Exhibit 1

Supreme Court of Kentucky

2019-SC-000167-D
(2017-CA-000842)

HELLIER MANOR APARTMENTS, LTD. — MOVANT

V.

PIKE CIRCUIT COURT
2016-CI-00197

CITY OF PIKEVILLE, KY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Lambert, J., not sitting.

ENTERED: December 13, 2019.

CHIEF JUSTICE

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000842-MR

HELLIER MANOR APARTMENTS, LTD. — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 16-CI-00197

CITY OF PIKEVILLE, KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

** ** ** ** **

BEFORE: GOODWINE, J. LAMBERT, and K. THOMPSON, JUDGES.

Having considered the Petition for Rehearing and the Response thereto filed, and being sufficiently advised, the COURT ORDERS that the

petition be, and it is hereby, DENIED.

JUDGE, COURT OF APPEALS

ENTERED: 2/25/19

RENDERED: NOVEMBER 30, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000842-MR

HELLIER MANOR APARTMENTS, LTD. — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 16-CI-00197

CITY OF PIKEVILLE, KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: JOHNSON,[1] D. LAMBERT, AND J. LAMBERT, JUDGES.

JOHNSON, JUDGE: Hellier Manor Apartments, Ltd., appeals a judgment of the Pike Circuit Court arising from an agreement under which the City of Pikeville

[1] Judge Robert G. Johnson authored this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

provided Hellier with funds to construct an apartment complex containing 20% low-income residential housing. After reviewing the record in conjunction with the applicable legal authorities, we affirm that portion of the circuit court's judgment concerning repayment of the loan funds and reverse that portion of the judgment which improperly calculated the appropriate pre-judgment and post-judgment interest to be applied to the loan.

BACKGROUND

Because the underlying facts are not in dispute, the issues before us are purely questions of law and contract interpretation. On September 10, 1985, the City of Pikeville and the U.S. Department of Housing and Urban Development ("HUD") entered into a Housing Development Grant Agreement, a specialized type of grant designed to encourage the construction of low-income housing. HUD granted Pikeville $1,430,002.00 to disburse with the stipulation that the project be comprised of at least 20% low-income residents. The Grant Agreement specified that Hellier would receive the grant funds provided to Pikeville for construction of the project. The term of the loan to Hellier was twenty years, with HUD having the power to grant extensions beyond that period. Hellier subsequently obtained the $1,430,002.00, another $1,500,000.00 in bonds, and $347,778.00 in private funds and constructed a 60-unit apartment complex, with 12 units designated for low-income occupants.

The Grant Agreement defined what constituted a "substantive violation" and gave Pikeville specific instructions to follow in the event Hellier committed a substantive violation, stating, "the amount of [the] HDG [Housing Development Grant] to be repaid shall be reduced by ten percent (10%) for each full year in excess of 10 years that intervened between the beginning of the term of the Owner/Grantee Agreement and the Substantive Violation." However, Section 7.04(a) of the Grant Agreement states in pertinent part, "[Pikeville] may, at [Pikeville's] option, include provisions for repayment even when there is no Substantive Violation or debt forgiveness at the end of 20 years or such longer period as may be required by the Exhibit D of this Grant Agreement and shall be executed on behalf of [Hellier] by authorized individual(s)." Section 8.04(c) of the Grant Agreement states, in relevant part, "Except[ing]. . . Exhibit D of this Grant Agreement, Program Income received after completion of assisted activities shall be treated as miscellaneous revenue, and shall be used by [Pikeville] to support the construction, rehabilitation or operation of real property to be used primarily for low and moderate income residential purposes." There is no allegation that Hellier committed any substantive violations. Exhibit D(V)(B) of the Grant Agreement provides:

> Repayment of the HDG loan shall be as follows: The annual payback of $105,100 is predicated upon a 7% simple interest rate per year non-compoundable for a period of 20 years. Payment of this amount will be made

> after payment of operating expenses, debt service on the first mortgage, and no more than a twelve percent (12%) cash-on-cash return on [Hellier's] equity investment. Any unmet portion of the payment shall accrue and shall be payable at the time of Project sale or refinancing. Total repayment of the . . . HDG loan shall be $2,102,000.

There was never any repayment under these terms as the income generated by the housing did not exceed the parameters outlined above.

Pikeville entered an Owner/Grantee Agreement with Hellier on September 23, 1985, as required by the Grant Agreement. The Owner/Grantee Agreement states, in pertinent part,

> WHEREAS, [Pikeville] and [Hellier], pursuant to the terms of the Grant Agreement, desire to enter into an Agreement providing for a grant by [Pikeville] to [Hellier] of an amount not to exceed $1,430,002.00, upon the terms and conditions hereinafter set forth.
>
> . . . .
>
> 12.(a) . . . [Hellier] shall execute a Note to [Pikeville] in the amount of the HDG not to exceed $1,430,002.00, which is marked as Exhibit "B" to this Agreement.

The Real Estate Note required by the Owner/Grantee Agreement of February 17, 1986, and executed by Hellier states in relevant part:

> Hellier . . . promises to pay to the order of . . . Pikeville . . . the principal sum of One Million, Four Hundred Thirty Thousand, Two Dollars ($1,430,002.00) . . . without interest, except for such interest that may accrue under Paragraph 16 of that certain Second Mortgage . . . .

> **The entire outstanding principal balance evidenced hereby shall be due and payable in full on the earlier to occur of the date 20 years from the commencement of the "Project Term" . . . or the date 22 years from the date hereof. . . .**
>
> This Note shall be repaid, to the extent possible, out of the Project Residual Receipts in annual installments not exceeding $105,100.00. Any unmet portion of the total annual installment of $105,100.00 shall accrue and be payable at the first to occur of (i) the Project sale, (ii) the Project refinancing, and (iii) the maturity date of this Note. **In any event, the total repayment of this Note shall be $2,102,000.00.**
>
> . . . .
>
> This Note is intended as a contract under and shall be construed and enforceable in accordance with the laws of the State of Kentucky.

(Emphasis added).

The parties proceeded under these agreements and the apartment complex was constructed with the appropriate amount of low-income housing included in the project. After the term of the contract, Pikeville sought and received a judgment and order of sale against Hellier for $2,102,000.00, with 8% interest dating back to February 17, 2008, and post-judgment interest at a rate of 12%.

This appeal followed.

STANDARD OF REVIEW

Concerning the standard of review in cases decided by summary judgment, the Supreme Court of Kentucky instructs that:

> In ruling on a motion for summary judgment, the trial court must examine the record to determine if any real or genuine issue of material fact exists. Summary judgment is proper when, as a matter of law, it appears that it would be impossible for the non-moving party to produce evidence at trial warranting a judgment in his favor. Because summary judgments involve no fact finding, this Court will review the circuit court's decision *de novo*.

3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist., 174 S.W.3d 440, 445 (Ky. 2005) (citations omitted).

"The interpretation of a statute is a matter of law." *Monumental Life Ins. Co. v. Dep't of Revenue*, 294 S.W.3d 10, 19 (Ky. App. 2008). "[T]he interpretation of a contract . . . is a question of law for the courts and is subject to *de novo* review." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002).

ANALYSIS

Hellier contends in this appeal: 1) that the agreements between the parties, when read in concert with controlling federal law, prohibit repayment of the Housing Development Grant when no substantive violation has occurred; and 2) that the trial court erred in imposing interest on the judgment. It argues that the resolution of this disagreement hinges on application of a related federal statute, 42 United States Code ("U.S.C.") 1437, and regulation, 24 Code of Federal

Regulations ("C.F.R.") 850.155,[2] to the agreements between Pikeville and Hellier. Conversely, Pikeville cites 24 C.F.R. 850.17 and 24 C.F.R. 850.33 to support their contention that the trial court's judgment and order of sale should be affirmed. We have reviewed the relevant statutes and regulations and have incorporated them into our analysis of the agreement between the parties.

Hellier claims that the language of 42 U.S.C. 1437o(d)(7)(B) and 24 C.F.R. 850.155 prevent repayment of the Housing Development Grant funds absent a substantive violation. Those portions of the federal statute and regulation, 42 U.S.C. 1437o(d)(7)(B) and 24 C.F.R. 850.155, specify that repayment of funds secured via the Housing Development Grant program are "payable in the case of any failure to carry out the agreements" and "repayable in the event of a substantive, uncorrected violation," respectively.

Pikeville, on the other hand, cites 24 C.F.R. 850.17(a) and 24 C.F.R. 850.33(7) as rebutting Hellier's argument against the possibility of repayment. This construction is confirmed by the statutory language of 42 U.S.C. 1437o(d)(1). Those regulations contain the following relevant language: "[h]ousing development grant funds may be used to provide grants or **loans** . . . to support the new construction . . . ." 24 C.F.R. 850.17(a) (emphasis added), and "the amount (if

[2] The cited sections of the Codes and Federal Regulations are those applicable to the agreement at issue.

any) of the housing development grant amounts to be repaid to the applicant and the repayment schedule." 24 C.F.R. 850.33(7). In addition, 42 U.S.C. 1437o(d)(1) states, "[d]evelopment grant funds may be used by the grantee to make grants or loans . . . to support the new construction. . . ." The statute and regulation cited by Hellier when read in concert with those cited by Pikeville lead us to conclude that Congress did not intend for there to be no possibility of repayment of Housing Development Grant loans. "We read the statute[s] as a whole . . . ." *Pearce v. University of Louisville, by and through its Board of Trustees*, 448 S.W.3d 746, 749 (Ky. 2014) (quoting *Lichtenstein v. Barbanel*, 322 S.W.3d 27, 35 (Ky. 2010)). The statute and regulation cited by Hellier specify how to proceed in the event of a violation but those cited by Pikeville explicitly state that the funds could be a grant or a loan and that repayment provisions could be included.

Turning again to the Grant Agreement, Section 7.04 states that there could be repayment provisions even without a substantive violation or debt forgiveness provision. The Owner/Grantee Agreement states that the two parties shall execute a Note and that the Real Estate Note unequivocally calls for repayment upon the maturity of the note. All three documents contain a provision concerning the possibility that the debt could be reduced by 10% for each full year after the tenth year that intervened between the beginning of the term of the agreement and the occurrence of substantial violation by Hellier. Hellier claims

that it could have committed a substantive violation in the nineteenth year, not corrected that violation, and would owe Pikeville just 10% of the Housing Development Grant as 90% would be forgiven. We disagree.

The parties agreed in the Real Estate Note that, "Any unmet portion of the total annual installment of $105,100.00 shall accrue and be payable . . . [on] the maturity date of this Note." The parties agree that Hellier rightfully never made any payments during the term of the Note after payment of the operating expenses, debt service on the first mortgage, and no more than a twelve percent cash-on-cash return on Hellier's equity investment as provided for in the Grant Agreement, Exhibit D(V)(B). The "debt forgiveness upon a substantive violation" terms would not absolve Hellier of its remaining obligation under the Real Estate Note. The parties agreed that the total repayment would be $2,102,000.00. Based on a comprehensive reading of the relevant statutes, we cannot agree that the "debt forgiveness upon a substantive violation" procedure was intended to provide Hellier with an avenue to make no payments towards the annual installment for the entirety of the agreement, commit a substantive violation in year nineteen, and avoid 90% the loan it had agreed to repay. It would be a misreading of the combination of the statutes, regulations, and agreements between the parties for us to so conclude. The Grant Agreement specifically states that repayment provisions, **even in the event of forgiveness provisions**, were allowable. Our

review of the associated federal statutes and regulations governing this program confirms this conclusion. However, as noted above, the Grant Agreement also specifies that any funds received by Pikeville upon the sale of the property must be re-invested in low and moderate income housing.

The Real Estate Note states, "[Hellier] promises to pay to the order of the City of Pikeville . . . the principal sum of One Million, Four Hundred Thirty Thousand, Two Dollars ($1,430,002.00) . . . without interest except for such interest that may accrue under Paragraph 16 of that certain Second Mortgage." Paragraph 16 of the Second Mortgage dealt with a substantive violation leading to interest being imposed, hence it is irrelevant to our analysis. However, the Real Estate Note subsequently states, "**In any event, the total repayment of this Note shall be $2,102,000.00**." (Emphasis added). The Grant Agreement also provides that "[t]he annual payback of $105,000 is predicated upon a 7% simple interest rate per year non-compoundable for a period of 20 years. . . . **Total repayment of the . . . HDG loan shall be $2,102,000.00**." (Emphasis added). And finally, the Owner/Grantee Agreement states, "[Hellier] shall execute a Note to [Pikeville] in the amount of the HDG not to exceed $1,430,002.00, marked as Exhibit B." "'[In] the absence of ambiguity a written instrument will be enforced strictly according to its terms,' and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Wehr Constructors,*

Inc. v. Assurance Co. of America, 384 S.W.3d 680, 687 (Ky. 2012) (as modified on denial of reh'g (Dec. 20, 2012) (quoting *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003)). Statutory and regulatory authority gave Pikeville the right to require Hellier to repay the loan and to use the repayment funds to reinvest in additional low and moderate income housing. The Grant Agreement specifically states that repayment could be required even in the absence of a substantive violation or debt forgiveness provision. The parties agreed upon a repayment amount of $2,102,000.00. The circuit court correctly determined that Pikeville is entitled to recover that sum.

As to the award of pre-judgment interest commencing in 2008, we again turn to the Real Estate Note which states, "[t]he entire outstanding principal balance evidenced hereby shall be due and payable in full on the earlier to occur of the date 20 years from the commencement of the 'Project Term' . . . or the date 22 years from the date hereof. . . ." Thus, the trial court rightfully utilized the twenty-two-year term in its calculation. Importantly, however, Exhibit D(V)(B) of the Grant Agreement specifically provides how interest on the loan was to be calculated: "[t]he annual payback of $105,100 is predicated upon a 7% simple interest rate non-compoundable for a period of 20 years. . . . Total repayment of the . . . HDG loan shall be $2,102,000." Kentucky Revised Statutes ("KRS") 360.040(3) states, "[a] judgment rendered on a contract . . . shall bear interest at the

interest rate established in that contract . . . ." Further, KRS 360.010(3) provides that, "[t]he party entitled to be paid in any written contract or obligation specifying a rate of interest shall be entitled to recover interest after default at the rate of interest as is expressed in the contract or obligation prior to the default . . . ." Thus, we conclude as a matter of law that the trial court erred in relying on KRS 360.010(1) and KRS 360.040, respectively, to assess 8% pre-judgment and 12% post-judgment interest. KRS 360.010(1) specifies an 8% interest rate, **except as provided in KRS 360.040**. Based upon the plain language of KRS 360.040(3) and KRS 360.010(3), and the express terms of the agreements between the parties, interest on the loan must be calculated at a rate of 7% for both pre-judgment and post-judgment interest.

CONCLUSION

Based upon the foregoing, we affirm that portion of the judgment of the Pike Circuit Court which required Hellier to repay the loan and reverse that portion of the judgment which improperly calculated the appropriate percentage of pre-judgment and post-judgment interest to be applied to the loan.

ALL CONCUR.

BRIEF FOR APPELLANT:

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ORAL ARGUMENT
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