United States Court of Appeals for the Federal Circuit

CALLAWAY MANOR APARTMENTS, LTD., FOX GARDEN APARTMENTS, LTD., FOX MANOR APARTMENTS, LTD., LAKE GARDEN APARTMENTS, LTD.,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2018-1926

Appeal from the United States Court of Federal Claims in Nos. 1:14-cv-00332-EGB, 1:14-cv-00333-EGB, 1:14-cv-00334-EGB, 1:14-cv-00335-EGB, Senior Judge Eric G. Bruggink.

Decided: October 2, 2019

MARK BLANDO, Eckland & Blando LLP, Minneapolis, MN, argued for plaintiffs-appellants. Also represented by JEFF HOWARD ECKLAND, VINCE REUTER, LARA SANDBERG; WILLIAM LEWIS ROBERTS, Faegre Baker Daniels LLP, Minneapolis, MN.

GEOFFREY MARTIN LONG, Commercial Litigation Branch, Civil Division, United States Department of

Justice, Washington, DC, argued for defendant-appellee. Also represented by JOSEPH H. HUNT, ROBERT EDWARD KIRSCHMAN, JR., FRANKLIN E. WHITE, JR.

Before O'MALLEY, LINN, and HUGHES, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* O'MALLEY.

Opinion concurring-in-part and dissenting-in-part filed by *Circuit Judge* HUGHES.

O'MALLEY, *Circuit Judge.*

Appellants Callaway Manor Apartments, Fox Garden Apartments, Fox Manor Apartments, and Lake Garden Apartments (collectively, "Appellants") appeal from a decision of the United States Court of Federal Claims ("Claims Court") granting the government's motion for summary judgment on certain breach of contract and takings claims. *Callaway Manor Apartments, Ltd. v. United States*, 136 Fed. Cl. 313 (2018). We find that the Claims Court improperly applied the law on the first issue and did so, in part, with respect to the second issue. Therefore, we reverse-in-part, vacate-in-part, affirm-in-part, and remand.

I. BACKGROUND

A. The Asserted Contracts

Between 1983 and 1984, Appellants each entered into identical loan arrangements with the Farmers Home Administration ("FmHA") of the United States Department of Agriculture. Under the loan arrangements, FmHA issued Appellants mortgage loans in exchange for Appellants providing housing for low-income tenants during the life of the loans (50 years) under Section 515 of the Housing Act of 1949, 42 U.S.C. §§ 1485, 1490a.

The loan arrangements consisted of three contemporaneously executed documents: a loan agreement, promissory note, and mortgage. Together, the parties labeled these

three documents the "loan obligation." J.A. 32 ("The indebtedness and other obligations of the Partnership under the [promissory] note evidencing the loan, the related security instrument[,] and [any] related agreement are herein called the 'loan obligation.'").

The loan agreement described the terms of the loan, reciting that FmHA would provide a loan to Appellants in exchange for Appellants abiding by certain restrictions on use of the property prescribed by § 515. J.A. 32–34.[1] The promissory note, issued under a 50-year term, detailed the amount of the debt and terms of payment, including providing that the "[p]repayment[] of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." J.A. 40–41. Finally, the mortgage—which noted that the loan must be used in compliance with § 515 and FmHA regulations—recited an additional use restriction that required Appellants to use the property for low-income § 515 housing for 20 years before they could prepay the loan and exit the § 515 program. J.A. 4, 35, 39.

In addition to being contemporaneously executed and pertaining to the same set of facts, the three documents also cite to each other. For example, the mortgage referenced the promissory note and expressly incorporated by reference the loan agreement. J.A. 4, 39. And, the loan agreement incorporated by reference both the promissory note and mortgage. J.A. 4, 32.

It is undisputed that, under the loan obligation and the FmHA regulations at the time the parties entered the arrangement, Appellants were required to use the loan for

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[1] The parties agree that the terms of the loan agreements, promissory notes, and mortgages are identical among all Appellants. Appellant Br. 3 n.1; Government Br. 6. We, therefore, cite to instruments only between Callaway Manor and the Government for simplicity.

§ 515 housing for a minimum of 20 years. But the moment the 20-year restrictive use period expired, Appellants could prepay the remaining balance on the loan, exit the program, and terminate the requirement of using their property for § 515 housing. *See* Appellant Br. 4; Government Br. 4.

B. Enactment of ELIHPA and HCDA

Before Appellants' 20-year restrictive use period ended, Congress, concerned with the vitality of the § 515 program due to the number of borrowers exercising their prepayment options, enacted the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (1988) ("ELIHPA") and the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992) ("HCDA").

Under ELIHPA and HCDA, regardless of the terms of any loan agreement, the borrower may no longer prepay loan installments at any time after the 20-year restrictive use period ends. The borrower, rather, must file a notice of intent to prepay the loan, to which the Department of Agriculture's Office of Rural Development and its agency, the Rural Housing Service (FmHA's successor), must respond by "mak[ing] reasonable efforts to enter into an agreement with the borrower . . . to extend the low income use of the assisted housing." 42 U.S.C. § 1472(c)(4)(A) (2012). For example, Rural Development may offer the borrower incentives to remain in the low-income housing program, including, e.g., reduced interest rates or rental assistance. 42 U.S.C. § 1472(c)(4)(B) (2012); 7 C.F.R. § 3560.656. If the borrower rejects these incentives or the agreement is not extended, the borrower must attempt to sell the property at fair market value to either a nonprofit organization or a public agency. 42 U.S.C. § 1472(c)(5)(A)(i); 7 C.F.R. § 3560.658. Finally, if a sale is not completed within 180 days from that point, the borrower may prepay the loan without any further restrictions. 42 U.S.C.

§ 1472(c)(5)(A)(ii); 7 C.F.R. § 3560.659(k); *see also* Rural Development Multifamily Housing Project Servicing Handbook, HB-3-3560, Chapter 15.31 (requiring the Loan Servicer to "[s]end a letter to the borrower notifying him or her that prepayment is permitted" if no sale is completed within the 180-day period).

As relevant here, because of the enactment of ELIHPA and HCDA, Appellants could not automatically prepay their loan at the end of the 20-year restrictive use period like their loan obligations had permitted. Appellants, rather, were required to follow the procedure outlined above before they were given the option to prepay the loan and be released from the § 515 restrictions.

C. Appellants' Restrictive Use Period Ends

Appellants' 20-year restrictive use period ended in 2003 and 2004, but Appellants did not attempt to exercise their right of prepayment until 2008. Specifically, on February 28, 2008, Rural Development sent Appellants written notice expressing concern about the economic viability of their properties. J.A. 59, 138, 203, 271. In response, Appellants submitted prepayment requests, received by Rural Development on April 28, 2008, expressing their desire to prepay their respective loans by December 1, 2008. J.A. 6, 65–66, 142–43, 207–08, 275–76.

Consistent with the requirements of ELIHPA and HCDA, Rural Development offered Appellants incentives to keep the properties in the § 515 housing program. J.A. 328, 338–39. Appellants rejected the incentive offers and, in 2009 through 2010, marketed their properties for the required 180-day period but were ultimately unable to sell the properties. J.A. 6. At this point, it is undisputed that Appellants satisfied the ELIHPA and HCDA requirements and could have prepaid the loans to be released of the restrictive use requirements.

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