IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,369

W. G. LASSITER, JR.,

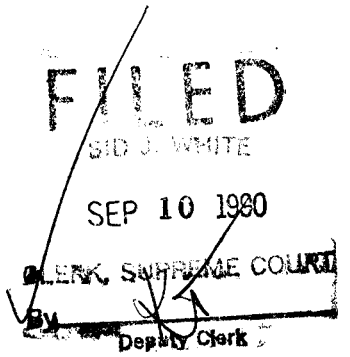
Petitioner,

vs.

LESTER KAUFMAN, IRENE KAUFMAN, and BLANCHE FINK,

Respondents.

Lower Tribunal No. 88-2567



RESPONDENTS' ANSWER BRIEF ON THE MERITS

On Review from the District Court
of Appeal, Fourth District
State of Florida

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INTRODUCTION

The Respondents, LESTER KAUFMAN, IRENE KAUFMAN, and BLANCHE FINK, by and through their undersigned attorney adopt the introduction of Petitioner.

STATEMENT OF THE CASE AND OF THE FACTS

Respondents accept the Statement of the Case and of the Facts as set forth by Petitioner in his Initial Brief on the Merits.

CERTIFIED QUESTION ON APPEAL

> IN THE DETERMINATION OF FAIR MARKET VALUE OF LEASED PROPERTY AT THE TIME OF THE EXERCISE OF A LESSEE'S OPTION TO PURCHASE, MAY THE TRIAL COURT CONSIDER THE PRESENT VALUE OF THE FEE UNENCUMBERED BY THE LEASE?

SUMMARY OF ARGUMENT

The Certified Question on Appeal should be answered in the affirmative. The trial court correctly applied the doctrine of merger in its finding as stated in Jackson vs. Relf (26 Fla. 465, 8 So. 184 [1890]). That the present value of the fee should be determined unencumbered by the lease. To allow the Lessee to have the benefit of the lease as an encumberance to devalue the property would work an inequitable result on the Lessor/Owners and would violate the doctrine of merger since it would not be in accordance with the intent of the owners/respondents. (Jackson, supra). As the Fourth District Court of Appeals stated the option "did not fix a price at $200,000.00; rather, under the option provision parties agreed to sell/buy at fair or reasonable price -- the market value at the time the option was exercised--

which could not be less than $200,000.00. (Kaufman v. Lassiter, 520 So.2d 692 (1988)).

As bluntly stated by Judge Schwartz in his dissenting opinion in Contos v. Lipsky, 433 So.2d 1242 (3rd DCA, 1983), the facts on their face clearly show that it was never the parties intent that the Lessee be allowed to utilize his lease as an encumbrance to drive down the fair market value of the property when exercising his option to purchase the fee. Indeed, to accept Lessee's argument is to give the Lessee an enormous windfall profit and certainly could not be said to comport with "a more equitable rule".

ARGUMENT

When the District Court of Appeals remanded the case in Kaufman v. Lassiter, supra, it instructed the trial court to determine what the fair market value of the leased property was at the time the Lessee sought to exercise his option to purchase under the Lease, and once having fixed the market value, to grant the specific performance remedy sought by the Lessee.

This the trial court did and fixed the fair market value of the property in the amount of $1,684,000.00 as of June 20, 1987, the date the Lessee exercised the option. In reaching this decision, the trial court relied upon Palm Pavilion of Clearwater, Inc. v. Thompson, 458 So.2d 893 (Fla. 2nd DCA 1984), which followed the rational of Judge Schwartz' dissent in Contos v. Lipsky, supra.

In Palm Pavilion, the Second District Court made the

following statement:

> "We believe the rationale of the dissent in Contos produces the correct result in the case at hand. The fundamental issue in this case involves what it was that the lessee had an option to purchase. (Emphasis added.) The Lease stated that the option was to purchase "the above-mentioned real property".
>
> The appraisal clause provided that the appraisers shall determine the market value "of said property". The term property appears to be clear and unambiguous. (more so perhaps than the term "the leased premises" in Contos, as discussed below). The term "property" in the agreement was not restricted or narrowed by qualifying words such as, "the landlords interest in the property" or "the fee as burdened by the lease". We feel that to construe the agreement as though it contains such restrictive or narrowed language would amount to a judicial rewriting of the agreement which is not our province to do." (458 So.2d at 894).

The Court in Palm Pavilion made reference to the doctrine of merger but stated it was not necessary to decide the issue upon that legal doctrine since there was nothing ambiguous about the language in the subject Lease. In the lease in the case at bar (Respondent's Appendix A-1) there is likewise nothing ambiguous about the language of the option clause. The option clause provides in part as follows:

> Provided Lessee is not in default of any of the terms, provisions, covenants and conditions in this lease contained, the Lessee shall have and is hereby given the privilege and option of purchasing the fee title to the above-described premises at any time subsequent to the tenth, annual, rental payment. (Emphasis added.)"

Unquestionably the word "fee" demonstrates that the terms of the option is clear and unambiguous as to what the lessee had an option to purchase. To hold otherwise is to rewrite the agreement.

What Judge Downey's dissent, the majority in Contos, and

the Court in Taylor vs. The Fusco Management Co., et al., Case No. 89-895-CIV-T-13A, all failed to recognize is that where a third person wishing to purchase the property from the Lessor/Owner would have to take the property subject to the lease, which understandably might make the property less attractive in the eyes of a third person purchaser, such is not the case as to the Lessee who, with his purchase of the property holds not only the fee title but the lease as well. This is the "reality" that Judge Schwartz refers to in his dissent in Contos. In other words, after the purchase the lessee would be invested with the entire bundle of rights for the property in question. See, Bystrom vs. Valencia Center, Inc., 432 So.2d 108 (3rd DCA 1983). From the language of the lease and from the trial court's findings at the conclusion of the trial, it is clear that the Lessors/Owners never intended to have the lease operate so as to devalue the market value of their fee title if the lessee/option holder exercised his option to purchase. See, Jackson v. Relf, 26 Fla. 465, 8 So. 184 (1890).

If the Lessee's position is accepted he will have acquired the property in fee simple at an unconscionably low price. The record shows that the assessed value of the property (for tax purposes) was Three Million Three Hundred Thousand Dollars ($3,300,000.00) "unimproved". It follows that the property is worth far in excess of Three Million Three Hundred Thousand Dollars ($3,300,000.00) in its "improved" state. Common sense and logic both dictate that the lessee never had any expectation

to purchase the fee title and hold in fee simple absolute such a valuable piece of property for the paltry sum of Two Hundred Seventy-five Thousand Dollars ($275,000.00). The true and equitable measure of value of the property should be, as to the lessee, what the market value is of the unencumbered fee title. This is 1) what the trial court found, 2) what the Fourth District Court affirmed, 3) what reasonably comports with intention of the parties as evidenced by the evidence, the lease and equitable principles, and 4) what the "realities" of the situation are. See, Jackson, supra and Judge Schwartz' dissent, Contos.

The Lessee declared his intention to exercise his option to purchase as set forth in Article 25 of the Lease. It is obvious that if the Lessee wishes to exercise the option and purchase the fee title under the option clause, he does not take subject to any encumberance. As Judge Schwartz observed dissenting in Contos, it does not require a great deal of analysis to grasp the reality of what the Lessee is attempting. Both common sense and logic clearly dictate that this lessee never really expected to be able to buy the fee title to such a valuable piece of property for $275,000.00, neither did the Lessors ever intend to sell the fee to such a valuable piece of property for such a paltry amount.

CONCLUSION

WHEREFORE, the certified question should be answered in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: James E. Weber, Esq., Attorney for Petitioner, 501 South Flagler Drive, Suite 502, West Palm Beach, Florida 33401 on this 7th day of September, 1990.

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