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 REPLY BRIEF ON THE MERITS

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

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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?

ARGUMENT

Lessors (Respondents) rely upon the doctrine of merger to support their position in their Answer Brief. Additionally, Lessors assert that if the doctrine of merger is not applied then it will produce an inequitable result. Lessors cite no additional authority in their Answer Brief and rely upon Jackson v. Relf, 26 Fla. 465, 8 So.184 (1890). In fact, Jackson v. Relf, supra, case supports the view of the Lessee (Petitioner). The intention that is involved is not the intention of the Lessors. Rather, it is the intention of the Lessee according to Jackson v. Relf, supra, where at page 185, 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." (emphasis supplied)

Since evidence did not reveal that the Lessee specifically announced his intention, then it must be presumed that he intended that effect which is most beneficial to him. It would not be most beneficial to him to pay the Lessors $1,684,000 and lose whatever he could make on said sum in order to avoid the payment of $20,000 per year for 37 years. Assuming a 10% return, the Lessee would be giving up more than $160,000 income per year to avoid the lease payment of $20,000 per year. Additionally, acquisition of Lessors' reversionary interest has a value of only approximately $62,000.[1] Non merger is clearly beneficial to the Lessee and, therefore, the proper application of the doctrine of merger in this case requires that no merger occur.

Lessors claim there is an inequitable result to them if Lessee is allowed to exercise the option to purchase for the sum of $275,000. While this is not the proper test for merger for reasons stated hereinabove, let us examine what happens to the Lessors if their interest in the leased property is purchased for the sum of $275,000. If they invest said sum of money at the rate of 10%, they will receive $27,500 per year until the year 2022 rather than receiving the sum of $20,000 per year for the same period. While they will not have any reversionary interest

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[1]The trial court found that the fair market value of the leased property to everyone other than to Lessee was a total of $275,000. This finding accepts the appraised value of the reversionary interest of approximately $62,000.

in the property after the year 2022, they will have received additional income of $7,500 per year for 37 years or an increased amount of $277,500. The value of the residuary interest is only approximately $62,000. Therefore, they are benefited in having Lessee purchase their interest in the leased property for the sum of $275,000. Under the circumstances, said sum is not paltry nor does it produce a hardship or inequity to the Lessors. Compare this to the inequitable result which occurs if the Lessee pays an enormous windfall price to the Lessors of $1,684,000, i.e., $1,409,000 more than would be payable by a third party according to the holding of the trial court.

The Lessors argue there is nothing ambiguous about the language of the option clause in the lease. In fact, the language in the option clause is so ambiguous it took an appellate court decision to interpret how the purchase price should be determined. Kaufman v. Lassiter, 520 So.2d 692 (Fla. 4th DCA 1988). Since the scrivener of the contract was the attorney for the Lessors, it is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected that language. Any ambiguities in contract should be construed against the drafting party. Finlayson v. Broward County, 471 So.2d 67 (Fla. 4th DCA 1985).

The Fourth District in Kaufman v. Lassiter, supra, held that the option purchase price was the market value of the leased property at time the option was exercised. There can only be one market value -- not one for the Lessee and another for any other party.

The language of the Fourth District in its opinion is the key language in the mandate to the trial court. However, if the language in the lease is to be followed, the evidence of the title to be delivered by the Lessors was encumbered by the lease. Section 25.04 states the following:

> "At least five (5) days prior to the date scheduled for the closing of title Lessor will furnish at Lessee's expense, an abstract of title brought to a day which is not later than ten (10) days prior to the date of closing of title, indicating the title of Lessor to be subject only to those things set forth in Article 1 of this lease and subject further to all unpaid taxes and assessments and to any liens, encumbrances, easements, and any and all other matters created by or against the Lessee or by acts done or suffered by the Lessee and subject further to all of the terms, conditions, covenants and provisions in this Lease contained." (emphasis supplied)

Bystrom v. Valencia Center Inc., 432 So.2d 108 (Fla. 3d DCA 1983), city by Lessors, is not applicable because it relates to a tax assessment case which is among the cases distinguished by Judge Downey in the Fourth District opinion because such cases are not applicable to private individuals (transactions).

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 execution 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 Respondents, 707 S.E. Third Avenue, P. O. Box 14604, Fort Lauderdale, FL 33302, this 27th day of September, 1990.

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