IN THE SUPREME COURT OF FLORIDA

W. G. LASSITER, JR.,

Petitioner,

vs.

LESTER KAUFMAN, IRENE KAUFMAN, and BLANCHE FINK,

Respondents.

Case No. 76,369

Lower Tribunal No. 88-2467

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

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INTRODUCTION

The Petitioner, WILLIAM G. LASSITER, JR., will be referred to herein as Lessee. The Respondents, LESTER KAUFMAN, IRENE KAUFMAN and BLANCHE FINK, will be referred to herein as Lessors. All emphasis supplied.

STATEMENT OF THE CASE AND OF THE FACTS

Lessee entered into a fifty-year lease with Lessors for a tract of unimproved property in Broward County. The lease provided for an annual rental of $20,000 throughout the term of the lease and for the Lessee to be responsible for all expenses, such as taxes, insurance, liens and repairs on the property. Furthermore, the Lessee was required to construct a commercial building of not less than 30,000 square feet within eight months after commencement of the lease. The Lessee was given an option to purchase the property after the end of the tenth year of the term for a purchase price of not less than $200,000. Lessee constructed the required improvements and, after more than ten years, notified the Lessors that he intended to exercise the option to purchase for $200,000. Since the lease provided that $200,000 was the minimum, the parties could not agree upon the option price and Lessee sued for specific performance. The trial court granted specific performance and found the option price to

be $200,000. On appeal to the Fourth District in Kaufman v. Lassiter, 520 So.2d 692 (Fla. 4th DCA 1988), the district court affirmed the granting of specific performance, but reversed as to the option price, and remanded it for further proceedings. The court held that the figure of $200,000 was a minimum purchase price; that under the option provision the parties had agreed to sell or buy at a fair or reasonable price, i.e., the market value of the leased property at the time the option was exercised.

Upon remand, the trial court heard evidence presented by the respective parties regarding the market value of the property. The Lessee's expert testified the property encumbered by the lease had a market value of $275,000. He calculated this amount on the "income stream" that the Lessors would receive on the remaining 37 years of the lease, that is, $213,387. He added to that the value of the landowner's reversionary interest in the property, that is, $61,924. The expert indicated that the improvements on the property (the shopping center) would be fifty years old at the end of the lease and would have no value. Thus, he concluded that the total amount for the purchase value of the property should be $275,000.

The Lessor's expert testified that the value of the property unencumbered by the lease or mortgage was $1,684,000.

Relying upon Palm Pavilion of Clearwater, Inc. v. Thompson, 458 So.2d 893 (Fla. 2d DCA 1984), and the dissent in Contos v. Lipsky, 433 So.2d 1242 (Fla. 3d DCA 1983), the final judgment concluded that the Lessors' valuation was correct and that the market value was $1,684,000. The judgment stated:

> "If the property were sold to a bona fide party, its fair market value would be $275,000 since that particular class of purchaser would buy the property subject to the lease. However, it is the finding of this Court that Plaintiff, Lassiter, is a special class of purchaser (because of the circumstances of this case). Should Lassiter purchase the property, he could acquire fee title to the property because of the doctrine of merger of title. In other words, the lease collapses or merges into the fee title and Lassiter takes title free of the leasehold interest. As a consequence the fair market value is higher. Once Lassiter acquired title to the property, he is free to resell it at any price."

The Lessee then appealed the finding of the trial court to the Fourth District Court of Appeals, Lassiter vs. Kaufman, Case No. 88-02467.

The district court, upon rehearing, affirmed the trial court but recognized a possible conflict between Palm Pavilion of Clearwater, Inc. v. Thompson, 458 So.2d 893 (Fla. 2d DCA 1984) and Contos v. Lipsky, 433 So.2d 1242 (Fla. 3d DCA 1983) and certified to the Supreme Court the following question:

> 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?

Upon rehearing, Judge Downey concurred in the court's decision to grant rehearing but adhered to his dissent to the court's initial opinion issued February 14, 1990.

POINT ON APPEAL

THE COURT ERRED IN HOLDING THAT THE FAIR MARKET VALUE OF THE LEASED PROPERTY AT THE TIME OF THE EXERCISE OF LESSEE'S OPTION TO PURCHASE WAS TO BE DETERMINED WITHOUT CONSIDERING THE ENCUMBRANCE OF THE LEASE.

SUMMARY OF ARGUMENT

The trial court did not follow the mandate of the district court to determine the value of the leased property and then to grant to Lessee the remedy of specific performance in accordance with the terms of the lease option agreement. The trial court incorrectly applied the doctrine of merger and arrived at a special price to Lessee which was in excess of the market value of the leased property.

The trial court did find that the actual market value of the leased property was $275,000. This amount is a fair and reasonable price and is based upon the income stream due from the Lessee to the Lessors for approximately the next 37 years plus the value of the reversionary interest to the Lessors upon termination of the lease. It is not fair and reasonable to set a special price to the Lessee which exceeds the market value by $1,409,000 ($1,684,000 less $275,000).

In simple terms, the Lessors only had so much to sell to anybody. It was the property subject to the encumbrance of the lease. The trial court, affirmed by the district court, allowed the Lessors to receive a windfall, i.e., a sales price that far exceeded the value of what they had to sell.

ARGUMENT

The district court in remanding this case to the trial court in its opinion in Kaufman v. Lassiter, supra, stated as follows:

> "Accordingly, we affirm the trial court's granting Lassiter's suit for specific performance. However, we remand this cause to the trial court to determine what the market value of the leased property was at the time the lessee sought to exercise his remedies under the lease, and to grant the specific performance remedy on that basis."

Lessors' appraiser was of the opinion that the fair market value of the property unencumbered by the lease or mortgages was $1,684,000. He testified that if it were a condemnation case, this was the total amount to be apportioned. He was not employed to render an opinion as to the apportionment amounts to be awarded to interested parties. There was evidence in the record that the property was encumbered by mortgage(s).

The Lessee has approximately 37 years remaining on the unexpired term of the lease and pays $20,000 per year to the Lessors. The district court directed the trial court to determine what the market value of the leased property was at the time

the Lessee sought to exercise his option under the lease. How can the Lessee have intended to purchase the property without considering the encumbrance of the lease and encumbrance of mortgages? To do so would be to his economic detriment and it cannot be presumed that he wanted such a result nor should it be. See Contos v. Lipsky, 433 So.2d 1242 (Fla. 3d DCA 1983). This case stands for the proposition that when exercising an option to purchase leased premises, the party acquiring the property intends the result most beneficial to him or her. The district court interpreted the parties' agreement to mean a fair or reasonable price. The district court states at page 694 of its opinion in Kaufman v. Lassiter, supra, as follows:

> "We think this option should be interpreted to mean the parties agree to sell/buy at a fair or reasonable price ... ."

What are the circumstances of this case? Loss of income on $1,684,000 at 10% is over $160,000 a year which far exceeds the $20,000 per year paid under the terms of the lease which has approximately 37 years to go. $1,684,000 not reduced by the encumbrance of the lease and/or mortgage(s) is not a fair and reasonable price. Contos, supra, was concerned with a factual situation similar to the case at bar.

The court stated at page 1245 of the opinion:

> "The same principles are equally applicable in the case of the lesser estate of a leasehold and the greater estate of a fee.

> "Whether in equity there is a merger of a lesser estate in a greater ... is largely a question of the intention of the parties, to be gathered to a great extent from the situation of the parties and the surrounding circumstances.
> ...
> "In the absence of an expressed intent, equity will look for and ascertain it from all the circumstances surrounding the parties and the transaction. If it appears to be against the interest of the party acquiring both estates to have a merger take place, then equity will presume that it was his intention that there should not be a merger. William P. Rae Co. v. Courtney, 165 N.E. at 290."

Further, at page 1245 of the opinion:

"The expenditures made by the lessee and her subtenants for improvements had, along with obviously favorable economic conditions, increased the rental value of the property. The fixed rental of $16,000, which the lessee was obliged to pay, was $64,000 less than she was able to earn by subletting the property. Thus, it is clear that the lessee had a valuable assignable interest in the property, and equally clear that if the lessors were to sell the property subject to their unfavorable lease, the sale price would be measurably reduced by the encumbrance of the lease. A merger of the leasehold estate would result in a loss to the lessee of the value of her profitable annual fair return for the length of the unexpired term. Were merger to be permitted, the lessee would have to pay as much for the premises as any stranger to the lease transaction and lose the value of her lease and the improvements made in reliance on the lease. On the other hand, the owners would receive for their property in 1981 that which they would be entitled to receive only after the lease expired."

At page 1247 of the opinion:

"Contrary to the lessors' suggestion, this is not a case of the lessee benefiting by having the true market value of the property arrived at by reducing it by an additional twenty-year lease encumbrance

> that could never come into being. The additional twenty-year encumbrance, fully binding on both parties, was in being as of 1962. We will not undo the lessors' improvident contract." Tampa Drug Co. v. West Drug Stores, 112 Fla. 331, 150 So.786 (1933); Steiner v. Physicians Protective Trust Fund, 388 So.2d 1064 (Fla. 3d DCA 1980); Florida Sportservice, Inc. v. City of Miami, 121 So.2d 450 (Fla. 3d DCA 1960)."

The trial court's final judgment cited Palm Pavilion of Clearwater v. Thompson, 458 So.2d 893 (Fla. 2 DCA 1984). The court in Palm Pavilion, supra, discussed Contos, supra, at page 894 as follows:

> "Whether or not our opinion is in conflict with Contos may be debatable. However, in Contos the option was to purchase "the leased premises." It may be inferred from the Contos majority opinion that the term was considered to be ambiguous as to whether or not it meant the premises encumbered by the lease. Contos 433 So.2d at 1242 n. 5. On the other hand, we believe no such ambiguity exists concerning the contractual descriptions, "said property" and "the property," in the case at hand. Also, there appear to have been equitable considerations in Contos which do not exist here."

The facts of Palm Pavilion, supra, are distinguishable from Contos, supra, and this case. The Contos, supra, facts are a situation where a lessee had an option to purchase "leased premises." The mandate of the district court to the trial court was to determine the market value of the "leased property."

The trial court was obligated to follow the directions in the opinion of the district court in this case. In effect, the district court instructed the trial court how to determine the

purchase price because the method to determine the purchase price was not set forth in the terms of the lease.

The trial court found the fair market value of the property to be $275,000. This included the value of the stream of income of the lease and the value of the reversionary interest. This was the opinion of the Lessee's expert and it is in compliance with the mandate of the district court. This is the total purchase price that Lessee should pay to the Lessors in accordance with the other terms of the lease, i.e., an orderly process to close, a down payment, and promissory note and mortgage in accordance with the terms of the lease.

The mandate of the district court was to determine the market value, and there can only be one market value. Fair market value is defined as what a purchaser willing but not obliged to buy would pay to one willing but not obliged to sell. See Words and Phrases, Fla. Jur., page 297.

The district court did not direct the trial court to find a special value for the plaintiff in contrast to the market value as well defined in the definition set forth hereinabove.

The doctrine of merger is not applicable. See Contos, supra.

In his dissent, below, Judge Downey carefully analyzed the issue before the court and applicable legal authorities. He first identified the legal issue when he said:

"The appellate question thus presented is whether the fair market value of the property is to be determined by treating the property as unencumbered by Lassiter's lease or as unencumbered property."

Judge Downey then addressed the cases concerned with tax assessments. He said:

"The authorities relied upon by the trial court and lessors are in the main tax cases that stand for the proposition that, in assessing property for ad valorem taxes, the Appraiser must assess all of the interests in the property. The assessment must include the owners' interest, leases, subleases, mortgages and any other interest in the land. As some of the cases characterize it, the Appraiser must assess the entire "bundle of rights" in the real property. Century Village v. Walker, 449 So.2d 378 (Fla. 4th DCA 1984); Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla. 3d DCA 1983); Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1970). This is so because the legislature has mandated that the Property Appraiser assess ad valorem taxes in that fashion. Interestingly, the lessors' appraiser testified that most of his experience has been in condemnation cases wherein he appraises the value of property as unencumbered; the apportionment of that total value among various interests is not part of his concern.

"In the present case, I question the applicability of the Property Appraiser's method of assessing property for ad valorem taxation. Private individuals are under no such mandate as is the Property Appraiser and the result fashioned here, I believe, demonstrates this point."

Next, Judge Downey, in consideration of the fact that the Lessors only possessed for sale the property subject to the lease, stated:

"In the present case, Lassiter negotiated a lease for fifty years with a constant rent. He was required to build and maintain substantial improvements on the property and pay all of the usual expenses for taxes

and insurance, etc. One of the aspects of the lease was an option to purchase at the end of ten years. As fortune would have it, the rental value of the property increased substantially and thus at the end of ten years the lease was beneficial to the lessee and detrimental to the lessor. The lessee's appraised value of $275,000 was found by the court to be the fair market value of the property if it were being purchased by a third party. Whereas, if Lassiter were to exercise the option contained in his contract with the lessors, the property had a different market value of $1,684,000. This anomaly comes about because the trial court found there was a merger of the leasehold and the fee. Thus, the lessee, who negotiated an advantageous contract with the lessor, ends up having to pay six times as much for the property as a total stranger to the property would be required to pay. Perhaps another scenario exemplifies the irrationality of the lessors' position. Instead of Lassiter exercising the option, he should form a corporation and assign the option to the corporation, which in turn would exercise the option at the $275,000 value."

Judge Downey addressed the merger issued and stated:

"I suggest the trial court erred in ipso facto finding a merger between the leasehold and the fee under the circumstances of this case. Under the common law, a merger would have automatically occurred. However, that is no longer the rule generally and certainly not in Florida. See Contos v. Lipsky, supra, and cases cited therein. Today merger is not favored and the courts apply a more equitable rule, which will permit or prevent merger based upon the intent of the parties. That intention is generally determined by the best interests of the party who unites the two estates in himself. As stated in Jackson v. Relf, 26 Fla. 465, 8 So. 184, 185 (1890), the Supreme Court of Florida stated:

> "[Whether there is a merger or not] depends upon the intention of the person in whom the interests are united, and that intention is to be determined by his declarations at the time, or, in the absence of these, by his interest, as shown in the condition of things then existing, or by

> the attending circumstances. When there is no evidence of the intention of the owner in uniting the legal and equitable estates in himself, it is proper to presume that he intended that effect which is the most beneficial to him.
>
> "See also 22 Fla.Jur.2d Estates, Powers and Restraints § 49; 22 Am.Jur.2d Estates § 381, and the excellent explication of the question by Judge Daniel Pearson in the majority opinion in Contos v. Lipsky. It is noteworthy that the trial court did not base its ruling upon a finding of the intention of the parties; rather, he based it upon the doctrine of merger.
>
> "It seems clear to me that a proper application of the doctrine of merger in this case, where non-merger would be so beneficial to the lessee, requires that no merger would occur and that the market value of the property is the same for all, $275,000."

Finally, Judge Downey opined as to the ultimate decision to be reached when he said:

> "It, therefore, appears that the proper appellate disposition of this case is to reverse the judgment appealed from and remand the cause to the trial court with instructions to enter judgment in favor of Lassiter for specific performance in accordance with the provisions of the lease contract."

In a recent Federal Court case in the U.S. District Court, Middle District of Florida, Tampa Division, Taylor, et al. v. The Fusco Management Co., et al., Case No. 89-895-Civ-T-13A, decided March 9, 1990, the Court held in favor of the Lessee in a case essentially identical to this case.[1] The Federal Court opinion stated as follows:

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[1]This case is presently pending appeal in the United States Court of Appeals for the Eleventh Circuit, Case No. 90-3288.

"In the event defendant/lessee purchases the property, it will own both the leasehold and the leased fee estates which, if combined, would form the complete fee simple. Plaintiffs' argument addressing merger would be more persuasive if, as they urge, acquisition of the leased fee estate automatically merged that interest with defendant's leasehold thereby resulting in plaintiffs selling to defendant a fee simple interest. Nothing in either the text of Paragraph 11 or the other provisions of the Lease Agreement discloses that defendant/lessee's acquisition of plaintiffs' estate would trigger an automatic merger. Indeed, the operative word "merger" does not appear in the lease, thus indicating that the original contracting parties did not envision automatic merger. Although the document does not expressly call for merger of acquired interests, any doubt regarding whether implementing the option clause reflexively generated a merger may be resolved by reference to evidence outside of the four corners of the lease. At the time the Lease Agreement was first executed, the applicable Florida law then held, as it does today, that the acquisition of two estates capable of merger does not result in an automatic unity of interest. Rather, in Jackson v. Relf, 26 Fla. 465, 8 So. 184, 185 (1890), the Supreme Court of Florida unequivocally stated that whether a merger of property interests takes place, "... depends upon the intention of the person in whom the interests are united ... ." Although now in its centennial year, the passing decades have only fortified the endurance of the rule expressed in Jackson. See, e.g., Walter J. Dolan Properties, Inc. v. Vonnegut, 133 Fla. 845, 180 So. 757 (1938); Gourley v. Wollam, 348 So.2d 1218, 1220 (Fla. 4th D.C.A. 1977; Friedman v. Pohnl, 143 So.2d 690, 691 (Fla. 3d D.C.A. 1962)(per curiam).

"... Although there is no supreme court decision applying the Jackson merger rule to a lease, the Third Appellate District's opinion in Contos, supra applied the Jackson principles to a situation very similar to the instant litigation. According to the court, the option clause under review which allowed the lessee to purchase "the leased premises ... [at a] purchase price ... based on the true market value at the time of exercising the option ..." did not clearly establish whether the term "true market value" means the value of the fee or the worth of the fee diminished by

> the burden of the lease. Finding no evidence in the record to definitely establish the meaning of the option clause, the court, applying Jackson, ruled that the lessee "intended the result most beneficial to her, that is, no merger." Id., 433 So. at 1245.
>
> "... Plaintiffs call this court's attention to Palm Pavilion of Clearwater v. Thompson, 458 So.2d 893 (Fla. 2d D.C.A. 1984) which, according to plaintiffs, controls resolution of the case-at-bar. Plaintiffs argue that, pursuant to Palm Pavilion, paragraph 11 must be construed to pass a complete fee simple, not simply the leased fee estate. Plaintiffs additionally stress the fact that Palm Pavilion emanates from the appellate district wherein sits the state trial court in which this action was originally commenced. Accordingly, plaintiffs assert, this court must apply Palm Pavilion rather than Contos which issued from a different appellate district. See, Standfill v. State, 384 So.2d 141, 143 (Fla. 1980)."

The Federal Court distinguished Palm Pavilion and additionally held that even if Palm Pavilion was helpful to Lessor's position, it was not the law of Florida as set forth in footnote 6 of the opinion as follows:

> "Moreover, even if arguendo, Palm Pavilion provided legal analysis favoring plaintiffs' position regarding merger, this court would be required under the Erie Doctrine to disregard such a holding and follow, instead, the definitive law set forth both by the Supreme Court of Florida in Jackson and by Contos, the intermediate appellate decision which specifically applied Jackson to a lease arrangement particularly analogous to the instant action."

CONCLUSION

The judgment appealed from should be reversed and remanded to the trial court to enter judgment in favor of the Lessee

awarding the remedy of specific performance for the purchase price of $275,000 as of the time of the executon of the option.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. mail to Wilton L. Strickland, Esq., Ferrero, Middlebrooks, Strickland & Fischer, P.A., Attorneys for Respondent, 707 S.E. Seventh Street, P. O. Box 14604, Fort Lauderdale, FL 33302, this 17 day of August, 1990.

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