THE SUPREME COURT OF FLORIDA

JOHN S. TAYLOR, III,
MARY TAYLOR HANCOCK, and
JEAN TAYLOR CARTER,

Plaintiffs/Appellants,

vs.

THE FUSCO MANAGEMENT COMPANY,
f/k/a THE FUSCO CORPORATION,
a Connecticut corporation,

Defendant/Appellee.

CASE NO. 77,477

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The issue posed by the United States Court of Appeals for the Eleventh Circuit in the question it certified to this Court was whether a ground lessor's interest should be valued as if it is not encumbered by the lease when the lessee exercises an option to purchase the property. The appellants, John S. Taylor, III, Mary Taylor Hancock and Jean Taylor Carter (the Taylors), are the owners of real property leased to the appellee, the Fusco Management Company (Fusco). Fusco sought declaratory relief to determine whether the Taylors' interest should be valued as if it is encumbered by the lease if Fusco exercises its option.

As noted in the Taylors' initial brief, the majority of the Florida appellate court decisions have held that the fair market value of the property is the value of the fee simple estate unencumbered by the lease. Thus, the trial court's decision was contrary to Florida law. Fusco contends that the trial court determined the parties' intent in concluding that the Taylors' interest should be valued as if it were encumbered by the lease. The trial court heard no such evidence.

As it has consistently through this litigation, Fusco contends that the merger doctrine does not apply and that Fusco would take this property subject to the lease. Fusco relies upon cases involving mortgages which rely upon an exception to the merger doctrine. To argue that Fusco would take this property subject to its own lease is to engage in a legal fiction.

Fusco tries to convince this Court that the Taylors' interest should be valued as if it is encumbered by the lease by

contending that its option would be worthless if it had to pay the fair market value for the Taylors' interest. The option is not worthless nor substantially reduced in value as Fusco contends. Furthermore, Fusco should pay more than a third party would pay for the property as the third party would take the property subject to Fusco's lease.

In its answer brief, Fusco argues it would need to pay for the improvements on the property twice if it pays the fair market value for the Taylors' interest. The Taylors have never contended that the value of the property should include the value of the improvements. The Taylors have consistently maintained that the value of the property simply be today's fair market value of the raw land with no consideration given for the value of the improvements.

Equity requires that this Court answer the certified question posed by the Eleventh Circuit that the fair market value of leased property at the time a lessee exercises an option to purchase the property is the value of the fee simple estate unencumbered by the lease.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE MAJORITY OF FLORIDA APPELLATE COURT DECISIONS HOLD THAT THE FAIR MARKET VALUE OF THE PROPERTY IS THE VALUE OF THE FEE SIMPLE ESTATE UNENCUMBERED BY THE LEASE

Most of Fusco's argument in its answer brief is designed to cloud the fact that three of the four appellate court decisions in Florida have held that the property should be valued as if it

is not encumbered by the lease. See Palm Pavilion of Clearwater v. Thompson, 458 So.2d 893 (Fla. 2d DCA 1984), Lassiter v. Kaufman, 563 So.2d 209 (Fla. 4th DCA 1990) and Simpson v. Fillichio, 560 So.2d 331 (Fla. 4th DCA 1990). Only one Florida appellate court has reached a contrary conclusion. Contos v. Lipsky, 433 So.2d 1242 (Fla. 3rd DCA 1983).

Accordingly, the trial court's decision was contrary to established Florida law. Instead of admitting that, Fusco tries to justify the trial court's decision by claiming that the trial court construed the parties' lease in accordance with "the Court's finding as to their intent." Fusco's answer brief at p. 10. The trial court could not have made any findings regarding the parties' intent as there was no evidence of their intent presented. Fusco called as its only witness Gene Dilmore, an appraiser who works in Birmingham, Alabama. On cross examination, Mr. Dilmore was asked the following questions:

> Q. Mr. Dilmore, do you have any knowledge regarding the appraisal methods that were conducted in Clearwater, Florida, in 1963?
> A. No.
> Q. You can appraise property, taking into consideration the value of a leasehold interest or ignoring it; can't you?
> A. Yes, you can -- whatever the assignment is, you can perform even a hypothetical value.
> Q. You don't know the intent of the parties, do you, to the lease that was entered into that is the subject matter of this litigation, do you?
> A. Only insofar as I would assume that they would be intending the same things that appraisers and others would consider in the terminology.
> Q. Did you know John S. Taylor, Jr.?
> A. No.

Q. Did you know Leonard Farber?
A. No.
Q. Did you ever speak to either one of them?
A. No.
Q. Did you ever speak to any of the lawyers who drafted any of the documents?
A. No.

Transcript of Afternoon Session, February 21, 1990, at pp. 20-21. Accordingly, the trial court had no evidence of the parties' intent other than the wording of the lease. Fusco is in error when it suggests in its answer brief on pp. 22-23 that the trial court may have determined the parties' intent based upon Mr. Dilmore's testimony. In fact, nowhere in the trial court's lengthy order is there any indication that the trial court relied upon Mr. Dilmore's testimony.

Fusco also contends that the trial court could determine the parties' intent based upon the surrounding circumstances, the applicable law and the custom, usage and practice at the time of contracting. There was no evidence presented to the trial court regarding the circumstances surrounding the formation of this contract. Fusco, which had the burden on this issue as it was included in its counter-claims, did not even call as a witness Leonard Farber, the only surviving party to this lease. As to its contention that the applicable law should be used to interpret the parties' intent, once again Fusco relies upon cases involving mortgages to argue that the merger doctrine is inapplicable. Fusco ignores the general rule that interests merge when held by the same person at the same time. Jackson v. Relf, 26 Fla. 465, 8 So. 184 (1890). In addition, the four

Florida decisions on this issue were all decided after the lease was executed and thus there was no law on this issue in 1963. Finally, the trial court had no evidence of any custom, usage or practice in Clearwater, Florida, in 1963, when this lease was executed.

As noted in the Taylors' initial brief, paragraph 11 of the parties' lease provides that Fusco may purchase "the premises". Paragraph 12 of the lease grants the lessee a right of first refusal to the "demised premises." Fusco asks this Court to ignore the word "demised" in paragraph 12 and to rewrite the lease so as to delete the word "demised" in paragraph 12 to support its theory that the word "premises" in paragraph 11 should be given the same definition as the word "premises" in paragraph 12. Only by ignoring the word "demised" can the Court reach the conclusion that the word "premises" in paragraph 11 has the same meaning as "premises" in paragraph 12.

As the Taylors noted in their initial brief, the Court should construe all terms in the parties' agreement as having meaning. Excelsior Insurance Co. v. Pomona Park Bar & Package, 369 So.2d 938 (Fla. 1979) and American Employers' Insurance Co. v. Taylor, 476 So.2d 281 (Fla. 1st DCA 1985). No word in the contract should be treated as surplusage if the Court can give any meaning which is reasonable and consistent with the remainder of the contract. Peoples Gas System, Inc. v. City Gas Co., 147 So.2d 334 (Fla. 3rd DCA 1962).

II. FUSCO MISCONSTRUES THE MERGER DOCTRINE TO CONTEND THAT THE PROPERTY SHOULD BE VALUED AS IF IT WERE ENCUMBERED BY THE LEASE

In this litigation, Fusco has consistently relied upon Jackson v. Relf, 26 Fla. 465, 8 So. 184 (1890), to contend that Fusco's interest would not merge with the Taylors' interest when it purchases the property. Although it has repeatedly quoted portions of the Jackson decision, Fusco has never quoted the general rule from Jackson which provides that when the interests are united in the same person, the mortgage is merged with the underlying fee and the owner holds an unencumbered title.

Fusco ignores that general rule from Jackson and instead relies upon language in Jackson and other mortgage cases which have held there is no merger when the mortgagee and mortgagor's interests are united in the mortgagor. None of those cases is factually similar to this litigation. Fusco does not hold a mortgage on the Taylors' property and the Taylors are not offering Fusco a deed in lieu of foreclosure. Accordingly, the exception to the general merger doctrine does not apply.

III. FUSCO ERRONEOUSLY CONTENDS THAT THE OPTION IS WORTHLESS IF THE TAYLORS' INTEREST IS VALUED AS IF IT IS NOT ENCUMBERED BY THE LEASE

Fusco contends in its answer brief that its option will be worthless or substantially reduced in value if the property is valued as if it is not encumbered by the lease. Fusco is in error. The value of the option with the right of first refusal is three-fold. First, the option gives Fusco the absolute right to purchase the property. The Taylors cannot refuse to sell the

property to Fusco. In addition, the lease gives Fusco a right of first refusal so the property cannot be sold to a third party unless Fusco is given the opportunity to purchase it. Accordingly, Fusco can prevent a third party from acquiring the property. Lastly, Fusco is the only entity with an option to purchase the property. It need not compete with other purchasers, a competition which would undoubtedly increase the purchase price of the property. Thus, Fusco's argument that the option is worthless is without merit.

Fusco also contends that it could assign the option to a third party which would exercise the option to purchase. This issue is a red herring. The lease requires that the Taylors approve any assignment. Obviously, they would not approve an assignment of the option. In addition, there is a split of authority on the issue of whether an option can be assigned and there are no Florida cases on that issue. See, Gilbert v. Van Kleck, 132 N.Y.S. 2d 580 (N.Y. App. Div. 1954). Furthermore, Fusco has not assigned the option and thus an assignment of the option is not an issue in this litigation.

When this lease was executed in 1963, inflation was not a substantial economic consideration. In the past 20 years, inflation has become a major factor in long term transactions. Because of inflation, Fusco has enjoyed years of paying below-market rent for this property. Now, Fusco wants to employ its low-rent lease to depress the true economic value of the land and buy it "cheap." Because Fusco's leasehold interest and the landlord's interest would merge when Fusco bought the land, the

land would no longer be burdened by the low-rent lease. Fusco could then turn around and immediately sell the property to a third party at today's fair market value, thus reaping an enormous windfall. Fusco wants this Court to approve a legal rule that will give Fusco a windfall and deprive the Taylors of the current fair market value of their raw land. Fusco's position is inequitable and unjust. This Court should not enshrine the legal principle Fusco advances. It will be utilized by hundreds of other long-term lessees with options to deprive the fee owners of the true fair market value of their property.

IV. FUSCO ERRONEOUSLY ARGUES THAT THE PRICE PAID BY A THIRD PARTY SHOULD BE LESS THAN THE AMOUNT FUSCO WOULD PAY FOR THE PROPERTY

In its answer brief, Fusco argues that it "has no reason to pay more" for the property than a third party would pay to purchase the Taylors' interest. Fusco's Answer Brief at p. 19. Fusco has a very good reason to pay more than a third party would pay. If it acquires the Taylors' interest, it can stop paying rent to the Taylors. The right to stop paying rent certainly has economic value to Fusco. It need only decide whether the money it would save in rent would justify purchase of the property.

In contending that it should pay no more than a third party would pay, Fusco overlooks that a third party would acquire the property burdened by the lease and would receive only a stream of income for seven decades. The third party could not use the property as it wished and could not lease the property to one of Fusco's competitors which might well pay more rent than Fusco

pays. Accordingly, a third party would certainly pay less for the property than Fusco would pay.

V. FUSCO'S THEORY THAT IT WOULD HAVE TO PAY TWICE FOR THE BUILDING ON THE TAYLORS' PROPERTY IS WRONG

To support its theory that equity requires that the property be valued as if it is encumbered by the lease, Fusco makes several references throughout its answer brief to its theory that it would be required to pay twice for the building on the land. Fusco argues that it paid for the improvements when it accepted the assignment of the lease from an earlier lessee and thus it should not be required to pay twice for the same interest.

The Taylors have never claimed that Fusco should pay twice for the building on their property. In their initial brief, the Taylors noted that any appraised value of the property should exclude the value of the building. In its answer brief, Fusco objects, contending that the Taylors' position is inconsistent. Apparently Fusco would prefer the Taylors to argue that they need to pay for the building twice so that Fusco can then contend that equity requires that the property be valued as if it is encumbered by the lease. Fusco is confusing the value of the property unencumbered by the lease with the value of the improvements. The property can be appraised as raw land as if it were not encumbered by the lease. The appraisal need not include the value of the improvements.

Fusco also mentions a "requirement" that it purchase the property. There is no such requirement. The lease permits the lessee to exercise the option. There is absolutely no

requirement in this lease that the lessee exercised the option to purchase. If Fusco believes that the purchase price is excessive, it need not exercise the option.

VI. PRECEDENT REQUIRES THAT THE TAYLORS' INTEREST BE VALUED AS IF IT IS NOT ENCUMBERED BY THE LEASE

As noted above, three of the four appellate court decisions in Florida have held that property such as the Taylors' should be valued as if it is not encumbered by the lease. Fusco dismisses those decisions and instead focuses on a 1929 New York case, William P. Rae Co. v. Courtney, 250 N.Y. 271, 165 N.E. 289 (1929). Fusco actually refers to the 62-year old Rae case as "the closest precedent". Fusco's answer brief at p. 26. Fusco is forced to turn to New York Law as the majority of the Florida decisions have held that the landlord's interest should be valued as if it is not encumbered by the lease.

The Taylors will not again review the Palm Pavilion, Lassiter and Simpson cases in detail. Instead, they will merely note that the Palm Pavilion case is almost identical to this case except that the Palm Pavilion lease refers to "said property" and "the property" while this lease mentions the "premises."[1]

Even Fusco's expert, Gene Dilmore, admitted that the word

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[1]Fusco hints in its answer brief that the real property subject to the lease in Palm Pavilion was not improved and thus that the Palm Pavilion Court might have agreed with the Contos Court if the property had been improved. Fusco answer brief at p. 27. Although the Palm Pavilion decision does not mention the improvement, a building stands on the property.

"property" and "premises" mean the same thing. On cross-examination, Mr. Dilmore acknowledged:

> Q. You made a comment on direct examination by Mr. Cutler that it makes no difference to the appraiser if the lease says "the leased premises" or "the premises for the property." Do "premises" and "property" mean the same thing to you?
> A. Yes.

Fusco ignores that portion of Mr. Dilmore's testimony as it supports the Taylors' theory that the Palm Pavilion decision controls. More importantly, the Palm Pavilion Court held that the option provision in the lease was not narrowed by any qualifying language such as "the landlord's interest in the lease" or "the fee as burdened by the lease." 458 So.2d at 894. The Palm Pavilion Court held that "to construe the agreement as though it contained such restrictive or narrowed language would amount to a judicial rewriting of the agreement which is not our province to do so." Id. Fusco is asking this Court to engage in such judicial rewriting of the parties' lease.

Fusco dismisses the Lassiter decision because it relied upon Palm Pavilion. However, even Fusco acknowledges that the Lassiter lease used the term "premises," precisely the same term which is used in paragraph 11 of the lease in this case. Fusco dismisses Simpson because the language in the parties' lease "was held to be controlling there...". Fusco's answer brief at p. 28. Thus, Fusco has not effectively distinguished the three Florida appellate court decisions which hold that the landlord's interest should be valued as if it is not encumbered by the lease.

CONCLUSION

In its conclusion, Fusco suggests that this Court reword the question certified by the Eleventh Circuit to slant the question in favor of Fusco's position. Fusco asks this Court to insert language into the certified question which would claim that "it would be financially disadvantageous to the lessee to value it as if it were unencumbered." Fusco's answer brief at p. 29. Fusco's apparent need to reword the question demonstrates the inequitable result it seeks. The Taylors, not Fusco, will suffer the adverse financial consequences if this Court holds that the fair market value of their property is the value of the fee estate encumbered by the lease. Fusco need not exercise the option. If Fusco exercises the option, the Taylors have no alternative but to sell their interest to Fusco. Fusco requests that this Court permit it to obtain the property for the same price that a third party would pay even though the third party would purchase the property subject to the lease. Fusco is asking this Court to hold that it can obtain the Taylors' property for a fraction of its fair market value. Equity requires that the Taylors receive the fair market value for their property which is the value of their interest unencumbered by the lease and without consideration of the value of the improvements.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been served upon Edward I. Cutler, Esquire, Hywell Leonard, Esquire, Carlton, Fields, P.O. Box 3239, Tampa, Florida, 33601 and Joseph E. Park,

Esquire, Park & Smith, 1150 Cleveland Street, Suite 410, Clearwater, Florida 34615, by regular U.S. mail, this 29th day of April, 1991.

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