Jim Cox

From: "Jim Cox" <jlscproperties@gmail.com>
Date: Thursday, June 04, 2015 8:39 PM
To: "Ed Fleming" <epfleming@pensacolalaw.com>
Subject: Re: Trial Court Order ATTORNEY-CLIENT PRIVILEGE APPLIES

While I cannot say I understand all of his arguments, the judge did revue the applicability of recent related rulings, including Ward v Brown, Accardo v Brown and 1108 Ariola v Jones.

On page 4 he says "The Court is compelled to conclude that the equitable ownership enjoyed by the lessees in this case is indistinguishable in any meaningful way from the equitable ownership described in Ward, Accardo, 1108 Ariola and other related cases ..."

On page 5 he says "this court concludes that the lease in question here provides the lessee with equitable ownership of the land as well. Ergo, the leasehold interest in the unimproved land should be taxable at ad valorem rates."

This is, unfortunately, consistent with all prior rulings for both Pensacola Beach and Navarre Beach. As much as we may feel there is a significant difference between the Pensacola Beach leases and the Navarre Beach leases, the courts simply have not bought that argument. We certainly can expect the Portofino condominium and Beach Club condominium summary judgments to follow suit.

Any idea when the summary judgments on the two condominium cases may be issued?

Despite years of putting up a good fight for what is right, I feel we are at the end of our options.

I do not see any merit in appealing this case (or the two condominium cases when they are finally ruled on).

Thanks for all of your years of work on this.

Jim Cox
393-2202

From: Ed Fleming
Sent: Thursday, June 04, 2015 6:26 PM
To: Jim Cox
Subject: Re: Trial Court Order ATTORNEY-CLIENT PRIVILEGE APPLIES

What did you think of judge's rationale?

Sent from my iPhone

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ISLAND RESORTS INVESTMENTS, INC.,
Plaintiffs,

CASE NO. 2011 CA 002367
DIVISION A

v.

CHRIS JONES, Property Appraiser for Escambia County, Florida, and JANET HOLLEY, Tax Collector for Escambia County, Florida,
Defendants.
_____/

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS CASE, one of the most recent in a line of cases involving taxation of leasehold property on Santa Rosa Island, is before the Court upon the motions of both Plaintiffs and Defendants for summary judgment. Both parties agree there are no disputed issues of material fact and that the case can be decided by summary judgment. The most significant difference between this case and those preceding it is that the real property in question is unimproved land at this point; no buildings or other improvements have been constructed.

The property is part of a condominium development. The parcels involved in this case remain unbuilt. A separate action is pending in this Court, before a different judge, concerning taxation of improvements to other parcels in the development. See, *Portofino v. Jones*, Case No. 2011 CA 2418, in the Circuit Court of Escambia County.

The history of the related litigation, as well as the underlying property transactions, has been set forth in numerous appellate cases, most recently *Accardo v. Brown*, 139 So.3rd 848 (Fla. 2014) and *1108 Ariola, LLC v. Jones*, 139 So.2d 857 (Fla. 2014). It is not necessary to repeat that history in this order. Suffice it to say that the property is leased to the Plaintiffs by Santa Rosa County under a 99-year lease, with right to a 99-year renewal.[1] The lease, which anticipates the property will be

[1] Plaintiffs contend the "right of renewal" is illusory, since it does not include a right to renew on the same terms, but provides that terms will have to be negotiated at the time of renewal.

developed, is for all intents and purposes indistinguishable from the leases considered in the *1108 Ariola* case.

Accardo v. Brown and *1108 Ariola*, *supra*, are the latest in a line of appellate cases finding that various interests under long term leases from a government entity, such as the lease in the instant case, may be found to establish "equitable ownership" in the lessee, so that the lessee's interest may be taxable as real property for purposes of ad valorem taxation. The seminal case of *Ward v. Brown*, 919 So.2d 462 (Fla. First DCA 2005) established that principle as it related to taxation of improvements on the leased property. Later cases have addressed variations on that theme.

Accardo v. Brown was a case involving property in the Santa Rosa County portion of Santa Rosa Island; most of the leases involved were perpetually renewable. In *Accardo*, the Supreme Court held that the leases established equitable ownership, and that because the leases were perpetually renewable, both the improvements to the property and the real estate itself could be taxed as real property. In a footnote, the opinion noted that some of the leases involved in that case were not perpetually renewable. No further mention was made of the leases which were not renewable in perpetuity, and the opinion is silent as to whether the land involved in those leases could be taxed along with the improvements to the land.

In *1108 Ariola*, released the same day as *Accardo*, the Supreme Court held, concerning leases in the Escambia County portion of Santa Rosa Island, that a right to perpetual renewal was not necessary to support a finding of equitable ownership. The opinion in *1108 Ariola*, however, referred only to taxation of improvements, without discussion of whether the underlying land itself could be taxed as real property. During the argument of these motions, the Defendants advised the Court that the *1108 Ariola* case did not involve separate taxation of the land because the taxing authorities in Escambia County had voluntarily refrained from assessing or collecting taxes on the land; Plaintiffs did not dispute the fact that taxation of the land was not at issue in that case, although they expressed skepticism about the voluntary nature of the Defendants' position.

The distinction of taxing the land versus taxing improvements to the land goes back to *Ward v. Brown*. The theory espoused in that case was that the improvements placed on the property would

not have a useful life as long as the lease, so that the lessee would have all of the benefits of the improvements, and thus "owned" the improvements for all practical purposes. Since those improvements were fixtures to the land, the *Ward* Court reasoned, the improvements were taxable as real property for ad valorem tax purposes. In October 2014, this Court, speaking through Judge Terrell, granted a summary judgment in favor of the taxing authorities in Escambia County in the *Portofino v. Jones* case cited above, holding that the *Ward* and *1108 Ariola* results would not be changed by a contention that improvements to the property were expected to have a useful life longer than the lease involved. The net result of these cases is that there can really be no dispute as to taxation of the improvements to real property encompassed by these leases; the remaining issue is whether the land itself can be taxed as real property equitably owned by the lessee in the absence of improvements.

Also to be considered in this discussion are §196.199, Florida Statutes (2014) and §199.023, Florida Statutes (2005). Those statutes, read together, provide an exemption from taxation, except as intangible personal property, for leasehold interests in property owned by the State or any of its subdivisions, unless those leasehold interests are for 100 years or more, exclusive of renewal periods. By its terms, the lease involved in the instant case would appear to fit squarely within the bounds of those statutes, and to require application of the exemption from ad valorem taxes. The same would be true, however, for the leases in all of the preceding cases, from *Ward* through *Accardo* and *1108 Ariola*. The *Accardo* Court disposed of that argument this way:

> "...[i]t must first be determined that the governmental entity is the "owner" of the property – not the mere holder of bear legal title – before there is any reason to consider whether the bright line-hundred year rule of §196.199(7) is applicable. Here for ad valorem tax purposes, the "owner" of the property is not a governmental entity."

Accardo 193 So.3d at 857.

Also instructive is *Capital City Country Club v. Tucker* 613 So.2d 448 (Fla. 1993). That case involved a 99 year lease from a municipality for use as a golf course and country club.[2] Justice Grimes, speaking for the Court, stated that

> "The legislature is without authority to grant an exemption from taxes where the exemption does not have a Constitutional basis [citation omitted] thus we conclude that the Legislature could not Constitutionally exempt from real estate taxation municipally owned property under lease which is not being used for municipal or public purposes. We cannot accept the contention that by imposing a state intangible tax which cannot exceed two mils [per Article VII of Constitution] on nonpublic leaseholds of municipal land, the Legislature can exempt the land from the higher level of local taxation permitted by Article VII Section 9 of our Constitution."

Capital City, 613 So.2d at 451-52. The *Capital City* Court avoided the Constitutional issue, however, by interpreting §196.199 as not affecting the country club property because the lease had been entered before the effective date of the act, deciding that "§196.199(4) does not *specifically* exempt from real estate taxes land which is subject to a lease entered before April 15, 1976: *it does so only by inference*." 613 So.2d 452 (emphasis added).

The Court is compelled to conclude that the equitable ownership enjoyed by the lessees in this case is indistinguishable in any meaningful way from the equitable ownership described in *Ward*, *Accardo*, *1108 Ariola*, and the other related cases in the jurisprudence of this State. The harder question is whether, in the absence of a perpetual lease or a right to purchase the land at some point in the future, the lessees have equitable ownership of the land itself, or only equitable ownership of the improvements. Put another way, is the *1108 Ariola* decision simply silent on the question of equitable ownership of the land because only taxation of the improvements was at issue in that case (as argued by the Defendants here), or does that decision imply (as argued by the Plaintiffs) that the distinction remains significant and that the improvements are subject to ad valorem taxation only because the useful life of the improvements is expected to be less than the term of the lease?

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[2] *Capital City* must be read with some caution because the lease involved was executed in 1956, and the statutes at that time made reference to contracts entered into before 1976. The Supreme Court also specifically noted that the property was owned by a municipality, and not another unit of government, although no explanation was made as to the significance of that particular fact.

It is worthy of note that *1108 Ariola* noted that no argument had been made concerning useful life of the improvements. 189 So.3d at 860. The equitable ownership of the improvements there was premised solely upon the privileges of ownership afforded by the lease, without the need for a showing of perpetual renewability. Taking that into consideration, along with the *Portofino v. Jones* case, *supra*, in which Judge Terrell has held equitable ownership of the improvements has been shown despite some showing that the useful life of at least some of the improvements is longer than the term of the lease, this Court concludes that the lease in question here provides the lessee with equitable ownership of the land as well. Ergo, the leasehold interest in the unimproved land should be taxable at ad valorem rates.

The Court concedes this is a close question, especially considering the earlier cases discussing useful life of improvements and related issues. Nevertheless, at this stage of the jurisprudence of this issue, this seems to be a distinction without a meaningful difference. Having reached this conclusion, the Court finds it unnecessary, as did Justice Grimes in *Capital City Country Club*, *supra*, to reach the constitutional issues raised by the defendants.

For all the above reasons, it is hereby **ORDERED AND ADJUDGED** that the Plaintiffs' Motion for Summary Judgment is DENIED and Defendants' Motion for Summary Judgment is GRANTED.

DONE AND ORDERED at Pensacola, Escambia County, Florida this 29th day of May, 2015.

EDWARD P. NICKINSON, III
CIRCUIT JUDGE

Copies to:

Thomas M. Findley, Esquire
Messer Caparello, P.A.
2618 Centennial Place
Tallahassee, FL 32308
tfindley@lawfla.com; cbrinker@lawfla.com; statecourtpleadings@lawfla.com
Counsel for Defendants

Edward P. Fleming, Esquire
R. Todd Harris, Esquire
McDonald, Fleming, Moorhead
25 West Government Street
Pensacola, FL 32502
rtharris@pensacolalaw.com; psheidebrecht@pensacolalaw.com; dmcraig@pensacolalaw.com
Counsel for Plaintiffs

Michael J. Stebbins, Esquire
504 North Baylen Street
Pensacola, FL 32501-3904
mjsteb@bellsouth.net; kasobiecki@aol.com
Counsel for Santa Rosa Island Authority

E-served on 6/9/15