windward Cove, LLC, 184 S.W.3d 693, 698 (Tenn. Ct. App. 2005). "Courts must look at the plain meaning of the words in a contract to determine the parties' intent. If the contractual language is clear and unambiguous, the literal meaning controls . . . ." *Allmand v. Pavletic*, 292 S.W.3d 618, 630 (Tenn. 2009) (internal citation omitted).

IV. Interpretation and Enforcement of the Agreed Order

The defendants contend that the trial court erred in its interpretation of the agreed order at issue in this case. The trial court concluded that the pertinent language in the agreed order precluded the defendants from appealing the denial of building permits to the Board. The court found that the order's language in paragraph 7, quoted above, meant that the defendants had no further administrative appeal from that order.

The City argues that the agreed order at issue was drafted by counsel for the defendants and that it is clear and unambiguous in its waiver of both parties' rights to further appeal, which the City maintains was the intent of the order. The City contends that the owners knew they were waiving further administrative appeal and freely and voluntarily agreed to do so. The City asserts that the intent behind the order was that it would be final and contractually bind the parties.

We agree with the City that a "judgment by consent is in substance a contract of record made by the parties and approved by the court." *Third Nat'l Bank v. Scribner*, 370 S.W.2d 482, 486 (Tenn. 1963). As our Supreme Court further elucidated:

> A consent decree is so binding as to be absolutely conclusive upon the consenting parties. The general rule as to the effect of a consent decree is well stated:
>
> > "While a consent judgment and a judgment on the merits are distinguishable, for enforcement purposes they stand on a parity * * * (A) consent judgment acquires the incidents of, and will be given the same force and effect as, judgments rendered after litigation." (30A Am.Jur., Judgments 148)
> >
> > "The conclusiveness of res judicata effect of a consent judgment applies even though the court rendering the consent decree has not ascertained the truth of the facts averred, and has not exercised its mind and passed on the matters in controversy, and

> even though the judgment is erroneous. The fact that without the consent of the parties the court might not have rendered the judgment does not affect its effect as res judicata." (30A Am.Jur., Judgments, 150.)
>
> . . .
>
> The policy of the law is to favor compromise. Thus, in the absence of fraud or mistake (that is, when there has been a true consent to the compromise), the courts will not overturn a consent decree.

Id. at 486-87 (other internal citations omitted). *See also Gardiner v. Word,* 731 S.W.2d 889, 893 (Tenn. 1987) ("[t]he reason for the unassailability of a consent decree is based on the well-founded maxim *volenti non fit injuria* (he who consents to what is done cannot complain of it)."); *Bacardi v. Tenn. Bd. of Regis. in Podiatry*, 124 S.W.3d 553, 562 (Tenn. Ct. App. 2003) ("[A consent] order is conclusive upon the consenting parties, and can neither be amended nor in any way varied without like consent.")[2]

Further, a consent decree, such as the agreed order in this case, is "merely a contract between parties to litigation and, as such, issues of enforceability of a settlement agreement are governed by contract law." *Envtl. Abatement, Inc. v. Astrum R.E. Corp.*, 27 S.W.3d 530, 539 (Tenn. Ct. App. 2000). Likewise, the proper interpretation of such an order is also governed by general contract law. *See Sweeten v. Trade Envelopes, Inc* ., 938 S.W.2d 383, 386 (Tenn. 1996). As our Supreme Court stated in *Sweeten*, "[i]n order to be enforceable, a contract 'must result from a meeting of the minds of the parties in mutual assent to the terms.'" *Id.* (quoting *Higgins v. Oil, Chem. & Atomic Workers*, 811 S.W.2d 875, 879 (Tenn. 1991)).

When interpreting a contract, our "initial task is to determine whether the language in the contract is ambiguous." *Ray Bell Cons't Co., Inc. v. Tenn. Dep't of Transp.*, 356 S.W.3d 384, 386-87 (Tenn. 2011) (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002)). "If the contract language is unambiguous, then the parties' intent is determined from the four corners of the contract." *Ray Bell*, 356 S.W.3d at 387 (citing *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998)). This Court has explained the principles applied to determine whether the contract language is clear or ambiguous as follows:

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[2] *Bacardi* also demonstrates that consent decrees entered in administrative proceedings are treated no differently than consent decrees entered in court proceedings. *See Bacardi*, 124 S.W.3d at 561.

> The language in dispute must be examined in the context of the entire agreement. *Cocke County Bd. of Highway Commrs. v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985). The language of a contract is ambiguous when its meaning is uncertain and when it can be fairly construed in more than one way. *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975). "A strained construction may not be placed on the language used to find ambiguity where none exists." *Id.*

Vanbebber v. Roach, 252 S.W.3d 279, 284 (Tenn. Ct. App. 2007). It is well settled that "ambiguities in a contract are to be construed against the party drafting it." *Frank Rudy Heirs Assocs. v. Moore & Assocs., Inc.*, 919 S.W.2d 609, 613 (Tenn. Ct. App. 1995). "The parol evidence rule does not permit contracting parties to 'use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract.'" *Staubach Retail Servs.-Se., LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 525 (Tenn. 2005) (quoting *GRW Enters. v. Davis*, 797 S.W.2d 606, 610 (Tenn. Ct. App. 1990)).

> The contractual provision at issue in this action provides in pertinent part:
>
> The City and the Appellants expressly agree that they shall be bound by this Order and that neither the City, nor either of the Appellants, shall make any further administrative appeal from this Order or petition any court for a writ of certiorari with respect to the entry of this Order, though the parties are not barred from seeking appropriate remedies with respect to questions involving the parties' performance of the obligations imposed by this Order and the enforcement of this Order.

We agree with the City that this provision is clear and unambiguous. The plain language of this provision states that both parties agree that they will be bound by the terms of the agreed order and that no party will file any further administrative appeal from the agreed order. There is no other reasonable interpretation of the above provision. This order was clearly intended to bring finality to the administrative process. As such, the trial court properly held the defendants' attempt to file a further appeal regarding the denial of a building permit to be a nullity.

The defendants argue that the provision regarding "seeking appropriate remedies with respect to questions involving the parties' performance of the obligations imposed by this Order and the enforcement of this Order" allows them to appeal the denial of the building permits to the Board. The defendants contend that to interpret the provision otherwise gives the Building Official complete control over whether they can go forward with repairs. The defendants further assert that until the administrative appeal process is complete, there is no

justiciable issue for the court to determine. Therefore, as the defendants posit, the court's issuance of a declaratory judgment deprives them of their right to exhaust administrative appeals in violation of their due process rights.

Based upon the plain language of the provision at issue and the precedent regarding interpretation and enforcement of consent decrees set forth above, we conclude that the defendants' contentions are unavailing. The agreed order's language of "seeking appropriate remedies with respect to questions involving the parties' performance of the obligations imposed by this Order and the enforcement of this Order" clearly refers to an action such as the one at bar, which is an appropriate remedy for interpreting and enforcing the disputed order. It is equally clear, however, that the parties intended for there to be no further proceedings before the Board whatsoever with regard to the subject order and that any further remedies would be pursued outside the bounds of the administrative process. We find that the defendants' contention regarding the meaning of the above language represents a "strained" construction, which "may not be placed on the language used to find ambiguity where none exists." *Vanbebber*, 252 S.W.3d at 284.

The defendants also assert that when reading the disputed provision in its entirety, their agreement that neither party "shall make any further administrative appeal from this Order or petition any court for a writ of certiorari with respect to the entry of this Order" should be interpreted as only disallowing appeals addressing entry of the order and not its interpretation or enforcement. Close parsing of the contract language reveals that the final prepositional phrases, "for a writ of certiorari/with respect to the entry/of this Order," apply to the verb and object that are their immediate antecedents, "petition any court." We determine that to read the final prepositional phrases as applicable to the previous verb phrase and object, "shall make any further administrative appeal" (already modified by the prepositional phrase, "from this Order"), is a strained construction at best. As previously stated, a "strained" construction "may not be placed on the language used to find ambiguity where none exists." *Vanbebber*, 252 S.W.3d at 284. Moreover, if such an ambiguity did exist, we note that "ambiguities in a contract are to be construed against the party drafting it," in this case, the defendants. *See Frank Rudy Heirs Assocs.*, 919 S.W.2d at 613.

The defendants also contend that the City breached its implied duty of good faith and fair dealing. As this Court has previously explained:

> Every contract imposes upon the parties a duty of good faith and fair dealing in the performance and interpretation of the contract. This duty requires a contracting party to do nothing that will have the effect of impairing or destroying the rights of the other party to receive the benefits of the contract.

Elliott v. Elliott, 149 S.W.3d 77, 84-85 (Tenn. Ct. App. 2004) (internal citations omitted). We find no evidence that the City breached its duty of good faith and fair dealing in this case. The City timely responded to the plans that were submitted by the defendants, as the order required, and provided the information necessary to allow the defendants to revise their plans and attempt to properly obtain a building permit for repairs. The fact that defendants failed to timely submit sufficient plans that would warrant the issuance of a building permit is their own failing and not that of the City.

V. Justiciable Issue and Declaratory Judgment

The defendants contend that there was no justiciable issue for the trial court to adjudicate until they exhausted their administrative remedy via the appeal process before the Board. With regard to this issue, the trial court found:

> 2. The Plaintiff's suit for declaratory relief presents a proper and justiciable issue pursuant to the *Tennessee Declaratory Judgments Act*, T.C.A. § 29-14-101, *et seq*., such that the Court declares the following:
>
> (a) The agreed Order entered into on March 29, 2012 constitutes a solemn contract between the Plaintiff, Gatlinburg, and Defendants, Kaplow and Greenstein, which is fully enforceable by the Plaintiff; and
>
> (b) The Defendants, Kaplow and Greenstein, materially breached and violated the agreed Order and, in so doing, forfeited any right to appeal further to the Board of Appeals and Adjustments or to seek permits for repair of the subject buildings. Thus, the attempted appeal by Defendants Greenstein and Kaplow to the Board of Appeals and Adjustments on June 27, 2012 is a nullity and shall be held for nothing; and
>
> (c) The Plaintiff is fully within its legal rights to enter upon the Property and remove or demolish the structures, clean the lot, and remove all debris, and the amount of costs incident to such work shall be a lien against the Property.

As previously stated, a consent decree is subject to enforcement as any other contract. In this case, the plain language of the order provided that both parties waived the right to

make any further appeal to the Board. Therefore, this Court must enforce the parties' contract as written.

The City asserts and the record supports a determination that the agreed order was the culmination of a year-long administrative process and that the defendants were at the point of having their buildings immediately demolished by the City, but for the agreement reached in the order giving the defendants the opportunity to make repairs. The order sets forth a detailed schedule, which was clearly intended to cover all contingencies and to provide a timetable by which the parties would be strictly bound. There is no question that the defendants failed to provide sufficient plans warranting the issuance of a building permit within the time frame provided by the agreed order. Therefore, the defendants breached the terms of the order and, pursuant to the order's express language, their administrative remedy with the Board became final.

Regarding what constitutes a justiciable claim pursuant to the Declaratory Judgment Act, our Supreme Court has elucidated:

> The primary purpose of the Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. . . ." Tenn. Code Ann. § 29-14-113. Although the Act is "to be liberally construed and administered," *id.*, we have acknowledged that "certain limitations must be placed upon the operation of the statute." *Johnson City v. Caplan*, 194 Tenn. 496, 253 S.W.2d 725, 726 (1952). For example, a declaratory judgment action cannot be used by a court to decide a theoretical question, *Miller v. Miller*, 149 Tenn. 463, 261 S.W. 965, 972 (1924), render an advisory opinion which may help a party in another transaction, *Hodges v. Hamblen County*, 152 Tenn. 395, 277 S.W. 901, 902 (1925), or "allay fears as to what may occur in the future," *Super Flea Mkt.*, 677 S.W.2d at 451. Thus, in order to maintain an action for a declaratory judgment a justiciable controversy must exist. *Jared v. Fitzgerald*, 183 Tenn. 682, 195 S.W.2d 1, 4 (1946). For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a legally protectable interest must be at stake. *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913, 915 (1949). If the controversy depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable. *Story v. Walker*, 218 Tenn. 605, 404 S.W.2d 803, 804 (1966). If the rule were otherwise, the "courts might well be projected into the limitless field of advisory opinions." *Id.*

State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 193 (Tenn. 2000).

The trial court properly found that a justiciable issue existed and granted a declaratory judgment pursuant to Tennessee Code Annotated § 29-14-103, which provides:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In this action, the trial court was asked to declare the rights of the parties pursuant to a contract and to determine the proper construction of the language contained therein. The question involved was real rather than theoretical, and the parties had legally protectable interests at stake. Pursuant to the express terms of the parties' agreed order, the parties waived any rights to further appeal or administrative remedy before the Board. As such, the City was entitled to have that order enforced as any other contract, and its seeking a declaratory judgment regarding interpretation and enforcement of the order was entirely proper. This issue is also without merit.

VI. Conclusion

For the reasons stated above, we affirm the trial court's judgment in all respects. The costs on appeal are assessed against the appellants, Stuart H. Kaplow and Maury R. Greenstein. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the judgment and collection of costs assessed below.

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THOMAS R. FRIERSON, II, JUDGE