

Bond Case Briefs

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Compass Bank v. Eager Road Associates, LLC

United States District Court, E.D. Missouri, Eastern Division - October 28, 2013 - Slip Copy - 2013 WL 5786634

Banks sought damages for the breach of a Settlement Agreement between the parties arising out of an underlying lawsuit. The dispute underlying the prior lawsuit arose out of a complex financial transaction involving the development of commercial and retail property known as The Meridian at Brentwood (the Meridian Project). The Banks alleged that the City of Brentwood issued tax increment revenue bonds (the Bonds) to finance certain public improvements associated with the Meridian Project and to reimburse Defendant Eager Road Associates (ERA) for certain costs incurred by ERA in constructing such improvements. In September 2011, the parties entered into a Settlement Agreement.

The Banks alleged that at issue were two provisions of the Settlement Agreement and Mutual Release, whereby Defendants were required to (1) tender to Plaintiffs \$4.15 million to purchase a portion of the Bonds (the Developer Settlement Payment), and (2) provide a \$1.35 million letter of credit (Developer Letter of Credit), payable in three years.

The Banks further alleged that the Settlement Agreement provided for Bond Refinancing, which involved either remarketing of Series 2007B Bonds or refunding both Series 2007A and Series 2007B Bonds and that, under the terms of the Settlement Agreement, delivery of the Developer Settlement Agreement and Developer Letter of Credit were conditions precedent to the Bond Refinancing. According to the Banks, they have performed their obligations under the Settlement Agreement, but ERA has failed to meet its obligations as designated by the Settlement Agreement, including making the Developer Settlement Payment, delivering the Developer Letter of Credit, and completing the Bond Refinancing.

For purposes of this lawsuit, ERA disclosed Eugene Norber as a non-retained expert witness. ERA's expert witness disclosure states that the subject matter of Mr. Norber's testimony will be "payments made from trust accounts maintained" by Defendant UMB Bank. N.A., relating to the Series 2007B Bonds, "including, but not limited to, interest payments to bondholders from said accounts and payments for legal fees made from said accounts."

The Banks sought to exclude Mr. Norber's testimony on the grounds that (1) ERA incorrectly designated him as a non-retained expert rather than as a retained expert; (2) even if Mr. Norber was properly designated a non-retained expert, ERA's expert disclosure does not properly comply with the requirements for non-retained experts under Rule 26(a)(2)(C); and (3) given the subject of Mr. Norber's testimony, ERA failed to disclose any unique knowledge or expertise Mr. Norber has regarding trust accounts or payments made from trust accounts.

A retained or specialty expert is "an expert who without prior knowledge of the facts giving rise to litigation is recruited to provide expert opinion testimony. A non-retained expert is one whose testimony arises from his or her involvement in events giving rise to the litigation.

“The Court finds that Mr. Norber was properly designated a non-retained expert. He was contacted and consulted to address an ongoing issue for which he has specialized expertise, and he was actively involved in financial matters related to the funding and development of Meridian Project. Because Mr. Norber was properly designated a non-retained expert by ERA, the Court finds that ERA’s expert witness disclosure regarding Mr. Norber was sufficient as it provided a ‘summary of the facts and opinions’ about which he is expected to testify, including payments made from trust accounts maintained by UMB relating to the Series 2007B Bonds.”

Consequently, the Banks’ Motion to Exclude Purported Expert Testimony of Eugene Norber was denied.