

16CA0589 US Bank v Constance Marie 06-01-2017 modified

COLORADO COURT OF APPEALS

DATE FILED: July 6, 2017
CASE NUMBER: 2016CA589

Court of Appeals No. 16CA0589
Douglas County District Court No. 15CV30395
Honorable Theresa M. Slade, Judge

U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as Trustee, successor by merger to Lasalle Bank, N.A., as Trustee, for the registered holders of Bear Stearns Commercial Mortgage Securities Inc., Commercial Mortgage Pass-Through and Certificated, 2007-PWR16, by and through C-III Asset Management LLC, solely in its capacity as special receiver,

Plaintiff-Appellee,

v.

Constance Marie, LLC, a California limited liability company; GKKK, LLC, a California limited liability company; and Cook Islands, LLC, a California limited liability company,

Defendants-Appellants.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE ASHBY
Terry and Richman, JJ., concur

Opinion Modified and
Petition for Rehearing DENIED

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced June 1, 2017

Perkins Coie LLP, Craig M.J. Allely, Daniel A. Graham, Denver, Colorado, for
Plaintiff-Appellee

Foster Graham Milstein & Calisher, LLP, Michael G. Milstein, Chip G. Schoneberger, Melanie MacWilliams-Brooks, Denver, Colorado, for Defendants-Appellants

OPINION is modified as follows:

Page 2, line 17 to page 3, line 4 currently reads:

required defendants to return the distributions to the receiver. The receiver responds by arguing that the district court's section 7-80-606 ruling was proper and offering an alternative ground that he did not present to the district court on which he claims we may affirm.

Opinion now reads:

required defendants to return the distributions to the receiver. U.S. Bank responds by arguing that the district court's section 7-80-606 ruling was proper and offering an alternative ground that it did not present to the district court on which it claims we may affirm.

Page 3, line 8 currently reads:

to determine whether the distributions must be returned.

Opinion now reads:

to determine whether the distributions must be returned under section 7-80-606.

¶ 1 Defendants, Constance Marie, LLC; GKKK, LLC; and Cook Islands, LLC, (collectively defendants) appeal the district court's order directing them to return \$80,000 in distributions that they received as members of GKKK, LLC. We reverse and remand.

I. Background

¶ 2 Defendants secured a \$3.775 million loan from a bank to purchase and operate a strip mall in Highlands Ranch. In October 2014, the monthly payment on the loan was approximately \$30,000. That month, defendants received a total of \$80,000 in distributions from GKKK, the LLC that was apparently managing the strip mall and of which defendants were members. After the distributions were made, the GKKK operating account from which the \$80,000 was disbursed contained approximately \$21,000. Because this amount was less than the \$30,000 that GKKK owed for the month of October, it failed to make the payment and defaulted on the loan.

¶ 3 U.S. Bank National Association (U.S. Bank), which had obtained the loan from the originating bank, foreclosed on the strip mall and the district court appointed a receiver to manage the property during the foreclosure process. Upon reviewing GKKK's

financial records during foreclosure, the receiver discovered that GKKK paid defendants \$80,000 in distributions the same month that it had insufficient funds to make the \$30,000 monthly payment and defaulted. The receiver therefore filed a motion asking the district court to order defendants to return the \$80,000 to the receiver pursuant to section 7-80-606, C.R.S. 2016.¹ The district court granted the motion without holding a hearing or making findings.

¶ 4 Defendants then moved the district court to reconsider and vacate its ruling and to hold a hearing on the receiver's original motion. Without holding a hearing, the district court denied defendants' motion in a written order that also explained why section 7-80-606 required defendants to return the \$80,000 to the receiver.

¶ 5 On appeal, defendants argue that there was insufficient evidence to support the district court's ruling that section 7-80-606 required defendants to return the distributions to the receiver. U.S.

¹ We do not consider whether the receiver was allowed to assert a claim under section 7-80-606, C.R.S. 2016, because that issue was not raised on appeal.

Bank responds by arguing that the district court's section 7-80-606 ruling was proper and offering an alternative ground that it did not present to the district court on which it claims we may affirm.

¶ 6 We decline to address this alternative ground and conclude that the district court erred in applying section 7-80-606. We therefore reverse the district court's order and remand the case with directions so that the district court can conduct further proceedings to determine whether the distributions must be returned under section 7-80-606.

II. Section 7-80-606

¶ 7 Section 7-80-606(1) prohibits an LLC from making a distribution to a member if, at the time of and giving effect to the distribution, the LLC's liabilities exceeded the fair value of its assets. Section 7-80-606(2) further provides that a member who receives a distribution in violation of section 7-80-606(1), and knows at that time that the distribution violated that section, is liable to the LLC for the amount of the distribution.

¶ 8 In its written order, the district court determined that (1) GKKK's distributions to defendants violated section 7-80-606(1) and (2) defendants knew at that time that GKKK's liabilities exceeded its

assets. Defendants argue that the district court erred because there was insufficient evidence to support either of these determinations.

¶ 9 Because we remand for the district court to reconsider its application of section 7-80-606(1), we do not address its application of section 7-80-606(2).

III. Liabilities Under Section 7-80-606(1)

¶ 10 Defendants argue that there was insufficient evidence supporting the district court's determination that GKKK's liabilities exceeded the fair value of its assets at the time of the distributions because the only liability identified by the district court — the loan — was statutorily exempt from consideration as a liability.

¶ 11 This is an issue of statutory interpretation that we review de novo. *See Fischbach v. Holzberlein*, 215 P.3d 407, 409 (Colo. App. 2009). We give the words and phrases in the statute their plain and ordinary meaning. *See Dubois v. Abrahamson*, 214 P.3d 586, 587 (Colo. App. 2009). And if that meaning is unambiguous, we apply it without further inquiry into the legislature's intent. *See Bd. of Cty. Comm'rs v. Costilla Cty. Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004).

¶ 12 Section 7-80-606(1) explains how to determine which liabilities and assets of an LLC courts must consider (we will call these statutory liabilities and statutory assets) for the statute’s liabilities-to-assets comparison. In calculating an LLC’s statutory liabilities, courts must not include “liabilities for which the recourse of creditors is limited to a specific property of the [LLC].” § 7-80-606(1).

¶ 13 Defendants argue that the district court should not have included the loan in its calculation of statutory liabilities because it is a liability for which U.S. Bank’s recourse was limited to “a specific property.” According to defendants, “a specific property” is not limited to a single property, but instead means any specifically identified property. In other words, defendants contend that “a specific property” encompasses all property that is specifically identified as security for a liability. We agree.

¶ 14 Section 2-4-102, C.R.S. 2016, provides guidelines for determining the plain meaning of Colorado statutes. *See Johnson v. State Farm Mut. Auto. Ins. Co., Inc.*, 2014 COA 135, ¶¶ 38-39 (applying section 2-4-102 to arrive at a statute’s clear and unambiguous meaning). It states that “[t]he singular includes the

plural, and the plural includes the singular.” § 2-4-102. Therefore, under section 2-4-102, the plain meaning of the term “a specific property,” includes “specific properties.”

¶ 15 In its order, the district court did not explicitly address whether U.S. Bank’s recourse for the loan was limited to specific properties. Nevertheless, based on our review of the loan documents and deed of trust, we conclude that U.S. Bank’s recourse was limited to specific properties.

¶ 16 The security agreement signed by defendants and the original bank provided that in exchange for the \$3.775 million loan, the bank received a security interest in the strip mall along with other specifically identified properties related to the use or operation of the strip mall. Indeed, the deed of trust contained a lengthy section identifying the specific properties that secured the loan. Under these circumstances, we conclude that the loan was a liability for which the recourse of creditors was limited to “a specific property” within the meaning of the statute as defined above. The district court therefore erred by counting the loan as a statutory liability for purposes of the liability-to-asset comparison required by section 7-80-606(1).

¶ 17 We note that our conclusion is not the end of the analysis required by section 7-80-606(1). Because the loan is one for which U.S. Bank's recourse is limited to a specific property, section 7-80-606(1) next requires a determination about the fair value of the specific property that is subject to the liability. If the fair value exceeds the amount of the liability, that excess constitutes a statutory asset for the liabilities-to-assets comparison. § 7-80-606(1) ("[T]he fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the [LLC] only to the extent that the fair value of that property exceeds that liability."). But it does not appear from the record that the district court made any findings about the fair value of the property securing the loan and we are ill-equipped to make such factual findings in the first instance.²

¶ 18 On remand, the district court should treat the loan as a liability for which U.S. Bank's recourse is limited to a specific

² At oral argument, U.S. Bank asserted that the loan exceeded the fair value of the assets securing it, leaving zero statutory assets to consider against GKKK's statutory liabilities (if any such liabilities exist). But because the court did not make findings about the fair value of the properties securing the loan, we are unable to address this assertion.

property and therefore exclude it from the calculation of GKKK's statutory liabilities. In calculating GKKK's statutory assets, the district court should determine whether the fair value of the specific property that secured the loan exceeded the amount owed on the loan. Any such excess should be included in GKKK's statutory assets. *See* § 7-80-606(1). The district court should then compare GKKK's total statutory assets and liabilities and make any additional findings it deems necessary to determine whether section 7-80-606 requires defendants to return the distributions to the receiver.

¶ 19 Finally, because we reverse the district court's order based on its application of section 7-80-606(1), we express no opinion about the propriety of the district court's application of section 7-80-606(2).

IV. Conclusion

¶ 20 The district court's order is reversed and the case is remanded with directions to the district court to determine whether defendants are required to return the distributions to the receiver under section 7-80-606 in light of the fact that the loan was a

liability for which the recourse of creditors was limited to a specific property.

JUDGE TERRY and JUDGE RICHMAN concur.

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