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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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SE Property Holdings, LLC, f/k/a Vision Bank

v.

Bank of Franklin

**Appeals from Mobile Circuit Court
(CV-09-900083 and CV-09-900085)**

SELLERS, Justice.

SE Property Holdings, LLC ("SEPH"), appeals from a summary judgment entered by the Mobile Circuit Court in favor of Bank of Franklin ("BOF") on BOF's claim demanding specific

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performance of a contractual provision.¹ We reverse and remand.

Facts and Procedural History

In March 2005, Vision Bank, a Florida banking corporation, loaned Bama Bayou, LLC, formally known as Riverwalk, LLC ("the borrower"), \$6,000,000. Multiple individuals allegedly personally guaranteed repayment of the loan ("the guarantors").

In June 2008, pursuant to a "participation agreement," Vision Bank conveyed to BOF a 25 percent interest in the loan ("the participation interest"). The participation agreement provides that Vision Bank "sells, grants, transfers, assigns, and conveys to [BOF], without recourse, and [BOF] ... agrees to purchase and acquire from [Vision Bank], an undivided interest in [Vision Bank's] right, title and interest" in the loan. Vision Bank conveyed additional participation interests in the loan to other banks.

¹The summary judgment from which SEPH appeals was entered in case number CV-09-900085. The record before us indicates that the trial court consolidated that action with another action, which had been assigned case number CV-09-900083. SEPH's notice of appeal references both case numbers, and this Court docketed two appeals, which it then consolidated.

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The borrower and the guarantors allegedly defaulted on their obligations with respect to the loan, and in January 2009 Vision Bank filed suit against them. That action was assigned case number CV-09-900085. The borrower and the guarantors asserted counterclaims against Vision Bank and brought BOF into the action as an additional counterclaim defendant.

In April 2009, Vision Bank foreclosed on a mortgage securing the loan. Vision Bank was the highest bidder at the foreclosure sale and thereafter executed foreclosure deeds in favor of BOF and the other participating banks.

In or around January 2012, Vision Bank sold its operating assets to Centennial Bank and relinquished its Florida bank charter. Shortly thereafter, Vision Bank and SEPH entered into an "agreement and plan of merger," whereby Vision Bank merged "with and into" SEPH. The merger agreement provided that SEPH was to be the surviving entity and, consistent with applicable merger law, that "the separate existence of Vision Bank shall cease." See generally Fla. Stat. Ann. § 607.1106 ("When a merger becomes effective ... [e]very other corporation party to the merger merges into the surviving

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corporation and the separate existence of every corporation except the surviving corporation ceases"); Ohio Rev. Code Ann. § 1701.82 ("When a merger or consolidation becomes effective, ... [t]he separate existence of each constituent entity other than the surviving entity in a merger shall cease").²

SEPH, as was Vision Bank before it, is a wholly owned subsidiary of Park National Bank. The merger was voluntary and was not the result of a judicial or quasi-judicial action. There is no indication that any governmental authority ordered Vision Bank to participate in the merger. The record before the Court suggest that, as a result of the merger, SEPH acquired Vision Bank's nonperforming loans. After the merger, SEPH, as successor to Vision Bank, became a party to this litigation.

In October 2016, the trial court entered an order setting aside the foreclosure sale and declaring the foreclosure deeds void. The record indicates that the trial court's order was entered in case number CV-09-900083, with which case number

²Although it is not clear which state's law governed the merger between Vision Bank and SEPH, this Court notes that the record suggests that Vision Bank was formed under the laws of Florida and that SEPH was formed under the laws of Ohio.

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CV-09-900085 was apparently consolidated. In any event, the order setting aside the foreclosure sale and declaring the foreclosure deeds void is not at issue in this appeal.

In July 2017, BOF filed a cross-claim against SEPH. Among other things, BOF asserted in its cross-claim that SEPH had an obligation to repurchase BOF's participation interest in the loan. In support, BOF pointed to the participation agreement between BOF and SEPH's predecessor, Vision Bank.³ Paragraph 13 of the participation agreement provides:

"Participating Bank [BOF] shall ... have the unilateral right (but not the obligation) to sell to Originating Bank [Vision Bank], regardless of self-imposed lending limits of Originating Bank, its Participation Interest up to the amount that Originating Bank is permitted to purchase without violating regulatory lending limit requirements, for an amount equal to the aggregate of all principal, interest, fees and other sums due with respect to its Participation Interest or the portion that is being sold, if:

"....

"c. any proceeding is commenced which involves the dissolution, termination of existence, insolvency, or business failure of Originating Bank, appointment by any governmental authority of a person or agency to take charge of Originating Bank's assets, or the appointment of a receiver of

³The parties agree that the participation agreement is binding on Vision Bank's successors and assigns.

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any part of the property of Originating Bank, or the assignment for the benefit of creditors of Originating Bank or if any proceeding is commenced under any bankruptcy or insolvency law, state or federal, by or against Originating Bank
...."

BOF asserted that Vision Bank had ceased to exist after the merger with SEPH. Based on that assertion, BOF demanded that SEPH purchase BOF's participation interest under paragraph 13.c of the participation agreement.

BOF filed a motion for a summary judgment on its claim demanding specific performance of paragraph 13.c of the participation agreement. Approximately a year later, the trial court entered an order granting BOF's summary-judgment motion. As stated in its judgment, the trial court determined that the evidence established that Vision Bank ceased to exist after the merger with SEPH. The trial court pointed out that Vision Bank had sold its operating assets to Centennial Bank, that Vision Bank no longer carried on a banking business, that Vision Bank had relinquished its Florida bank charter, that Vision Bank had merged with SEPH, and that, under the terms of the merger, SEPH was the surviving entity and "the separate existence of Vision Bank [had] cease[d]." Pursuant to

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paragraph 13.c of the participation agreement, the trial court directed SEPH to "to repurchase BOF's participation interest not later than thirty-one (31) days after the entry of [the trial court's] Order for a price equal to \$2,043,326.21, plus interest." SEPH appealed. The parties agreed to a stay of the trial court's order pending appeal.⁴

Discussion

A.

It is undisputed that the trial court's order granting BOF's motion for a summary judgment did not resolve all claims against all parties and that it is not a final judgment. Although a nonfinal judgment typically will not support an appeal, Jakeman v. Lawrence Grp. Mgmt. Co., 82 So. 3d 655, 659 (Ala. 2011), the parties point to Rule 4(a)(1)(A), Ala. R. App. P., which allows an appeal from "any interlocutory order

⁴BOF also argued in its summary-judgment motion that Vision Bank had breached the participation agreement and that SEPH was therefore required to purchase BOF's participation interest under a different portion of paragraph 13. The trial court, however, did not rely on that argument in entering the summary judgment in favor of BOF. BOF asserts in its brief to this Court that its claim for specific performance based on that portion of the agreement remains pending, and BOF does not attempt to convince the Court that the trial court's summary judgment should be affirmed on that alternative basis.

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granting ... an injunction." In Dawkins v. Walker, 794 So. 2d 333 (Ala. 2001), this Court considered an interlocutory order described by the trial court in that case as a "partial summary judgment," which directed the members of a board of directors to reinstate an ex-member who allegedly had been improperly removed from the board. The Court considered the partial summary judgment as an injunction for purposes of Rule 4(a)(1)(A), noting that an injunction is "'[a] court order commanding or preventing an action.'" 794 So. 2d at 335 (quoting Black's Law Dictionary 788 (7th ed. 1999)).

The interlocutory order in the present case is not simply a money judgment that can be executed upon. It grants BOF specific performance of an alleged contractual duty by commanding SEPH to purchase BOF's participation interest within 31 days of the entry of the order. The order appears to be enforceable by contempt proceedings. We agree with the parties that, for purposes of appeal, the order should be treated as an injunction. See Saad v. Saad, 31 So. 3d 706, 708 (Ala. Civ. App. 2009) (indicating that a partial summary judgment in favor of a counterclaim plaintiff, which afforded him specific performance of an alleged agreement requiring the

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counterclaim defendants to take steps necessary to give the counterclaim plaintiff a mortgage on real property, was an injunction for purposes of Rule 4(a)(1)(A)). See also Union Oil Co. of California v. Leavell, 220 F.3d 562, 566 (7th Cir. 2000) (pointing to 28 U.S.C. § 1292(a)(1), which allows appeals in federal cases from "interlocutory orders ... granting ... injunctions," and stating that "[t]he district judge did not use the magic word 'injunction,' but his order [was] injunctive in nature, requiring the [defendants] to perform enumerated steps under threat of the contempt power"); and Medcom Holding Co. v. Baxter Travenol Labs., Inc., 984 F.2d 223, 224-25 (7th Cir. 1993) (citing 28 U.S.C. § 1292(a)(1) and considering the merits of an appeal from an interlocutory order commanding specific performance of a contract requiring the transfer of all the defendants' shares of stock in a particular corporation).

B.

This Court applies a de novo standard of review to a summary judgment. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). As noted, paragraph 13.c of

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the participation agreement allows BOF to sell back its participation interest if

"any proceeding is commenced which involves the dissolution, termination of existence, insolvency, or business failure of Originating Bank, appointment by any governmental authority of a person or agency to take charge of Originating Bank's assets, or the appointment of a receiver of any part of the property of Originating Bank, or the assignment for the benefit of creditors of Originating Bank or if any proceeding is commenced under any bankruptcy or insolvency law, state or federal, by or against Originating Bank"

(Emphasis added.) The parties to the participation agreement are sophisticated business entities, and they affirmed that the agreement was "fully negotiated by both parties with the representation and advice of their legal counsel, to the extent so desired."

SEPH argues on appeal that the trial court erred in determining that a "proceeding" involving Vision Bank's termination of existence was "commenced," so as to invoke paragraph 13.c. It asserts that Vision Bank's voluntary merger with SEPH was not a "proceeding."

"The intention of the parties controls in construing a written contract, and the intention of the parties is to be derived from the contract itself, where the language is plain and unambiguous. Food Service Distributors, Inc. v. Barber, 429

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So. 2d 1025 (Ala. 1983). Likewise, in Flowers v. Flowers, 334 So.2d 856, 857 (Ala. 1976), this Court held that, absent evidence to the contrary, "the words of an agreement will be given their ordinary meaning."

Loerch v. National Bank of Commerce of Birmingham, 624 So. 2d 552, 553 (Ala. 1993). Moreover, "[a]ll the provisions of a contract must be construed together so as to give harmonious operation to each of them, so far as their language will reasonably permit." City of Fairhope v. Town of Daphne, 282 Ala. 51, 58, 208 So. 2d 917, 924 (1968). In a related vein, "[a] court seeks to accord the contracts "a reasonable construction under the terms used by the parties who made them, and when the contracts contain several provisions, all are construed together so that a harmonious operation can be given to each." ANCO TV Cable Co. v. Vista Commc'ns Ltd. P'ship I, 631 So. 2d 860, 863 (Ala. 1993) (quoting United States Fid. & Guar. Co. v. Jacksonville State Univ., 357 So. 2d 952, 955 (Ala. 1978))."

Hanover Ins. Co. v. Kiva Lodge Condo. Owners' Ass'n, Inc., 221 So. 3d 446, 451-52 (Ala. 2016).

The term "proceeding" should be construed holistically in light of the entire participation agreement and the purpose behind paragraph 13.c. Participation agreements allow lenders to invest in loans in which they might not otherwise be able to invest and to spread the risk of the performance of the loans among multiple parties. The participation agreement in this case states that BOF's participation interest was

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conveyed without recourse, meaning that BOF had no guarantee from Vision Bank that all required payments would be made by the borrower or by the guarantors. Paragraph 13.c, however, appears aimed at providing BOF at least some security in the form of a right to force the repurchase of its participation interest in the event of the financial deterioration of the originating bank, i.e., Vision Bank. That right is triggered by the commencement of a "proceeding."

Black's Law Dictionary defines "proceeding" as:

"1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing. 5. Bankruptcy. A particular dispute or matter arising within a pending case--as opposed to the case as a whole."

Black's Law Dictionary 1398 (10th ed. 2014). See also Ex parte Jenkins, 723 So. 2d 649, 653 n.2 (Ala. 1998) (indicating that "proceeding" means "'actions and special proceedings before judicial tribunals as well as proceedings pending before quasi-judicial officers and boards'" (quoting State ex rel. Johnson v. Independent Sch. Dist. No. 810, 260 Minn. 237, 245, 109 N.W.2d 596, 602 (1961))); Datron, Inc. v. CRA

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Holdings, Inc., 42 F. Supp. 2d 736, 743 (W.D. Mich. 1999) ("[I]n common parlance and understanding, the term [proceeding] has a legal connotation and is customarily limited to the actions before judicial and quasi-judicial tribunals.").

To be sure, broader definitions of "proceeding" can be found. For example, although Merriam Webster's first definition of "proceeding" is "legal action," with "a divorce proceeding" given as an example, additional definitions include "procedure," "events, happenings," and "transaction." Merriam-Webster's Collegiate Dictionary 990 (11th ed. 2003). The context in which "proceeding" is used in the participation agreement, which was the culmination of a sophisticated commercial transaction between experienced lending institutions, makes clear to this Court that the term means a judicial or quasi-judicial action relating to the originating bank's financial decline and putting the originating bank under the supervision of some official authority. Thus, a voluntary merger like the one entered into by Vision Bank and SEPH is not a "proceeding" as that term is used in paragraph

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13.c.⁵ Accordingly, we reverse the trial court's judgment ordering SEPH to purchase BOF's participation interest, and we remand the cause.⁶

1171167--REVERSED AND REMANDED.

1171195--REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, and Bryan, JJ., concur.

Stewart, J., recuses herself.

⁵It is also noteworthy that the participation agreement is binding on Vision Bank's "successors and assigns," suggesting that it would remain in effect in the event of a merger and acquisition of the originating bank.

⁶SEPH argues alternatively that the merger between it and Vision Bank did not actually result in Vision Bank ceasing to exist for purposes of paragraph 13.c of the participation agreement. SEPH asserts that, although the merger terminated Vision Bank's existence as a company separate from other companies, Vision Bank still exists for some purposes as a part of SEPH. Because we conclude that no "proceeding" was commenced, we pretermitt consideration of SEPH's alternative argument.