STATE OF MINNESOTA
IN COURT OF APPEALS
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.

Filed May 27, 2008
Affirmed
Harten, Judge*

Ramsey County District Court
File Nos. C5-06-200031; CX-04-200070; C2-02-200043

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Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HARTEN, Judge

Respondent the Port Authority of the City of St. Paul, lacking sufficient funds to pay the interest and principal owed to its bondholders, petitioned the district court for an instruction approving its plan to liquidate the repayment fund and discharge a percentage of its debt to all bondholders. Appellants, holders of bonds with early expiration dates, moved the district court to dismiss respondent's petition for an instruction on the ground of lack of subject matter jurisdiction and to appoint a receiver; they also moved to vacate district court orders issued in response to respondent's petitions for instructions in 2002 and 2004. Appellants now challenge the denial of their motions. Because the district court had authority to issue instructions in response to respondent's current petition and in response to the 2002 and 2004 petitions and because the district court's denial of appellants' motion for the appointment of a receiver was not an abuse of discretion, we affirm.

FACTS

In 1974, to finance development of the area over which it has authority, respondent began issuing bonds under Basic Resolution 876. Basic Resolution 876 provides in relevant part:

> 4-1. [Respondent] covenants that it will promptly pay or cause to be paid the principal of and interest on every General Revenue Bond issued under Basic Resolution No. 876 . . . at the place, on the dates and in the manner provided . . . in said General Revenue Bonds.
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> . . . .
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> 4-7. The General Revenue Bonds may not be payable from or be a charge upon any funds of [respondent] other than the revenues pledged to the

payment thereof; nor may any Holder or Holders of the General Revenue Bonds have the right to compel any exercise of the taxing power of [respondent] or of the City of St. Paul to pay any General Revenue Bonds or the interest thereon . . . .[N]othing herein shall impair the rights of Holders of General Revenue Bonds to enforce the covenants made for the security thereof as provided in Basic Resolution No. 876, and . . . [respondent] has made the covenants and agreements herein for the equal and proportionate benefit of all Holders of the General Revenue Bonds . . . .

. . . .

4-9. [Respondent] covenants that it will lease, operate or otherwise cause to be used its Facilities and will require such rentals, payments on notes or other similar payments, or rates and charges in connection with all Facilities as are sufficient to assure prompt payment of principal, interest and premium of all General Revenue Bonds . . . .

. . . .

4-12. No Holder of any General Revenue Bond shall have the right to institute any proceeding, judicial or otherwise, for the enforcement of the covenants herein contained, without the written concurrence of the Holders of not less than twenty percent (20%) in aggregate principal amount . . . of the General Revenue Bonds . . . but the Holders of this principal amount of General Revenue Bonds may, either at law or in equity, by suit, action, mandamus, application for appointment of a receiver or other proceeding, protect and enforce the rights of all Holders of such General Revenue Bonds.

. . . .

5-8. All General Revenue Bonds shall be equally and ratably secured by and payable from the Bond Fund, without priority of one such General Revenue Bond over any other . . . . In the event that the balance in the Bond Fund is at any time insufficient to pay all principal and interest then due on General Revenue Bonds, [respondent] shall apply the balance first to pay pro rata the interest then due on all such General Revenue Bonds, and [respondent] shall apply pro rata any remaining balance toward the payment of principal of the then matured General Revenue Bonds.

. . . .

9-2. The Holders of not less than fifty-one percent (51%) . . . of the General Revenue Bonds . . . shall have the right to consent to and approve the amendment of Basic Resolution No. 876 by [respondent] . . . except that nothing herein shall permit a reduction in the aggregate principal amount of the General Revenue Bonds required for consent to any such amendment, nor an extension of the maturity . . . of the principal or of interest on any General Revenue Bond not held by a consenting Bondholder, nor grant a privilege or priority of any General Revenue Bond over any other General

> Revenue Bond not held by a consenting Bondholder . . . without the consent of the Holders of all outstanding Bonds.

Basic Resolution 876 contains no provision for the situation in which it will never be able to repay bondholders their principal and their interest in full.[1]

Respondent began issuing 876 bonds in 1974; the last 876 bonds were issued in 1991. The maximum duration of a bond was 30 years. *See* Minn. Stat. § 469.061, subd. 2 (2006). The scheduled end of respondent's 876 fund was 1 September 2022, when all bondholders would be paid off in full.

Unfortunately, however, by 1991, economic circumstances made it evident that the 876 fund would be depleted before 2022. A number of facilities financed by 876 bonds defaulted, reducing the fund's income. The annual shortfall, or difference between the amount put into the fund by the performance of 876 facilities and the amount needed to pay the principal and interest due on 876 bonds, approached $15 million.

In 1993, the legislature amended Minn. Stat. § 501B.25, permitting respondent, at its own election, to petition the district court under Minn. Stat. § 501B.16(23) for instructions on the management of the 876 fund.[2] In 2002, respondent first petitioned the district court for instructions concerning its intent to hold a "Dutch auction" tender, whereby bondholders could offer to sell respondent their bonds at whatever discounted price they chose. On 8 October 2002, in answer to respondent's petition, the district

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[1] Section 5-8 of Basic Resolution 876 contemplates the situation in which the balance is temporarily insufficient to pay all the interest and principal then due; it does not contemplate the situation in which the balance will never be sufficient to pay interest and principal as they become due in the future.

[2] Previously, only funds with indentured trusts could petition. *See* Minn. Stat. § 501B.25(1992).

court issued an order (the 2002 order) approving the terms for the Dutch auction. Bondholders were notified of the petition. Some bondholders contested it, but did not appeal the district court's order. Respondent repurchased bonds, beginning with those on which the greatest discount was offered, until the funds available for this purpose were exhausted.

On 27 October 2004, in response to another petition from respondent for instructions, the district court issued an order (the 2004 order) permitting respondent to realign the dates on which interest and principal would be paid on outstanding bonds and to pay administrative expenses of the 876 fund. Again, bondholders received notice of the petition; it was uncontested, and there was no appeal from the 2004 order.

Since January 2005, except on one occasion when the sale of a hotel enabled respondent to pay off about half the principal then owing to bondholders, the 876 fund has provided enough funds to pay off only part of the interest and none of the principal owed to bondholders. In June 2006, over $50 million was still owed on principal.

In 2006, respondent proposed to liquidate the 876 fund by converting any future revenue streams to present value, adding them to proceeds realized from the sale of repossessed properties. The 876 fund would then be distributed equally and proportionately to all the 876 bondholders regardless of when their bonds fell due.

Respondent petitioned for an instruction from the district court permitting it to liquidate the fund in this manner. Appellants, holders of bonds that matured early, contested the petition, arguing that the district court lacked subject matter jurisdiction

over respondent's petitions; they moved for vacation of the executed 2002 and 2004 orders on the same basis. Appellants also moved to appoint a receiver.

The district court found that it had jurisdiction. It approved respondent's plan, reasoning that:

> If the Port Authority proceeds under the status quo, these Special Funds [from the sale of the last of respondent's repossessed properties] will be used to pay principal in full for those bondholders whose 876 bonds have matured. Thereafter, the 876 revenues will only be able to pay a partial and ever declining percentage of debt service. If the Port Authority maintains the status quo, a minority of bondholders will receive 100% of their principal, while a majority will receive very little, if any, principal.

The district court noted that, if the liquidation proposal were adopted, all bondholders would be expected to receive 60% to 65% of their principal and a tax benefit. The district court also denied appellants' motion to have the 2002 and 2004 orders declared void for lack of subject matter jurisdiction and the petition for appointment of a receiver.

Appellants challenge the denial of their motions to vacate the 2002 and the 2004 orders (A07-1513 and A07-1514) to dismiss the 2006 petition, and the denial of their petition for the appointment of a receiver (A07-1512). This court ordered the appeals consolidated.[3]

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[3] In its brief, respondent challenges the district court's denial of respondent's motion to dismiss appellants' petition for the appointment of a receiver and its finding that appellants "have established that they hold at least 20% (in aggregate principal amount) of the general revenue bonds which were at any time outstanding." Because respondent did not file a notice of review, we do not address this issue. *See* Minn. R. Civ. App. P. 106 (respondents may obtain review by filing a notice of review).

DECISION

1. The 2002 and 2004 Orders

In 2006, appellants moved to vacate the 2002 and 2004 orders as void for lack of subject matter jurisdiction under Minn. R. Civ. P. 60.02(d) (providing that a motion to vacate an allegedly void judgment be made "within a reasonable time"). Subject matter jurisdiction may be challenged, and its absence used as a basis for dismissal, at any time during a proceeding. Minn. R. Civ. P. 12.08(c). But a motion to vacate a judgment for lack of subject matter jurisdiction must be made "within a reasonable time." *Bode v. Minnesota Dep't of Natural Res.*, 612 N.W.2d 862, 870 (Minn. 2000). A reasonable time is determined "by considering all attendant circumstances such as . . . intervening rights, loss of proof by or prejudice to the adverse party, the commanding equities of the case, the general desirability that judgments be final and other relevant factors." *Id.* (quotation omitted). *Bode* rejected a post-judgment challenge to subject matter jurisdiction in part because those who made it "have not proffered any satisfactory reasons why this motion was not brought earlier" and in part because the earlier judgment "was presumed valid and relied on." *Id.*

In 2002 and 2004, respondent invoked Minn. Stat. § 501B.16(23) and Minn. Stat. § 501B.25 to petition for instructions from the district court relative to respondent's management of the 876 fund. Those instructions were issued in the 2002 order and the 2004 order, to which respondent gave effect.[4] Appellants did not challenge respondent's

[4] At oral argument, counsel for appellants conceded that, as a practical matter, it would be impossible to undo the actions taken in reliance on the 2002 and 2004 orders, but argued

right to petition under those statutes until 2006, after respondent had again invoked the statutes, petitioned the district court for instructions, and obtained the court order that appellants now challenge (along with the 2002 and 2004 orders) on the basis of subject matter jurisdiction. Appellant's current challenge to the 2002 and 2004 orders on the basis of subject matter jurisdiction is futile. The 2002 and 2004 orders were, and remain, as a practical matter, exhausted, dormant, and beyond effective involvement in this litigation. The district court did not err in denying the motions to vacate those orders.

2. Subject Matter Jurisdiction

This court reviews de novo issues of subject matter jurisdiction and statutory construction. *In re Ivey*, 687 N.W.2d 666, 669 (Minn. App. 2004) (subject matter jurisdiction); *Brookfield Trade Ctr., Inc. v. County of Ramsey,* 584 N.W.2d 390, 393 (Minn. 1998) (statutory construction).

Respondent petitioned for instructions, and the district court issued them, in reliance on two statutes. Minn. Stat. § 501B.16(23) (2006) provides that

> [a] trustee of an express trust by will or other written instrument or a person interested in the trust may petition the district court for an order . . . to instruct the trustee, beneficiaries, and any other interested parties in any matter relating to the administration of the trust and the discharge of the trustee's duties.

Minn. Stat. § 501B.25 (2006) states that Minn. Stat. § 501B.16 applies "at the sole election of the issuer of bonds issued under chapter 469, without a trust indenture, to the

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that this court could vacate the orders without addressing the actions. But if an event occurs that makes an award of effective relief impossible, the matter will be dismissed as moot. *In re Inspection of Minn. Auto. Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984). An appellate court will not decide a matter only to set precedent. *Id.*

pledges and other bond covenants made by the issuer in one or more resolutions with respect to the bonds." Appellants assert that these statutes do not apply because: (a) their application violates the prohibition of retroactive application; (b) respondent's bonds were issued under chapter 474, not chapter 469; and (c) their application violates the constitutional guarantee of freedom to contract.

a. Retroactivity

"No law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature." Minn. Stat. § 645.21 (2006). Appellants argue that, because the final 876 bonds were issued in 1991 and the language making Minn. Stat. § 501B.16-.23 (the right to petition the court for instructions) applicable at the election of respondent (an issuer of bonds under chapter 469) was not added to Minn. Stat. § 501B.25 until 1993, the application of Minn. Stat. § 501B.16-.23 is retroactive. But the relevant date is not when the last bonds were issued but, rather, when respondent petitioned the district court for instructions.

The amendment to Minn. Stat. § 501B.25 was effective from the time of its adoption. *See* Laws 1993, ch. 271, § 12 at 1549. The first petition was filed and the first district court order issued in 2002, long after the 1991 amendment. Both respondent and the district court were following statutory procedure that had been in effect for years.

To construe the statute as appellants suggest, it would be necessary to read into it additional language, i.e., that it applies with respect *only* to bonds *not yet sold* or *sold after 1993*. While the legislature could have restricted Minn. Stat. § 501B.25 in this way, it did not, and this court cannot add to a statute "what the legislature purposely omits or

inadvertently overlooks." *Ullom v. Indep. Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994) (quotation omitted). Appellants suggest no reason why the legislature in 1993 would have permitted respondent, which sold bonds only from 1974 to 1991, to ask the court for instructions pertaining only to bonds sold after 1993.

Retroactive application of Minn. Stat. § 501B.25 would have occurred if a district court had assumed jurisdiction over petitions filed under that statute prior to 1993 because the statute did not confer the right to petition until 1993. But the district court's responses to petitions filed in 2002, 2004, and 2006 were not retroactive application of Minn. Stat. § 501B.25 and Minn. Stat. § 501B.16.[5]

b. Chapter 474 and Chapter 469

Respondent adopted Basic Resolution 876 in 1974, when the governing law was chapter 474. In 1987, the legislature repealed chapter 474 and enacted chapter 469 as part of a statutory recodification. Despite this recodification, the 1989 legislature continued its reference to "bonds issued under chapter 474" when it recodified Minn. Stat. § 501.37 as Minn. Stat. § 501B.25. Only in 1993 was that "474" changed to "469". The district court "found no record of the reason why the reference to Chapter 474 was not changed until 6 years after the recodification occurred" and noted that "[i]t appears

[5] The district court used an analysis distinguishing between substantive and procedural amendments, based in part on outdated law, to reach the conclusion that respondent's petitions for instructions did not violate the prohibition against retroactive application. This does not mandate our reversal of that conclusion. *See Gutierrez v. Red River Dist., Inc.*, 523 N.W.2d 907, 908 (Minn. 1994) (affirming "although for different reasons"); *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (holding that an appellate court "will not reverse a correct decision simply because it is based on incorrect reasons").

far more likely that this was due to an oversight rather than the result of any intentional decision."

Appellants argue, however, that there was no oversight and that Minn. Stat. § 501B.25, referring to "bonds issued under Chapter 469," does not apply because respondent adopted Basic Resolution 876 under chapter 474, not chapter 469, and the 1993 amendment was intended to refer only to bonds issued in or after 1987.[6] Again, appellants do not explain why the 1989 legislature would have permitted respondent to seek instructions pertaining only to bonds issued under the repealed chapter 474 and not to bonds issued under recodified chapter 474 (chapter 469).

Neither the fact that respondent's petitions concerned bonds sold before 1993 nor the fact that the bonds were sold under chapter 474 rather than chapter 469 precludes the application of Minn. Stat. § 501B.25 to permit respondent to petition the court for instructions relating to those bonds under Minn. Stat. § 501B.16 (23).

c. Constitutional Issues

Appellants claim that the application of the statutes is unconstitutional because it impairs appellants' right to contract as provided by the federal and state constitutions. *See* U.S. Const., art. I, § 10, and Minn. Const., art. I, § 11. We review de novo the constitutionality of the application of the statutes. *Jacobsen v. Anheuser-Busch, Inc.* 392 N.W.2d 868, 872 (Minn. 1986).

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[6] This is an alternative to appellants' argument that applying Minn. Stat. § 501B.25 to any bonds issued before 1993 is retroactive.

To successfully claim that the application of a statute unconstitutionally impairs the right to contract, a party must show that: (1) the statute operates to substantially impair the contractual relationship; (2) there is no demonstrated significant and legitimate public purpose behind the statute's application; and (3) the adjustment of the contracting parties' rights and responsibilities is not based on reasonable conditions and is not appropriate to the public purpose. *Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983).

Appellants claim that the district court's approval of the liquidation of the 876 fund substantially impairs their contractual rights. Insofar as appellants will not receive all that they contracted for under the terms of Basic Resolution 876, this is true. But if the status quo is maintained, the contractual rights of the majority (65%) of the bondholders to receive even a partial return on their investment, would be more significantly impaired. Thus, while appellants show that the statutes' application impairs their contractual rights, they cannot show that there is no demonstrated significant and legitimate public purpose behind the statute's application—the legitimate public purpose behind the district court's involvement is to prevent greater impairment of more contractual relationships and advance a greater good for a greater number. Appellants also cannot show that there is no legitimate public purpose in the adjustment of the parties' rights and responsibilities so as to partially compensate all parties to Basic Resolution 876; section 4-7 of the Resolution itself targets "an equal and proportionate benefit" to all bondholders. We conclude that appellants' right to contract granted by the

state and federal constitutions is not violated by the application of Minn. Stat. § 501B.25 and Minn. Stat. § 501B.16(23).

3. Appointment of a Receiver

The district court denied appellants' petition to appoint a receiver. The appointment of a receiver may be reversed only for an abuse of discretion. *Brown v. Muetzel*, 358 N.W.2d 725, 728 (Minn. App. 1984).

Appellants assert first that section 4-12 of Basic Resolution 876, permitting them to apply for the appointment of a receiver, obviates their need to meet the criteria for appointment of a receiver set out in Minn. Stat. § 576.01 (2006). For this assertion, they rely on *Minnesota Hotel Co. v. ROSA Dev. Co.*, 495 N.W.2d 888, 892 (Minn. App. 1993). The district court rejected appellant's argument, concluding that "the Basic Resolution allows [appellants] to petition this Court for appointment of a receiver, but they must still satisfy the Court that appointment of a receiver is appropriate [under Minn. Stat. § 576.01]."

Appellants' reliance on *Minnesota Hotel* is misplaced. There, the parties had an agreement providing that, if a default occurred, the creditor would have the right to cause itself or its designee to be appointed as a receiver and to receive amounts to which the debtor would have been entitled if it had not defaulted. *Id.* at 890. Here, Basic Resolution 876 provides that 20% or more of the bondholders may apply for appointment of a receiver, but it does not provide that they are automatically entitled to the appointment of a receiver upon application.

The district court found that appellants were not entitled to the appointment of a receiver under Minn. Stat. § 576.01, subd. 1, providing, in relevant part, that a receiver may be appointed when a party shows "an apparent right to property which is the subject of [an] action and is in the possession of an adverse party, and the property, or its rent and profits, are in danger of loss or material impairment." The district court found that appellants sought a receiver to prevent the 876 bondholders from suffering a loss and that this purpose would be advanced by the liquidation of the 876 fund rather than by preservation of the status quo.

A district court should not grant a petition for appointment of a receiver unless the petitioner can show "by clear and convincing evidence that (1) the person in possession is insolvent, (2) the person in possession is committing waste, and (3) the value of the security is inadequate to protect the debt." *Brown,* 358 N.W.2d at 728. The district court found that respondent's financial problems are not of its own making because it has not committed waste and that maintaining the status quo would be adverse to the bondholders' interests and likely to result in waste. We agree.

Appellants claim that they meet the *Brown* requirements because: (1) respondent asserts that the 876 fund is insolvent; (2) evidence shows that respondent has committed or intends to commit waste to appellants' detriment, and (3) respondent asserts that the value of the 876 fund is inadequate to pay its obligations to the bondholders. Points (1) and (3) are undisputed, but appellants' assertions of waste are unsupported by the evidence.

First, appellants object to the 2004 district court order permitting payment of 876 administrative costs from the fund. But appellants do not dispute that respondent has been acting in accord with the court's order by using the 876 fund to pay 876 administrative expenses. Moreover, obedience to a court order is not committing waste within the meaning of Minn. Stat. § 576.01.

Second, appellants contend that respondent's financing of a river maintenance fund by reducing its tonnage fees by half and imposing river maintenance fees in that amount constitutes waste because the tonnage fees were pledged to the 876 fund. But appellants do not dispute that the Basic Resolution allows respondent to pay maintenance costs from the tonnage fees before depositing them into the 876 fund.

Third, appellants argue that, unless a receiver is appointed, respondent can and probably will commit waste by selling non-revenue-bond facilities and keeping the proceeds rather than depositing them in the 876 fund. But appellants have no lien on the non-revenue-bond facilities: Basic Resolution 876 pledges only the income, not the sale proceeds, from these facilities to the 876 fund.

Finally, appellants ask this court to order the appointment of a particular individual as receiver. Such an act is beyond our scope of review. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (role of this court is to correct errors, not to find facts); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (function of this court limited to identifying and correcting errors).

We conclude that Minn. Stat. § 501B.25 provided the district court with subject matter jurisdiction over respondent's petitions and that the district court did not abuse its discretion in denying appellant's petition for the appointment of a receiver.

Affirmed.

Dated: 15 MAY 2008

James C. Harten, Judge