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Assured Guaranty Corporation v. Madison County, Mississippi

United States Court of Appeals, Fifth Circuit - May 31, 2017 - Fed.Appx. - 2017 WL 2372641

In July 2005, Parkway East – a Mississippi special-purpose government entity – issued $27,770,000 of special assessment bonds. Parkway East subsequently entered into a Contribution Agreement Madison County to help Parkway East market the bonds at a lower interest rate.

Section 3 of the Contribution Agreement, which is at issue in this case, describes three obligations by which the County and Parkway East are bound. The parties disagree about the following portions of Section 3: (1) a promise that the County advance funds when Parkway East cannot make bond payments if the County is satisfied with Parkway East's performance of its obligations under the Contribution Agreement, and (2) a requirement that Parkway East reimburse the County for such advances within two years of when they are made.

In connection with its issuance of bonds, Parkway East also purchased a bond insurance policy from Assured Guaranty. As bond insurer, Assured only makes bond payments if a shortfall remains after applying funds from special assessment collections and any contribution made by the County.

Following the failure of the underlying commercial development, the County advanced bond payments four times before refusing to make any further advance payments because Parkway East had failed to reimburse the County within two years, an obligation the County alleged had to be fulfilled before the County was required to make advances. Assured then began advancing funds to cover any bond payment deficiencies.

On November 1, 2013, Assured sued the County, seeking a declaration finding the Contribution Agreement valid and obligating the County to advance bond payments regardless of whether Parkway East reimbursed the County within the two-year period described in the contract.

The District Court held in favor of Assured, finding that the County was obligated to advance payments so long as the bonds remained outstanding, regardless of whether Parkway East reimbursed the County within two years. County appealed.

The Court of Appeals reversed, finding that the plain language of the Contribution Agreement conditioned the County's advancement obligation on Parkway East's performance of its reimbursement obligations.

The parties agreed that the Contribution Agreement is unambiguous, but disagreed about the import of Part 3. The County argued that Part 3's reimbursement provision is a condition precedent to its obligation to advance funds for bond payments. In other words, the County contended that if Parkway East failed to reimburse it for bond-payment advances within two years of when the advances were made, it was no longer required to make any future advance payments. Assured, however, argued that Part 3's reimbursement provision is separate and removed from any conditional language in Part 1 and accordingly that reimbursement is not a condition precedent to

the County's obligation to make advance payments under Part 1. Thus, Assured posited that the County was obligated to make bond-payment advances as long as the bonds remained outstanding, regardless of whether Parkway East ever reimbursed the County. Section 12 of the Contribution Agreement provides that the agreement shall last for "the duration of any Bonds issued by Parkway East."

"Given that the plain meaning of "notwithstanding" is "in spite of," logic dictates that the word "notwithstanding" implies some contradiction regarding what it refers to. Thus, Assured is only correct that the reimbursement covenant in Part 3 is carved out from the remainder of the provision at issue if Part 3 contradicts both Parts 1 and 2. However, only Part 2—requiring immediate reimbursement by Parkway East under certain circumstances—conflicts with the two-year reimbursement requirement of Part 3. Part 1, on the other hand, is wholly consistent with Part 3. There is no tension between a requirement that the County advance bond payments when Parkway East is unable to make them if Parkway East satisfies its obligations under the Contribution Agreement (Part 1) and a requirement that Parkway East reimburse the County for such advances within two years of when they are made (Part 3). Accordingly, we find that the language "notwithstanding the above" does not carve out Parkway East's obligation to reimburse the County from the obligations referred to in Part 1."

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