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Senior Care Living VI, LLC v. Preston Hollow Capital, LLC

Court of Appeals of Texas, Houston (1st Dist.) - November 30, 2023 - S.W.3d - 2023 WL 8262772

Assisted-living facility management company brought declaratory-judgment action against bank and trust company, seeking declaration that management company was not in default under bond agreements to finance construction of facility.

Bondholder intervened, and its separate action against individual guarantor of management company's debt was consolidated with declaratory-judgment action.

Bank and trust company conditionally asserted same claims as bondholder, alleging breach of contract against management company and claim against guarantor under guaranty.

The District Court entered partial summary judgment that bank and trust company were properly appointed as co-successor trustees, dismissed management company's claims for conversion, and after bench trial, entered judgment against management company and guarantor, jointly and severally, for $52.6 million.

After their motions for new trial were overruled, management company and guarantor appealed.

The Court of Appeals held that:

- Appointment of bank and trust company as successor co-trustees was effective;
- Notice to co-trustees was not a condition precedent to bondholder bringing action against management company;
- Bondholder did not qualify as guaranteed party entitled to enforce guaranty against individual guarantor;
- Notice of intent to accelerate debt incurred under bond agreements was not clear and unequivocal; and
- There was no evidence that management company owned or had possession of funds or entitlement to possession of funds under bond agreements.

Issue on appeal, in declaratory-judgment action brought by company that managed assisted-living facility against bondholders who issued bonds to finance construction of facility, raised by company, alleging bondholder was not entitled to receivership because it did not plead for that relief, was rendered moot when, during pendency of appeal, receiver moved for final accounting and sought to be discharged, and trial court granted that request and discharged receiver from all duties, responsibilities, and obligations under trial court's post-judgment receivership order.

Appointment of bank and trust company as successor co-trustees by bond trustee, who managed distribution of proceeds from sale of bonds to finance construction of assisted-living facility and loan payments from facility's management company, was effective under provision of trust indenture agreement governing appointment of co-trustees, even though management company, as obligor

under agreement, did not give prior consent; bond trustee sent notice appointing bank and trust company as co-trustees, provision explicitly vested bond trustee with "power to appoint" one or more persons to act as co-trustee jointly with bond trustee, and provision gave bond trustee power to make the appointment "on its own" if obligor did not join.

Assisted-living facility management company and individual guarantor of management company's debt incurred under bond agreements to finance construction of facility, waived argument on appeal that bondholder could not recover on its breach of contract claim because copy of agreement admitted at trial indicated that it had been amended, but bondholder did not introduce amended version into evidence; no party argued in trial that agreement was inoperable or sought to introduce amended agreement, and management company did not attempt to establish in trial that agreement had been amended, and it obtained no fact findings on amendments modifying agreement.

Provision of trust indenture agreement, under which proceeds from sale of bonds were used to finance construction of assisted-living facility, regarding actions taken by bondholder representative in lieu of bond trustee, did not make written notice a prerequisite to proceeding in lieu of trustee, merely noting bondholder's election to proceed would be evidenced by written notice, and thus, notice was not a condition precedent to bondholder bringing action against facility's management company, as obligor under agreement, for breach of contract; provision contemplated that written notice would constitute contemporaneous or after-the-fact proof that an election to proceed had taken place, and provision did not have conditional language such as "if," "provided that," or "on condition that."

Even if provision of trust indenture agreement, under which proceeds from sale of bonds were used to finance construction of assisted-living facility, regarding notice of actions taken by bondholder representative in lieu of bond trustee was a condition precedent to bondholder bringing action against facility's management company, as obligor under agreement, bondholder substantially complied with such condition; bondholder's counsel emailed bank serving as co-trustee under agreement, stating that counsel intended to file a complaint against management company in federal court, including complaint as attachment, and stating that filing included input from bank's counsel and counsel for trust company serving as co-trustee.

Bondholder, as noteholder representative and majority bondholder representative under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, could pursue remedies on behalf of subordinate bondholders for breach of contract claim against assisted-living facility management company, as obligor under agreements, even if relevant provisions ensured priority of senior notes and bonds; nothing in relevant provisions of agreements provided that, when entire debt had been accelerated due to default, bondholder could pursue remedies only on behalf of senior bondholders, and could not also pursue remedies on behalf of subordinate bondholders in same proceeding.

Bondholder, as noteholder representative and majority bondholder representative under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, was not a noteholder, and thus, did not qualify as a guaranteed party entitled to enforce guaranty against individual guarantor of financing for facility; bondholder was not a registered owner of promissory notes, and was not required to be in order to be noteholder representative, and guaranteed parties under guaranty included only trustee for the benefit of noteholders.

Bondholder's status as noteholder representative and majority bondholder representative, under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, did not grant it authority to enforce guaranty against individual guarantor of

financing for facility; text of guaranty itself said nothing about allowing either noteholder representative or majority bondholder representative to pursue remedies under guaranty, and instead provided only that noteholder representative could direct trustee under agreements to take action after an event of default.

Assisted-living facility management company and individual guarantor of management company's debt, incurred under bond agreements to finance construction of facility, preserved for appeal issue of whether bondholder properly accelerated debt under agreements, even if bondholder pleaded that all conditions precedent to suit had been performed, and management company and guarantor did not specifically challenge notice of intent to accelerate as condition precedent, where trial court admitted evidence of notices of default, of intent to accelerate debt, and of acceleration, and made express fact findings that debt was properly accelerated.

Trustee's notice of intent to accelerate debt incurred under bond agreements to finance construction of assisted-living facility, including parenthetical "(subject to further election and notice to you)," was not clear and unequivocal, and thus, subsequent notice of acceleration of debt was ineffective; agreements gave trustee option to accelerate payment of amounts owed by facility's management company upon occurrence of an event of default, and by including parenthetical, trustee failed to unequivocally indicate that management company's failure to cure alleged defaults would automatically result in acceleration, and instead suggested that an additional election and notice would need to be made in the future.

Court of Appeals would reverse $52.6 million award of damages in favor of bondholder and remand for a new trial on bondholder's breach of contract claim, which was reversed in part on appeal, rather than suggesting a remittitur, in declaratory-judgment action brought by company that managed assisted-living facility against bondholders who issued bonds to finance construction of facility; no party had suggested an amount for a remittitur, management company had not challenged all breaches found by the trial court, and the trial court made no findings that would identify an appropriate lesser amount of damages.

There was no evidence that assisted-living facility management company owned or had possession of funds or entitlement to possession of funds, under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, as required element of management company's conversion claim against bank and trust company, as co-trustees managing distribution of proceeds from sale of bonds and loan payments from management company, and bondholder.

There was no evidence that bank and trust company, as co-trustees under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, and bondholder held money that belonged to assisted-living facility management company, as obligor under agreements, as required element of management company's money had and received claim against bank, trust company, and bondholder.

Guaranty, under which individual guarantor of assisted-living facility management company's debt incurred under bond agreements to finance construction of facility guaranteed full and prompt payment of debt to trustee for the benefit of noteholders, could not be used to justify requiring guarantor to pay bondholder's attorney fees and expenses, in management company's declaratory-judgment action seeking declaration that it was not in default under agreements; bondholder was not a guaranteed party, i.e., noteholder, under guaranty, and could not enforce guaranty.

Bank and trust company, as co-trustees under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, were not entitled to recover

attorney fees against individual guarantor of financing for facility, in declaratory-judgment action brought by management company of facility against bank, trust company, and bondholder, seeking declaration that it was not in default under agreements; bank and trust company conditionally asserted same causes of action asserted by bondholder, in the event bondholder lacked authority to bring suit, and trial court awarded damages against guarantor to bondholder only, such that condition to trigger assertion of bank and trust company’s claims never occurred.

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