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PROJECT FINANCE - TEXAS

[Cottonwood Development Corporation v. Preston Hollow Capital, LLC](#)

Court of Appeals of Texas, Austin (3rd Dist.) - November 27, 2024 - S.W.3d - 2024 WL 4906771

Title company filed interpleader action against lender and borrower, a local-government corporation, seeking order to deposit certain escrowed funds into court registry, borrower filed counterclaim against company for conversion, third-party claim against law firm retained by lender for conversion, civil conspiracy, and declaratory relief, and cross-claim against lender for breach of contract, violation of the Texas Open Meetings Act (TOMA), and declaratory relief under the Uniform Declaratory Judgments Act (UDJA), and lender filed cross-claims against borrower for breach of contract, and declaratory relief under the UDJA.

The 368th District Court granted firm summary judgment as to borrower's third-party claim, granted lender summary judgment as to its cross-claims, and awarded lender attorney fees, subsequently, the trial court denied borrower's motion to reconsider, then denied borrower's combined plea in bar and motion for summary judgment, next granted lender's motion for summary judgment on all remaining issues involving borrower, and finally, issued final judgment and order of foreclosure, and granted borrower's motion to sever its claims against lender and firm from company's interpleader action. Thereafter, the trial court denied borrower's motion to set aside deeds of trust, to place certain funds in court registry, and for temporary and permanent injunction suspending order of sale.

Borrower appealed.

The Court of Appeals held that:

- Judgment was not rendered as to state-law claims by court of competent jurisdiction in prior federal action, as required for federal judgment to be res judicata;
- Borrower lacked authority to bring action based on its own and city's alleged violations of TOMA;
- Loan documents were not void ab initio on basis that city had made illegal delegations of authority to city manager;
- Loan documents were not void ab initio on basis that lender failed to secure Attorney General's approval of note;
- Lender did not materially breach terms of loan agreement; and
- Conduct of attorney of firm representing lender was within scope of firm's representation, thus, attorney immunity applied to bar claims against firm.

Borrower, a local-government corporation, waived for appellate review its challenges to the trial court's orders denying borrower's motion to strike intervenor's petition in intervention, denying borrower's motion to set aside deeds of trust, and denying borrower's motion for temporary and permanent Injunction preventing the issuance of an order of sale of mortgaged property, in action in which lender asserted cross-claims for breach of contract and declaratory judgment that it was the

lawful owner of advanced funds held in escrow, that it was legally entitled to foreclose on mortgaged property, and that the loan agreement and all other loan documents were valid and enforceable, where the arguments did not appear in borrower's appellate brief.

Judgment was not rendered as to lender's state-law claims by a court of competent jurisdiction after lender's only federal-law claim was dismissed in lender's prior action in federal court, as required for the federal judgment to be *res judicata*, in action in which lender asserted cross-claims against borrower for breach of contract and declaratory relief as to the validity of a lending agreement; federal judge would clearly have declined to exercise discretionary pendent jurisdiction over the state-law claims, as the judge expressly declined to exercise supplemental jurisdiction over the state-law claims when dismissing the federal claim, and the same judge declined to exercise jurisdiction over potential or pleaded state-law claims after dismissing federal-law claims in nine other cases.

Lender's alleged statement in a prior federal action that the contracts underlying its lending agreement with borrower were void were not *res judicata* on the basis that the statement was a judicial admission, in action in which lender asserted cross-claims against borrower for breach of contract and declaratory relief as to the validity of the lending agreement; statement was not a judicial admission, as the statement was about a question of law for the court, and was not a fact that could be admitted.

Borrower, a local-government corporation created by city, lacked authority to bring an action based on its own and city's alleged violations of the Texas Open Meetings Act (TOMA) under TOMA provision authorizing an interested person to bring an action by injunction to reverse a violation of TOMA by members of a governmental body, as would support borrower's claim that the TOMA violations voided documents governing lender's loan of funds to borrower for a development project; statute distinguished between the "interested person" who could bring an action and the "members of a governmental body" who were the subjects of that action.

Borrower, a local-government corporation created by city, failed to preserve for appellate review its argument that it was entitled to summary judgment as to lender's cross-claims for breach of contract and declaratory judgment because the term sheet prepared in preparation for a loan agreement for a development project was void *ab initio* on the basis that it required illegal contract zoning, in action alleging lender was the lawful owner of advanced funds held in escrow, that it was legally entitled to foreclose on mortgaged property, and that the loan agreement and all other loan documents were valid and enforceable, where borrower's petition failed to plead any claim against lender alleging invalidity of the term sheet because it required "contract zoning."

Loan documents governing the terms of lender's loan of funds for a development project to borrower, a local-government corporation, were not void *ab initio* on the basis that city had made illegal delegations of authority to city manager, in action in which lender asserted cross-claims against borrower for breach of contract and declaratory judgment that it was the lawful owner of advanced funds held in escrow, that it was legally entitled to foreclose on mortgaged property, and that the loan agreement and all other loan documents were valid and enforceable; even if city had illegally delegated authority to the manager, the documents were executed by city's mayor and a city board member for corporation as the contracting party after the manager separated from city.

Agreement and related documents governing the terms of lender's loan of funds for a development project to borrower, a local-government corporation, were not void *ab initio* on the basis that lender failed to secure the Attorney General's approval of the note in violation of the Transportation Code, in action in which lender asserted cross-claims against borrower for breach of contract and declaratory judgment that it was the lawful owner of advanced funds held in escrow, that it was legally entitled to foreclose on mortgaged property, and that the loan agreement and all other loan

documents were valid and enforceable; statute provided no consequence for failing to submit a note, but rather merely provided that a note could not be contested if the Attorney General approved it.

Lender did not materially breach the terms of the agreement for the loan of \$35 million to borrower, a local-government corporation, by only tendering approximately \$12.5 million of a promised \$15 million advance and by failing to release from escrow the remaining funds, in action in which lender asserted cross-claims against borrower for breach of contract and declaratory judgment that it lawfully owned the escrowed funds, that it was legally entitled to foreclose on mortgaged property, and that the loan agreement and all other loan documents were valid and enforceable; lender disbursed the full \$15 million into escrow for borrower's benefit at closing, consistent with the agreement, and city and corporation's representatives agreed that approximately \$2.5 million could remain in escrow.

Conduct of attorney of firm representing lender, who instructed title company to pay \$60,000 of attorney's fees to firm out of an initial advance to borrower of \$15 million distributed pursuant to a loan agreement, was within the scope of firm's representation, and, thus, attorney immunity applied to bar borrower's claims against firm for conversion, civil conspiracy, and declaratory judgment that firm was in wrongful and illegal possession of the attorney fee funds, and that such funds should be repatriated and transferred to borrower, where lender's attorney drafted a letter stating that the attorney fees were to be paid from borrower's funds, and borrower's attorney reviewed the letter and confirmed to company that the fees would be taken out of the initial advance.