IN THE SUPREME COURT OF FLORIDA

1108 ARIOLA, LLC, et al.,

Petitioners,

v.

CHRIS JONES, Property Appraiser for Escambia County, Florida, and JANET HOLLEY, Tax Collector for Escambia County, Florida,

Respondents.

CASE NO: SC11-2231
DCA NO.: 1D10-2050

PETITIONERS' MOTION FOR REHEARING OR CLARIFICATION

Petitioners, 1108 Ariola, LLC, et al., pursuant to Fla. R. App. P. 9.330, move for rehearing or clarification of the ruling of the Court in its opinion dated March 20, 2014, and set out the following matters that appear to have been overlooked by the Court:

(1) At page 6 of the opinion it is noted that petitioners made no specific argument about the useful life of the improvements. However, this issue was discussed at length in the trial court's Summary Final Judgment, which is set out in the Appendix to Petitioners' Initial Brief.

(2) Footnote 1 at p. 5 of the opinion indicates that some of the leases at issue are perpetually renewable. Clarification is needed because both the courts below specifically determined that none of the petitioners' leases are perpetually renewable.

Petitioners move for a reconsideration of the Court's Opinion, based upon point (1) above, and - because useful life should not be a determining factor in this

case - the entry of an order quashing the decision of the First District, directing the trial court to enter declaratory judgment that the petitioners' leasehold improvements are not owned by the lessees and therefore not subject to ad valorem tax, and ordering the immediate refund by respondent Holley of all taxes and interest paid to date by any petitioner. Alternatively, based on point (2) above, petitioners request the entry of an order clarifying which leases, or which lease forms, have been determined by this Court, to be perpetually renewable.

MOTION FOR REHEARING

THE COURT OVERLOOKED PETITIONERS' PRESENTATION OF THE TRIAL COURT'S FINAL SUMMARY JUDGMENT, WHICH SHOWED AN ESSENTIAL FLAW IN THE USEFUL LIFE ARGUMENT.

In its discussion of the issue of the useful life of the improvements on petitioners' leaseholds, the Court observed at page 6 of its opinion in this matter, that there had been no specific argument from petitioners regarding that issue. At page 14 of their Reply Brief, petitioners did comment on the two cases respondents had cited. As it turned out, petitioners' arguments regarding those authorities did not persuade this Court.

However, it appears that the Court overlooked the rather extensive discussion of this topic by Circuit Judge Michael Jones at pp. 34-37 of the Summary Final Judgment of December, 2009, a copy of which was included (under Tab 3) in the

Appendix to Petitioners' Initial Brief on the merits filed in this Court on April 23, 2012. While it is true that petitioners' initial brief did not highlight that section of the summary judgment order, the initial brief was necessarily focused on the opinion of the First District. That opinion included no comment of any kind on the topic of useful life of the improvements. *See, 1108 Ariola, LLC v. Jones*, 71 So. 3d 892 (Fla. 1st DCA 2011).

The trial judge, however, had addressed the issue, and his findings in the final judgment establish that, on motion for summary judgment, the defendants (respondents here) did not prove that the improvements sought to be taxed would be destroyed before the end of the lease term. In fact, the evidence presented by plaintiffs (petitioners here) indicated the opposite: that many structures in Escambia County exceed 99 years in useful life. But the analysis went further (pp. 36-37):

> In the instant case, the Defendants offered no credible evidence proving that the "useful life" of the improvements will expire prior to the expiration of the leases. On the other hand, the Plaintiffs submitted evidence that many structures in this area are well over 99 years of age. The record before this Court contains proof that improvements made upon the Plaintiffs' properties may not be destroyed prior to the end of the leases.[59]
>
> Further, all the Plaintiffs' leases provide that legal title to any building or improvement of a permanent character erected on the premises shall vest in Escambia County, subject to the terms of the leases. The leases all contain clauses requiring the lessees to repair or rebuild any building or improvement damaged or destroyed by fire, windstorm, water or any cause so as to place the same in as good and tenable condition as it was before the event causing such damage or destruction. Pursuant to their lease agreements, no Plaintiff may remove any building or improvement of a permanent character from the

leased premises.[60] The Plaintiffs' leases provide that upon default the lessees shall forfeit all rights of possession of the leased property. All Plaintiffs' leases provide that upon the expiration or sooner termination of a lease, the lessee shall have 15 days in which to remove all personal property, and the lessee must surrender possession of the land and improvements in as good state and condition as reasonable use and wear will permit. These provisions in Plaintiffs' leases ensure that the improvements will not be destroyed by the end of the lease term and that the county will have the improvements delivered to it at the end of the lease term.

"Useful life" may very well be a factor to be used by the taxing authorities in determining the valuation of the improvements after a determination is made that the property is taxable. However, this Court concludes that the "useful life" of the improvements is not a determining factor in deciding whether the Plaintiffs are equitable owners of the improvements.

59 See *Brosnaham Affidavit*

60 See *Partial Stipulation of Facts*

Thus, the trial court exposed a flaw in the "useful life" argument in this case, since petitioners must repair or rebuild the improvement if damaged or destroyed. The useful life analysis in *Gay v. Jamison*, 52 So. 2d 137 (Fla. 1951) involved a sales tax, collected only once, and that court would have no concern regarding any later construction to repair or rebuild. As noted in the Summary Final Judgment, P. 36, in the case of *Offutt Housing Co. v. Sarpy County, Neb.*, 351 U.S. 253 (1956), the useful life of the improvements "was a factor in determining whether only part or the full value of the buildings was to be taxed to the lessee," but not as a factor in determining equitable ownership.

In summary, petitioners urge the Court to withdraw its opinion of March 20 and enter a revised order determining that the improvements on Pensacola Beach cannot be encumbered with ad valorem taxes because they are not owned by the lessees.

MOTION FOR CLARIFICATION

IT IS UNCLEAR WHICH LEASES THIS COURT FOUND TO BE PERPETUALLY RENEWABLE

At p. 5 of the Opinion of March 20, 2014, the Court, having stated in the text that "in contrast [to *Accardo v. Brown*, No. SC11-11445 (Fla. Mar. 20, 2014)], this case presents leaseholds that are not perpetually renewable," declared in note 1: "The record does show, however, that some of the leases at issue are perpetually renewable."

Petitioners adopt by reference the motion for clarification filed this date by the petitioners in *Accardo*, which highlights the risk for confusion and need for clarification here, as well.

As pointed out in the *Accardo* motion for clarification, it is difficult to reconcile this Court's ruling in *Sisco v. Rotenberg*, 104 So. 2d 365 (Fla. 1958) and the cases that have followed it, with the decision in *Accardo,* especially as to those subleases without the "automatic" renewals found in *Ward v. Brown*, 919 So. 2d 462 (Fla. 1st DCA 2005).

The footnote in the present opinion is especially problematic in light of the rulings of the courts below in *1108 Ariola*. The trial court's 49-page Final Summary Judgment is found at Tab 3 of petitioners' appendix to the initial brief on the merits.

The trial court addressed the issue of perpetual leases at pp. 22-23 of the judgment order, including a recitation of the renewal language respondents claimed would allow some of the leases to be renewed over and over again:

> *In the event lessee shall fully perform all of the terms, provisions and conditions on his part to be performed for the full terms of this lease, lessee shall have the right and privilege at his elections, to renew this lease for a further term of 99-years by giving the authority written notice of such election to renew not later than 6 months prior to the expiration of the original term. Such renewal shall be on the like covenants, provisions and conditions as are in this lease contained, including an option for further renewals.* (Italics supplied.)

> This language does not necessarily provide Plaintiffs with a perpetual right to the use of the property, in part because such renewals require action on the part of the lessee to be triggered. Further, as noted above, over 600 of the leases at issue have no renewal provision at all, and some of the other leases require negotiation of renewal terms. An additional consideration can be found in the undisputed affidavit of the Administration, Leasing and Marketing Manager of the SRIA, which states that the SRIA does not consider any of the leases it entered into to be perpetual leases and that it was not the intent of the SRIA to issue perpetual leases.
>
> Finally, it is not insignificant that all of the leases contain clauses providing that the lessees will surrender possession of the land and improvements in good condition and repair upon the expiration of the lease, which further suggests that the leases are not perpetual. All of Plaintiffs' leases provide that legal title to any building or improvement of a permanent character erected on the premises shall vest in Escambia

> County, subject to the terms of the leases. The leases all contain clauses requiring the lessees to repair or rebuild any building or improvement damaged or destroyed by fire, windstorm, water or any cause so as to place the same in as good and tenable condition as it was before the event causing such damage or destruction. Further, pursuant to their lease agreements, no Plaintiff may remove any building or improvement of a permanent character from the leased premises. These provisions emphasize that the ultimate benefit of ownership remains in the county. This Court also finds that the leases at issue in the instant case – unlike the subleases at issue in *Ward v. Brown* – are not perpetual leases.

The District Court of Appeal fully agreed with the trial judge's conclusion, stating as much in three separate places in its opinion:

> All of the leases at issue are for 99-year initial terms. Although many of these leases include renewal options, some contain no renewal options, and none of the leases are automatically renewable.

1108 Ariola, 71 So. 3d at 895.

> [N]one of the leases in the instant case renew automatically and vary widely from 99-year renewable to no renewal provision at all.

Id.

> In *Ward v. Brown*, this court emphasized the fact that the leaseholders in that case had the right to perpetual lease renewals, a factor which is not present in the case before us.

1108 Ariola, 71 So. 3d at 897.

Petitioners acknowledge that the footnote in the Court's opinion does not represent its holding. However, there is a potential that the statement in that footnote will engender confusion and it may be misconstrued in cases pending in Escambia

County, which were not resolved by this Court's decisions in either *1108 Ariola* or *Accardo*.

The decision by the Court in the present case, once it has ruled on the rehearing aspect of this motion, will be binding on all cases filed by petitioners in subsequent years (2009-2012) challenging the taxation of the leasehold improvements on Pensacola Beach. But in 2011, respondent Jones also placed on the Escambia tax rolls the land involved in each leasehold. As a result, a significant number of the petitioners in this case (joined by others), filed suit in Circuit Court in Escambia County in 2011 and 2012, challenging taxation of the land only. These cases have been stayed by stipulated order, pending the outcome of the *Accardo* case.

Based on the First District's declaration in this case that there were no perpetually renewable leases on Pensacola Beach, and the ruling by this Court in *Accardo* (grounded on a finding of perpetually renewing leases on Navarre Beach), it would appear that the land on Pensacola Beach would not be subject to ad valorem tax. The footnote statement at p. 5 of the opinion here casts doubt on the rulings of the trial court and the District Court on that issue.

If some of the Pensacola Beach leases are deemed by this Court to be perpetually renewing, both the petitioners (and other beach lessees), and the taxing officials as well, need clarification as to the language of the lease renewal provisions

that meet that "perpetual" criteria. As is reflected in the record on appeal (R5756-5875, affidavit of Dennis Tackett), there are at least 10 different renewal provisions and there are 641 parcels with no renewal provision at all.

On the other hand, the issue of taxation of land on Pensacola Beach would be resolved favorably to the petitioners if the footnote were to be omitted, in consideration of the prior findings of both of the courts below that none of the leases can renew perpetually. Alternatively, the decision in *Sisco v. Rotenberg*, 104 So. 2d 365 (Fla. 1958) certain justifies such a result.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by electronic service on this 4th day of April, 2014 to:

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