

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7348

BOULEVARD BANK N.A. ,

Plaintiff-Appellee,

versus

GALVESTON INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant.

Appeal from the United States District Court for
the Southern District of Texas
(CA G-91-109)

(February 15, 1993)

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:¹

Galveston Independent School District (GISD) appeals a summary judgment in favor of Boulevard Bank, N.A. (Boulevard), wherein the district court found GISD liable for damages arising from its breach of an equipment lease contract. We affirm.

I. BACKGROUND

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

In November 1986, GISD entered into an equipment lease/purchase agreement with Commercial Energy Systems, Inc. (CES). Under the terms of the agreement, CES was to purchase and install certain energy-saving devices in several GISD schools. GISD was to "buy back" the equipment through 120 monthly payments of \$10,000.00; alternatively, GISD could "buy out" the lease at any time by paying 102% of the amortized lease balance. In either case, upon fulfillment of its payment obligations, GISD would have title to the equipment. After purchasing and installing the equipment, CES assigned its interest in the agreement to Boulevard. CES made this assignment with the knowledge and approval of GISD.

GISD made monthly payments pursuant to the agreement until September 1, 1990. On August 30, 1990, GISD notified Boulevard that GISD's Board of Trustees had neither appropriated nor budgeted funds for the lease payments for the 1990-91 school year. GISD informed Boulevard that no further lease payments would be made after the August 1, 1990 payment.

Boulevard sued GISD in April 1991, seeking past due lease payments and a "buy out" payment, plus pre- and post-judgment interest. By an order dated January 8, 1992, the district court granted Boulevard's motion for summary judgment on the validity of the lease agreement and GISD's inability to arbitrarily terminate its obligations under the agreement. Following a joint stipulation as to damages, the district court entered final judgment for Boulevard in the amount of \$750,000.00, including

damages, pre-judgment interest, and attorneys' fees. GISD appeals as to its liability under the agreement.

II. DISCUSSION

Section 6 of the lease agreement provides, in relevant part:

It is [GISD]'s intent to make all Lease Payments for the full term of this Lease if funds are legally available therefor. [GISD] expects that funds will be obtained sufficient to make all Lease Payments for the full term of this Lease. [GISD] shall do all things lawfully within its power to obtain, maintain, properly request and diligently pursue funds from which the Lease Payments may be made, including making provisions for such payments to the extent necessary in each budget submitted for the purpose of obtaining funding, using its bona fide best efforts to have such portion of the budget approved and exhausting all available administrative reviews and appeals in the event such portion of the budget is not approved.

In the event that sufficient funds are not appropriated, budgeted or otherwise available by any means whatsoever in any fiscal period of [GISD] for all Lease Payments due under this Lease in such fiscal period, [GISD] shall *immediately notify* [CES/Boulevard] of such occurrence and this Lease shall terminate on the last day of the fiscal period for which sufficient funds were available, without penalty or expense to [GISD] of any kind whatsoever, *provided that [GISD] shall have paid to [CES/Boulevard] all amounts outstanding and due hereunder as of such date of termination, including Lease Payments, and shall have returned the Equipment pursuant to Section 21 [sic]² below.*

(emphases added).

A. GISD'S OBLIGATIONS AND ACTIONS UNDER THE LEASE AGREEMENT.

GISD interprets "appropriated, budgeted, or otherwise available by any means whatsoever" to represent three alternatives -- making the "or" disjunctive, rather than

² This is an erroneous reference. Section 22, not 21, of the Agreement governs "Return of Equipment and Repossession."

conjunctive. Thus, pursuant to Section 6, if sufficient funds are (1) not appropriated, (2) not budgeted, or (3) not otherwise available, the lease shall terminate, following notice by GISD, on the last day of the last period for which funds were (1) appropriated, (2) budgeted, or (3) otherwise made available. Since no funds were budgeted for FY 1990-91, GISD argues that the lease terminated on the last day of FY 1989-90, following notice to Boulevard by GISD.

Boulevard interprets the same phrase such that, pursuant to Section 6, if sufficient funds are (1) not appropriated, (2) not budgeted, *and* (3) not otherwise available, the lease shall terminate, following notice by GISD, on the last day of the last period for which funds were (1) appropriated, (2) budgeted, or (3) otherwise made available. Despite the fact that GISD failed to allocate funds for the lease payments in its 1990-91 budget, it did have funds "otherwise available." Thus, when GISD unilaterally chose to stop making payments, despite having "sufficient funds . . . otherwise available," Boulevard argues that GISD breached the lease agreement.

Boulevard's interpretation is better reasoned, especially in light of the language in Section 6 requiring GISD to use its "best efforts" and to "do all things lawfully within its power to obtain, maintain, properly request and diligently pursue funds from which the Lease Payments may be made, *including making provisions for such payments to the extent necessary in each budget submitted for the purpose of obtaining funding.*" We

cannot reconcile the italicized provision with GISD's argument that choosing not to include the lease payments in the budget effected a termination of the agreement. In light of the clear wording of Section 6, we hold that GISD breached its lease/purchase agreement with CES/Boulevard.

B. THE PERMISSIBILITY OF THE AGREEMENT.

In the alternative, GISD argues that the agreement, as interpreted by the district court violates Texas law and/or is contrary to public policy. Texas law prohibits a school district from entering into a contract that will create a "deficiency debt." Tex. Educ. Code Ann. § 22.08(e). A "deficiency debt" is created when a "contract call[s] for expenditures in excess of current year funds." *National Surety Corp. v. Friendswood Indep. Sch. Dist.*, 433 S.W.2d 690, 693 (Tex. 1968); see also *Teague Indep. Sch. Dist. v. Mason*, 233 S.W.2d 176, 179 (Tex. Civ. App.--Waco 1950, writ ref'd n.r.e.) ("[S]chool trustees have no legal authority as a general rule to create any indebtedness . . . which cannot be liquidated by the application of the available school funds of the district for the scholastic year in which the debt arises.").

In November 1986, GISD contracted to pay CES \$1.2 million over 10 years. At the time, GISD had a "general funds" surplus of between \$7.1 million and \$11.3 million. Furthermore, the fact that much of that \$7.1 million may have ultimately been spent on other things is irrelevant, so long as the funds *could have been* used to fully pay GISD's obligation to CES. See *National Surety*,

433 S.W.2d at 693-94 ("Where [eligible funds are available in the year the contract is made], the subsequent exhaustion of such funds for other purposes does not retroactively destroy the original validity, or impair the continuing binding force, of the contract. No logical reason is perceived why the contracting party should be denied a judgment against the district under such circumstances"); see also *Bowman v. Lumberton Indep. Sch. Dist.*, 801 S.W.2d 883, 889 (Tex. 1990) (approving the use of "general funds" surplus from a prior year to fulfill a school district's contractual obligations that exceed its current anticipated revenues).

III. CONCLUSION

GISD entered into a legal contract with CES whereby it agreed to exercise its "best efforts" to ensure that funds would be made available over ten years to pay CES or its assigns. Alternatively, GISD could at any time elect to pay the remaining "principal" balance (plus 2%) of its obligation. Either way, GISD could only be relieved of its obligation to pay CES or its assigns if GISD was unable to obtain the necessary funds through budgeting, appropriations, or any other legal means. However, GISD unilaterally chose not to make funds available to pay its obligation, and now seeks to be relieved of that obligation, but offers this court no sound legal basis to contradict the district court's summary judgment in favor of Boulevard (CES's assign).

AFFIRMED.