MINNESOTA STATE LAW LIBRARY

OFFICE OF
APPELLATE COURTS
SEP 29 2009
FILED

A07-1512
A07-1513
A07-1514

State of Minnesota
In Supreme Court

In re a Petition for Instructions to Construe
Basic Resolution 876 of the Port Authority
of the City of St. Paul

APPELLANTS 876 BONDHOLDERS' RESPONSE TO PETITION FOR REHEARING BY THE PORT AUTHORITY OF THE CITY OF SAINT PAUL

Kay Nord Hunt (I.D. No. 138289)
Phillip A. Cole (I.D. No. 17802)
Keith J. Broady (I.D. No. 120972)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Appellants
876 Bondholders

Scott G. Knudson (I.D. No. 141987)
Paul C. Thissen (I.D. No. 241416)
Diane B. Bratvold (I.D. No. 018696X)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Attorneys for Respondent
The Port Authority of the
City of Saint Paul

As this Court stated in Derby v. Gallup, 5 Minn. 119, 5 Gil. 85 (1860), "where a question of law has once been fully discussed on the argument, and considered by the Court, we cannot admit that a party is entitled to a re-argument, on the ground that there is a manifest error in the decision." The Respondent Port Authority of the City of Saint Paul (Port Authority), dissatisfied with this Court's unanimous ruling that Minn. Stat. Chapter 501B does not apply to revenue bonds sold by the Port Authority under Basic Resolution 876 and that the district court orders regarding Basic Resolution 876 are void, is seeking to simply reargue its position. Minn. R. Civ. App. P. 140.01 is not intended to nor does it provide a party with yet another chance to re-argue to this Court. Appellants/Petitioners 876 Bondholders (Bondholders) respectfully request that the Court deny the Petition for Rehearing and grant Bondholders $500.00 in attorney's fees pursuant to Minn. R. Civ. App. P. 140.03 for responding to this Petition.

I. THIS COURT HAS RULED THE DISTRICT COURT ORDERS REGARDING BASIC RESOLUTION 876 ARE VOID.

In 2002, 2004 and 2006, the Port Authority petitioned the court "pursuant to Minnesota Statutes § 501B.16 and 501B.25" and it was on that basis that the trial court held the 2002, 2004 and 2006 Petitions were before the court. (A. 9, 16). This Court has ruled as a matter of law that the 876 Bonds are not within the purview of Minnesota Chapter 501B.

The Port Authority's rehearing arguments are the same arguments contained in Respondent's brief to this Court. (See Respondent Port Authority Respondent's Brief at p. 20). The Port Authority cannot credibly argue that an application of Chapter 501B to

the Basic Resolution does not work an amendment to Basic Resolution 876. As this Court recognized, "applying to these bonds the 1993 amendment to section 501B.25 alters the contractual rights of the bondholders under Basic Resolution 876." (Court's Opinion, p. 11). The Port Authority, in direct contravention to the terms of the Basic Resolution, wrongfully utilized Minn. Stat. Chapter 501B to declare itself a "trustee" and petition the court to reform the terms of the bond contracts or authorize a deviation from its terms under Minn. Stat. § 501B.16(4). Such a transfer of power from the Bondholders to the Port Authority and to the court is in direct contravention to the terms of the Basic Resolution.

A. The Port Authority's Wrongful Use of Chapter 501B Resulted in Amendment of the Basic Resolution Without Bondholder Consent.

The Port Authority cannot also credibly argue its intent was not to amend the Basic Resolution without Bondholder approval. The trial court, in responding to the Port Authority's 2006 Petition, recognized that "[t]his matter is before the Court on Port Authority's Petition for Instructions Regarding its Basic Resolution 876 Pursuant to Minn. Stat. §§ 501B.16 and 501B.25. The Port Authority seeks authorization to liquidate the 876 bonds and terminate the Basic Resolution . . . ." (A. 13-14). Without Chapter 501B, there is no legal basis by which the Port Authority could seek such "instructions" by the Court or "authorization" to terminate its contractual relationship with the Bondholders.

Under basic contract principles, contract modification can only occur when the parties agree to alter a contractual provision. Minnesota Valley Gun Co. v. Northline

Corp., 207 Minn. 126, 290 N.W. 222, 224 (1940); Telex Corp. v. Data Products Corp., 271 Minn. 288, 135 N.W.2d 681, 687 (1965). A party cannot unilaterally modify even unworkable provisions of a contract. In re Woodcock, 45 F.3d 363, 367 (10th Cir. 1995). Nor can equitable relief be granted by the court where the rights of a party are governed by contract. Cady v. Bush, 283 Minn. 105, 106 N.W.2d 358, 361 (1969).

The record is replete with examples that the Port Authority's intent throughout its multiple 501B petitions was to utilize Chapter 501B to unilaterally alter the terms of the parties' contract. In 2002, for example, the Port Authority asked the trial court to authorize "the Port Authority to recover the expenses of the proposed tender offer or those incurred with future offers, including the expenses of pursuing this Petition and responding to the Franklin Funds request, from funds on deposit under the Basic Resolution, and to recover up to 0.75% of the principal of bonds tendered as a cost of tender." (A. 108-109). No provision of the Basic Resolution so allows. The trial court's allowance of such costs is an amendment to the Basic Resolution without Bondholder consent and is directly contrary to Section 9-2 of the Basic Resolution. (A. 89).

Following the Port Authority's success in 2002, in 2004, the Port Authority brought another Petition, this time seeking to change the timing of the principal and interest payments. (A. 139). The Port Authority even acknowledged to the trial court that under the terms of the Basic Resolution such a change required Bondholder consent; the Port Authority did not seek such consent. It instead asserted that the court had the power

under Minn. Stat. § 501B.16 "to construe the Basic Resolution to authorize this adjustment." (A. 142-143).

In 2004, the Port Authority sought to recover the costs of the Petition "as well as other ongoing costs necessarily incurred by the Port Authority in connection with the administration of the 876 Fund and the 876 Bonds, from Prepaid Net Revenues, Special Funds and, after depletion of those funds, from Net Revenues." (A. 144). No language in the Basic Resolution authorized the Port Authority's request. (T. 242-244). Using these revenues pledged to the Bond Fund is a breach of Section 5-2(3) that requires the use of funds in the Bond Fund to be withdrawn "solely" to pay principal and interest owed on the Bonds. (A. 76).

Finally, in 2006, the Port Authority brought another Petition. In that Petition, it reminded the trial court that in 2004 the trial court had exercised "its authority to construe, interpret and reform the Basic Resolution" by its 2004 Order adjusting the payment terms. (A. 175). The Port Authority came before the court requesting a court order "allowing the Port Authority to liquidate the 876 Bonds and terminate the Basic Resolution." (A. 178-180).

In Paragraph 12 of its 2006 Petition, the Port Authority asserted "lease revenues are funds that could be used for other public purposes if not pledged to the 876 funds." (A. 172). The Port Authority in its Petition sought to have the court relieve the Port Authority from its pledge, to the detriment of the Bondholders and contrary to Section 4-9 of the Basic Resolution, drafted by the Port Authority. (A. 68).

In Paragraph 42 of its 2006 Petition, the Port Authority proposed to solicit proposals from third parties to purchase revenue streams that are pledged to payments on 876 Bonds through 2022 "when the 876 Fund would ordinarily have ended." (A. 179). In fact, 2022 is merely the due date on the last 876 Bond, not the end of the 876 Fund or the end of the Port Authority's obligation. Again, this proposal is directly contrary to Basic Resolution § 4-9. (A. 68). The Port Authority has specifically admitted there is nothing in the Basic Resolution that supports its request, and no statute says that the Port Authority is acquitted of its covenants after 30 years. (T. 364-365).

The Port Authority admits that the Port Authority could be relieved of its covenants by negotiating an amendment to the Resolution with 51% of the Bondholders, as the Basic Resolution provides. (Section 9-2; A. 89-90; T. 257). No such negotiations occurred. (Id.)

What the Port Authority petitioned for and was granted by the 2002, 2004 and 2006 Orders were material and significant alterations of the Basic Resolution.

B. The Port Authority's Wrongful Invocation of Chapter 501B Deprived Bondholders of Due Process.

The Port Authority argues that the Port Authority used the procedures of Chapter 501B because they offered an "efficient" means to put its "liquidation plan" before the district court and the bondholders would get "adequate" notice. (Petition at pp. 3-4). The Port Authority ignores the fact that by utilizing Chapter 501B, no personal service of the Port Authority's Petitions was ever made on the 876 Bondholders. Instead, invoking Minn. Stat. § 501B.18, notices of the hearings on the Port Authority's Petitions were published in some newspapers and a copy of each notice and petition was to be mailed to

"the addresses of each person as last known to the Port Authority" 15 days before the hearing. (A. 111). The Port Authority then merely declared it would mail a notice of hearing "to as many bondholders as is feasible." (A. 107-108, 111; T. 9/13/02 pp. 6-7).

By the Port Authority's improper use of 501B procedures, the Bondholders were denied the rights guaranteed to them in any other contract action – i.e., service of a summons and complaint in conformity with Minnesota Rules of Civil Procedure and an opportunity to answer. Purported "efficiency" does not grant the Port Authority the unilateral right to deprive the Bondholders of their contractual rights nor their rights to due process under Minnesota law.

C. The Port Authority Has No Defense of Impossibility of Performance.

This Court vacated the May 17, 2007 district court order issued in response to the Port Authority's 2006 Petition and held that Order void. (Court Opinion, pp. 1, 12, 14). Even though the Court has ruled there was no jurisdiction by which the trial court could hear and decide the 2006 Petition, the Port Authority premises its rehearing request on pages 2 and 6 of its Petition on the findings of a void order issued following a hearing that the court had no jurisdiction to conduct. That order, as well as the proceedings leading to that order, as a matter of law, have no force and effect. Lange v. Johnson, 295 Minn. 320, 204 N.W.2d 205, 208 (1973).

That proceeding and its findings, which are a nullity, cannot now be utilized by the Port Authority as a rehearing basis for its "impossibility of performance" argument. Nonetheless, the Port Authority asks this Court to somehow honor the trial court's

findings in a void order and apply the doctrine of "impossibility of performance" to their 2006 Chapter 501B Petition for liquidation. This is a legal impossibility.

Moreover, even without the jurisdictional infirmity to the Port Authority's request, its legal analysis is otherwise contrary to law. A basic principle of the law of contracts is a promisor is bound to perform the agreement according to its terms or respond in damages for breach of contract. Impossibility is an affirmative defense to a breach of contract action, an action which has not been presented to this Court. 4 Minn. Prac. CIVJIG 20.80 (5th ed.); 30 Williston on Contracts § 77:6 (4th ed.).

Contrary to the Port Authority's argument, asserted economic loss or hardship is never enough to excuse performance of a contract. J.J. Brooksbank Co. v. Budget Rent-A-Car Corp., 337 N.W.2d 372, 376 (Minn. 1983). The affirmative defense of impossibility of performance is not to be invoked where the impossibility or difficulty is the result of financial difficulty or economic hardship. 30 Williston on Contracts § 77:46; 6 Fletcher Cyc. Corp. § 2585.30. That is the Port Authority's argument here, which is contrary to law. Even if a breach of contract action was pending before this Court, the Port Authority's argument, as a matter of law, would fail.

II. THE COURT'S HOLDING THAT THE 1993 AMENDMENT TO CHAPTER 501B WAS RETROACTIVE IS IN DIRECT ACCORD WITH SETTLED LAW.

As it did in its briefing to this Court, the Port Authority asserts that the 1993 Amendment to § 501B could be applied retroactively because it is "procedural." (Compare Petition for Rehearing at pp. 4-5 with Respondent's Brief at pp. 27-30). The

Bondholders, at pages 17-22 of the Reply Brief, provided to this Court a detailed response to the Port Authority's inaccurate review of Minnesota law on this issue and will not repeat it here. In addition to the fact that the Port Authority has utilized 501B to make substantive changes, this Court, long before this case, unequivocally held that "it is immaterial in this state whether a law alters procedural or substantive rights; the Legislature still must express its intention to make it retroactive." Estate of Murphy v. State, 293 Minn. 298, 198 N.W.2d 570, 576 (1972). The Court reiterated this point in its opinion in this case by its citation to Estate of Murphy. (Court Opinion, p. 10). Nonetheless, the Port Authority comes before this Court and states that this Court's holding "effectively overturns settled precedent." (Petition for Rehearing, p. 4). Such assertion, in addition to being improper re-argument, is wholly without merit.

III. THERE IS NO BASIS UNDER MINN. R. CIV. APP. P. 140.01 FOR THE PORT AUTHORITY'S REQUEST THAT FOOTNOTE 4 BE REMOVED FROM THIS COURT'S OPINION.

The Port Authority argues that "[t]he Obiler Dictum of footnote 4 should be dropped as unnecessary to the decision." (Petition for Rehearing, p. 5). The Bondholders assume that the Port Authority actually meant to refer to the doctrine of "obiter dictum."

The Port Authority claims that the following quoted language from this Court's decision is obiter dictum:

> The Port Authority contends that, instead of petitioning under section 501B.16, it could have achieved the same results through a declaratory judgment under chapter 555. But chapter 555 only allows a court to construe a contract, not modify or deviate from one, which was part of the Port Authority's requests. Minn.

> Stat. § 555.02 (2008). Therefore, the chapter 555 procedures are irrelevant to the issue in this case.

(Court Opinion, p. 12, n.4).

It is not.

Dictum is divided into two categories: judicial dictum and obiter dictum. Judicial dictum involves a court's expression of its "opinion on a question directly involved and argued by counsel though not entirely necessary to the decision." State v. Rainer, 258 Minn. 168, 103 N.W.2d 389, 396 (1960). Obiter dictum is simply Latin for "something said in passing." Black's Law Dictionary 1102 (8th ed. 2004). Judicial dictum is entitled "to much greater weight than mere obiter dictum and should not be lightly disregarded." Rainer, 103 N.W.2d at 396; Rhoads v. Chicago & A. R. Co., 81 N.E. 371, 374 (Ill. 1907) (expression of opinion considered to be judicial dictum held to have force of judicial determination).

What the record shows is the notion that the Port Authority could have achieved the same result through a Minn. Stat. Chapter 555 declaratory judgment action as a Minn. Stat. § 501B petition was directly put before this Court by the Port Authority. The Port Authority specifically asserted to this Court (as well as the Court of Appeals) that application of Minn. Stat. § 501B.25 does not somehow change the remedies available to the Port Authority, citing to Minnesota's declaratory judgment statute – Minn. Stat. § 555.02. (Port Authority Respondent's Brief, p. 38). It is the Bondholders' recollection that the Port Authority also specifically orally argued Chapter 555 to this Court as a basis for lower court affirmance. This Court properly responded to and rejected that argument.

As the Bondholders asserted in response to the Port Authority's Chapter 555 argument, while it is true that under Chapter 555 a court may construe the terms of a contract, the court has no authority under Chapter 555 to modify or deviate from the terms of the contract. (Appellants Bondholders' Reply Brief, pp. 15-16). Moreover, the Port Authority would have had to initiate such an action by summons and complaint personally served on the Bondholders in accord with the Minnesota Rules of Civil Procedure. Minn. Stat. § 555.011. (Id.) Footnote four is certainly a necessary holding given the Port Authority's argument to this Court. It is not obiter dictum as argued by the Port Authority. Even if the footnote were dictum (which it is not), it is judicial dictum, which is nonetheless binding on the lower courts. There is no basis to grant rehearing on this footnote.

CONCLUSION

Appellants 876 Bondholders respectfully request that rehearing be denied and they be awarded $500.00 in attorney's fees pursuant to Minn. R. Civ. App. P. 140.03.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: September 29, 2009

BY_____

Kay Nord Hunt, I.D. No. 138289
Phillip A. Cole, I.D. No. 17802
Keith J. Broady, I.D. No. 120972
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Appellants 876 Bondholders

OFFICE OF
APPELLATE COURTS

NOV - 6 2009

FILED

STATE OF MINNESOTA

IN SUPREME COURT

A07-1512
A07-1513
A07-1514

In re a Petition for Instructions to Construe
Basic Resolution 876 of The Port Authority
of the City of St. Paul.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the motion of The Port Authority of the City of St. Paul to file a reply in support of its petition for rehearing be, and the same is, denied.

IT IS FURTHER ORDERED that the petition of The Port Authority of the City of St. Paul for rehearing filed in the above-entitled matter be, and the same is, denied.

IT IS FURTHER ORDERED that the request of the bondholders for attorney fees be, and the same is, denied.

Dated: November 6, 2009

BY THE COURT:

G. Barry Anderson
Associate Justice

MAGNUSON, C.J., took no part in the consideration or decision of this case.