

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

1108 ARIOLA, LLC, et al.,

Plaintiffs

vs.

CASE NO: 2004-CA-002290

DIVISION: J

CHRIS JONES, PROPERTY
APPRAISER FOR ESCAMBIA COUNTY,
FLORIDA, and JANET HOLLEY, TAX
COLLECTOR FOR ESCAMBIA COUNTY,
FLORIDA,

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR PROTECTIVE ORDER AND IN OPPOSITION TO
DEFENDANTS' MOTION TO COMPEL**

Plaintiffs have moved for a protective order, pursuant to Fla. R. Civ. P. 1.280(c), regarding certain portions of the discovery requested by Defendant Chris Jones in his first set of interrogatories and his request for production. Defendants have moved for an order compelling Plaintiffs to fully respond to Defendants' Request for Production of Documents and Interrogatories.

This case was initiated by Plaintiffs in response to Defendant Chris Jones', as Property Appraiser of Escambia County, and Janet Holley's, as Tax Collector of Escambia County, decision to appraise the Plaintiffs' leasehold improvements on Pensacola Beach as real property in 2004 and to levy 2004 real property taxes on the appraised value of those improvements. Prior to 2004, for a period of approximately 16 years, the Plaintiffs' leasehold improvements have been regarded by the Defendants as intangible personal property.

In their Complaint, Plaintiffs allege that this Court and the First District Court of Appeal in Bell v. Bryan, 505 So. 2d 690 (Fla. 1st DCA 1987), rev. den. 513 So. 2d 1060 (Fla. 1987), and Bell v. Bryan, 519 So. 2d 1024 (Fla. 1st DCA 1988), have previously ruled that:

(1) Buildings and other improvements of a permanent character erected or placed on the leased premises on Pensacola Beach are as much a part of the leasehold as the realty itself.

(2) Title to the buildings and the improvements of a permanent character erected or placed on the leased premises vested in Escambia County forthwith (immediately) upon the erection or placement of the improvements on the leased premises.

(3) The Florida Legislature has classified the leaseholds on Pensacola Beach, including the improvements erected or placed on the leased premises pursuant to the terms of the leases, as intangible personal property and has directed that such leasehold interests be taxed as intangible personal property.

Defendants' primary defense to Plaintiffs' allegations is that the Defendants did not raise the issue of "equitable ownership" in the prior Bell v. Bryan, supra, litigation, and thus they have the right to raise that issue in this lawsuit. Defendants claim that the Plaintiffs are the "equitable owners" of the improvements erected or placed on the leased premises and that because Plaintiffs are the "equitable owners" of the improvements, the improvements are subject to taxation as real property. The Defendants in their official capacities as

Property Appraiser and Tax Collector for Escambia County also suggest that the Florida Statutes construed by this Court and the First District Court of Appeal in Bell v. Bryan, supra, are unconstitutional. Plaintiffs challenge Defendants' standing to contest the constitutionality of the Florida Statutes, deny that the Plaintiffs are the "equitable owners" of the improvements and deny that the issue or argument of "equitable ownership" was not raised in Bell v. Bryan, supra.

The Defendants do not contend that the realty upon which the improvements have been erected is owned by the Plaintiffs, nor do the Defendants challenge the fact that Escambia County is the "legal owner" of the improvements. Accordingly, it is undisputed that Escambia County is the owner of the realty and the legal owner of the improvements erected on the leased premises.

Thus, the issues before the Court on which discovery efforts may be directed are:

- (1) The allegations in Plaintiffs' Complaint.
- (2) Defendants' primary defense that Plaintiffs are the "equitable owners" of the improvements.
- (3) Defendants' affirmative defenses claiming the Florida Statutes relied upon by Plaintiffs are unconstitutional.

- (4) Plaintiffs' reply denying that they are the "equitable owners" of the improvements and denying that this issue or argument was not raised in the prior Bell v. Bryan cases.

In their Motion to Compel, Defendants direct this Court's attention to the decision rendered by the Circuit Court in and for Santa Rosa County in Ward v. Brown, Case Number 01-892-CA-01-DJ (March 18, 2004), which case was appealed to the First District Court of Appeal. That Court issued an opinion on June 17, 2005, finding that the Navarre Beach leaseholders were the "equitable owners" of the improvements on their leased premises primarily because it found the leases in question were "perpetual leases."

The Ward v. Brown decision is not controlling in this case primarily because the facts in that case and this case are not the same, and any reliance by the defendants on the Ward v. Brown decision is misplaced. Nevertheless, this memorandum will address the factors relied upon by the trial court in Ward v. Brown, supra, in determining that the lessees on Navarre Beach were the equitable owners of the improvements erected on the leased premises at Navarre Beach.

In paragraphs 8 and 9 of their Motion to Compel, Defendants state:

"8. In Ward v. Brown, this Court cited several factors relating to the issue of equitable ownership, all of which are directly connected to the information that the Defendants are requesting of the Plaintiffs as discovery in the instant case. According to this Court's Order in Ward v.

Brown, the factors relevant to equitable ownership include specifically the useful life of the property; any debt or encumbrances associated with the property; the rights of possession and control; the right to dispose of, alienate or transfer the property; the right to receive income from rentals; the obligation to insure the property; and the responsibility to maintain and repair the property.

9. Based on the filing of the property appraiser in Ward v. Brown, this Court found that the plaintiffs in that case encumbered their property; that they realized appreciation in value on subsequent sales of their property; that they received rental income from their properties; that they insured and maintained the properties; and that the length of the leases was much longer than the estimated useful lives of the improvements. Therefore, this Court concluded that those plaintiffs were the equitable owners of the improvements. Order. p. 10-13."

Whether those factors are present in the instant case is to be determined by a review of the Plaintiffs' leases, which Plaintiffs have made available to defense counsel in response to Defendants' Request for Production.

A review of the leases in question shows that the Pensacola Beach leases contain those type clauses generally found in a standard lease, such as:

(1) Plaintiffs are required to pay a lease fee for the premises they lease.

(2) Plaintiffs are required to maintain the improvements erected on the realty in good condition and repair.

(3) Plaintiffs are required to insure the improvements against damage by fire, windstorm or other such casualty.

(4) Plaintiffs have the right to mortgage their leasehold interest in the realty and improvements to secure funds borrowed by the Plaintiffs.

(5) Plaintiffs have the right to assign their leasehold interest in the realty and improvements to a third party.

(6) Plaintiffs have the right to sublease or rent their leasehold interests to a third party.

(7) Plaintiffs have the right to possess and utilize the leased premises during the term of the respective leases provided they comply with the conditions and provisions contained in the leases.

These type provisions form and establish the relationship of Lessor/Lessee. They do not convert the lessees' interests into "equitable ownership" of the properties being leased.

For purposes of discovery, however, Plaintiffs agree that the factors relied upon in Ward v. Brown, supra, may be discovered by the Defendants. The best and only evidence of whether those factors exist here are the leases.

What Plaintiffs do not agree on and what Plaintiffs strenuously contend are irrelevant and immaterial are the details sought by the Defendants in their Interrogatories and Request for Production.

Defendants have attached a copy of Defendant Chris Jones' first set of interrogatories under Tab B to Defendants' Motion to Compel. Plaintiffs will not unduly lengthen this memo by attaching another copy of the Interrogatories.

Applicable Law

Florida Rule of Civil Procedure 1.280 pursuant to which the Defendant Chris Jones has propounded his Interrogatories and submitted his Request for Production to the Plaintiffs limits discovery to matters relevant to the subject matter of the pending action.

As stated by the Florida Supreme Court in Allstate Insurance Co. v. Langston, 655 So. 2d 91 (Fla. 1995), "Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence."

The Evidence Code § 90.401 Florida Statutes (2004) defines relevant evidence as: "Relevant evidence is evidence tending to prove or disprove a material fact." Quoting from Charles W. Ehrhardt, Florida Evidence § 90.401 (2001 ed.), the Fourth District Court of Appeal in Jordan v. Masters, 821 So. 2d 342 (Fla. 4th DCA 2002), stated "[i]ncluded within the section 90.401 definition of relevancy is the concept of materiality; the evidence must 'tend to prove or disprove a material fact.' When evidence is offered to prove a fact which is not a matter in issue, it is said to be immaterial."

The First District Court of Appeal in Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So. 2d 852 (Fla. 1st DCA 1993), also

held that the trial court, in deciding whether a party should be required to respond to a given discovery request, should weigh the relevance of the information sought against the burdensomeness of the request.

**Discovery Requests Are Irrelevant,
Immaterial, and Overly Burdensome**

The most compelling evidence that the discovery to which the Plaintiffs have objected is irrelevant and immaterial are the admissions made by the Defendant Chris Jones in his deposition (pages 142 through 164).

As Defendant Jones readily admits, he relied on the terms contained in the leases issued by the SRIA in determining that the Plaintiffs were the "equitable owners" of their leasehold improvements. In response to questions regarding whether all the factors Defendant Jones would take into consideration in determining if a lessee was the "equitable owner" of his leasehold improvements would be contained within the four corners of the lease, Defendant Jones responded:

"Factors in the lease is what we take into consideration, yes, sir." (page 120, lines 9 and 10).

The following exchange also took place regarding this subject with the question being posed by counsel for the Plaintiffs and Defendant Jones responding:

"Q. What I'm asking you, is there anything that you look at in making the determination as to whether a lessee is the equitable owner other than really looking at the lease and the law that's applicable to that lease?"

A. I can't think of anything right offhand." (page 121, lines 2 through 6)

It was the "rights" and "obligations" of the lessees under the lease provisions that were relevant and material to Defendant Jones. The fact that the leases his staff examined granted the lessees the "right" to possess and control the property during the term of their leases, the "right" to receive income from rentals, the "right" to transfer their leasehold interest and retain any profits from the transfers, the "right" to mortgage their leasehold interest, and the "obligation" to insure the improvements, the "obligation" to maintain and repair the improvements, and the "obligation" to pay any legally assessed taxes led Defendant Jones to conclude the Plaintiffs were the "equitable owners" of their leasehold improvements. Those "rights" and "obligations" are ascertainable from an examination of the leases, which the Plaintiffs have made available to defense counsel in response to Defendant Jones' Request for Production.

As stated hereinabove in this memorandum, the leases under which the Plaintiffs hold possessory or leasehold interests in the improvements grant them:

- (1) the "right" to possess the leased premises during the term of their leases provided they comply with the conditions and provisions contained in the leases,
- (2) the "right" to receive income from rentals,
- (3) the "right" to transfer their leasehold interest and retain any profits from the transfer, and

(4) the "right" to mortgage their leasehold interest,

and impose on them the following obligations:

- (1) the "obligation" to insure the improvements,
- (2) the "obligation" to maintain and repair the improvements, and
- (3) the "obligation" to pay any legally assessed taxes.

The leases speak for themselves, but there is no dispute over the foregoing material facts. Any "facts" regarding whether the Plaintiffs exercised these "rights" or failed to fulfill their "obligations" are not material in that they do not tend to prove or disprove a matter in issue.

According to Defendant Jones, the amount paid by the purchaser of a leasehold interest (pp. 143-145), whether a Plaintiff financed his acquisition of his leasehold interest (pp. 145-146, 150-151), the amount of a Plaintiff's insurance policy (pp. 151-152), any amounts paid on an insurance claim (p. 153), the maintenance history of the property (p.149), any amounts paid by a Plaintiff for repairs to his leased property (p.149), any amounts paid by governmental entities on a Plaintiff's storm damage or other claims (p. 158), the appraised value of the improvements (p.151), and any complaints made by a Plaintiff about governmental services (p.158), were completely immaterial and irrelevant with regard to his determination that Plaintiffs were the "equitable owners" of their leasehold improvements. Defendant Jones also admitted that this type information would not be a factor in determining whether Sections 196.199 and 199.023, Florida Statutes, were unconstitutional (p. 161-164).

Defendant Jones basically agrees that the interrogatories and production requests to which the Plaintiffs have objected are irrelevant and immaterial. It is patently unfair and contrary to the Florida discovery rules for this same person, as Defendant in this case, to insist that Plaintiffs must answer discovery requests for such admittedly irrelevant and immaterial information.

The Court can take notice of the fact that Pensacola Beach was struck by Hurricane Ivan on September 16, 2004, and a great number of the structures on the beach were substantially damaged or destroyed. Several Plaintiffs have relocated while their leasehold improvements are being repaired or reconstructed. Communications with many of the Plaintiffs has been very difficult because of disrupted mail service, changed locations, and changed or nonexistent telephone service. It has proven very expensive to locate and have the Plaintiffs respond to those Interrogatories and Requests for Production which were relevant. Requiring these Plaintiffs to respond to Interrogatories and Requests for Production which are irrelevant and immaterial would be prejudicial and overly burdensome.

Objectionable Discovery

In their Motion for a Protective Order, Plaintiffs have objected to Interrogatories 2C, 2D, 2G, 3 (as to "closing documents" and "purchase agreements" only), 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22 and 23. Plaintiffs have also objected to defendant Chris Jones' Request for Production as

to those items identified in the First Set of Interrogatories to which Plaintiffs have objected.

The following is an explanation of the reasons Plaintiffs have objected to the specified interrogatories and requests for production.

Interrogatories 2C, 2D and 2G.

In these Interrogatories, Defendants ask whether the Plaintiffs are permanent residents of Florida (2C), whether they have filed a homestead exemption in Florida (2D) and the remaining useful life of the Real Property Improvements for federal tax purposes (2G).

These Interrogatories have no relevance to the issues in this case. Whether the Plaintiffs are permanent residents of Florida or have filed for a homestead exemption in Florida, has absolutely no bearing on the terms of the Plaintiffs' leases, the relationship of the Santa Rosa Island Authority (SRIA) with the lessees, whether the lessees are the equitable owners of the leasehold improvements, or whether the applicable Florida Statutes are constitutional.

The remaining useful life of the Real Property Improvements for federal tax purposes is totally immaterial. IRS Regulations allow a taxpayer to depreciate his investment over a period of approximately 27.5 years if the property is residential rental property and over a period of approximately 39 years if the property is nonresidential property. However, even if the actual useful life of the improvements is held to be relevant in considering Defendants' theory of "equitable ownership", the remaining time for depreciation of the

property for federal tax purposes is not the same as actual useful life. Many of the residential lessees do not rent their properties and do not depreciate their leasehold improvements on their federal income tax returns.

Interrogatory 3 (as to "closing documents" and "purchase agreements")

Contrary to Defendants' assertion in their Motion to Compel, Plaintiffs have not objected to Interrogatory 2E requesting that Plaintiffs name any condominium association in which the Plaintiffs are members. In their response to Interrogatory 2E, Plaintiffs have named any condominium associations to which they belong, and in response to Defendant Chris Jones' Request for Production, Plaintiffs have produced copies of their declarations of condominium (where applicable), copies of the initial leases covering the subject properties, and copies of the assignments of lease and/or subleases through which the Plaintiffs attained their possessory interests in the subject property.

What Plaintiffs object to is the identification and production of the closing documents and purchase agreements associated with the acquisition of their leasehold or sublease interests. The terms of any purchase agreement, the amounts the Plaintiffs paid for their leasehold or sublease interests, and the closing costs of the transactions are completely immaterial. Whether a Plaintiff paid \$200,000 or \$500,000 for his leasehold or sublease interest makes no difference in determining if the Plaintiff is the equitable owner of the leasehold improvements.

Interrogatory 4

In Interrogatory 4, Defendants seek identification and production of all tax returns filed by the Plaintiffs in which they reported home mortgage interest, depreciation, or casualty losses in connection with the subject property, and all statements from financial institutions notifying the Plaintiffs of the amount of home mortgage interest paid in connection with the financing of the subject property.

Plaintiffs who acquired their leasehold interests for cash would not report any home mortgage interest payments on their tax returns and Plaintiffs having a leasehold interest in residential property who did not rent their leasehold could not depreciate their investment in the leasehold. For purposes of the issues in this lawsuit, is the Plaintiff who pays cash for his leasehold interest or who does not rent his leasehold not an equitable owner of the leasehold improvements, but the Plaintiff who finances the acquisition of his leasehold or rents his leasehold an equitable owner? The answer is obviously that it makes no difference with regard to the issues in this lawsuit whether a Plaintiff finances the acquisition of his leasehold or rents his leasehold. The information and documents sought by Defendants are wholly immaterial and irrelevant.

Interrogatory 6

Defendants ask whether the Plaintiffs have rented the subject property, and, if so, to identify the parties (including address and phone number) to whom the leasehold was rented, and the amount of rent paid.

For the reasons stated hereinabove regarding Interrogatory 4, whether the Plaintiffs rented their leaseholds, and, if so, to whom they rented the subject property and the amount of rent paid is immaterial and irrelevant with regard to the issues in this lawsuit.

Interrogatory 7

Defendants ask the Plaintiffs to state the remaining useful life of the leasehold improvements for federal tax purposes as of January 1, 2004.

For the reasons stated hereinabove regarding Interrogatory 2G, the remaining useful life of the leasehold improvements for federal tax purposes, is irrelevant and immaterial.

Interrogatory 8

Defendants ask Plaintiffs to identify all instances in which the subject property has been renovated or improved and the dates and costs of such renovations or improvements.

All of the properties leased by the Plaintiffs have been improved in accordance with the express terms of the leases requiring that the properties be improved. The improvements have also been repaired or renovated as necessary to maintain them in good condition and repair. If the Plaintiffs had failed to improve the properties and to properly maintain the improvements, and if this were a lawsuit by the SRIA to enforce the terms of the lease or to seek ejectment of the Plaintiffs for violation of the terms of the lease, then the subject Interrogatory may be material. However, the cost of improving, repairing,

and/or renovating the improvements is irrelevant with regard to the issues in this lawsuit.

Interrogatory 9

Defendants ask Plaintiffs to identify and produce all contracts or other documents pertaining to any financing of the subject property.

For the reasons stated hereinabove regarding Interrogatory 4, whether Plaintiffs financed the acquisition of their leasehold interests (and if so, the amounts financed), is totally immaterial and irrelevant to the issues in this lawsuit.

Interrogatory 10

Defendants ask Plaintiffs to identify and produce all documents in which Plaintiffs have mentioned or referenced their interests in the subject property as an asset, including loan applications, credit card applications, personal financial statements, other application, surveys, registrations or other materials.

Does the listing of the subject property as an asset of the Plaintiffs on a loan application, credit card application, personal financial statement, survey, or any other application or registration affect the relationship between the SRIA and lessees or have any bearing on the issues in this lawsuit? Absolutely not. The information sought through this Interrogatory is completely immaterial and irrelevant to the issues in this case.

Interrogatory 11

Defendants ask Plaintiffs to identify and produce all appraisals, valuations and/or assessments regarding the subject property.

This lawsuit does not challenge the Property Appraiser's appraised value of the subject properties. The value of the subject properties does not affect or have any bearing on whether the lessees are the equitable owners of the leasehold improvements.

Interrogatory 12

Defendants ask Plaintiffs to identify and produce all correspondence between them and any governmental or administrative entity or authority relating to the subject property.

Any correspondence between the Plaintiffs and any governmental or administrative entity or authority, or with anyone else for that matter, relating to the subject property will not affect the relationship between the SRIA and the lessees. The relationship is created solely by the terms of the respective leases and no correspondence can amend, modify or change that relationship.

Interrogatory 13

Defendants ask Plaintiffs to identify any and all instances in which any governmental entity or authority has made any payment for the construction, maintenance, insurance or repair of the Subject Property and/or the Real Property Improvements thereon.

Under the terms of the leases at issue in this case, the lessees are responsible for the construction of the improvements on the Subject Property, the maintenance, renovation, repair and reconstruction of such improvements, and for the insuring of the improvements. In some instances, some lessees may have obtained FEMA or SBA loans to assist them in repairing and/or rebuilding their leasehold improvements, but whether some lessees obtained such assistance does not change the terms of the leases or the relationship between the SRIA, as Lessor, and the Plaintiffs as Lessees. Are the Defendants suggesting that a lessee who receives a "payment" from a governmental entity is the "equitable owner" of the improvements, but a lessee who did not receive such "payment" is not an "equitable owner"? Plaintiffs doubt such is the case, but the raising of the question demonstrates the immateriality and irrelevant nature of the Interrogatory.

Interrogatory 16

Defendants ask Plaintiffs to identify any and all employees or agents of governmental entities or authorities, county commissioners, county employees, city commissioners, or city employees with whom the Plaintiffs or their representatives have spoken or otherwise communicated regarding the property, including the improvements.

For the reasons stated hereinabove regarding Interrogatory 12, any communications between the Plaintiffs and any governmental employees relating to the subject property will not affect the relationship between the SRIA and the

lessees. The relationship is created solely by the terms of the respective leases and no communication can amend, modify or change that relationship.

Interrogatory 17

Defendants ask Plaintiffs to identify any person or entity who has rendered advice to them regarding the taxability or exempt status of the property.

The fact that an attorney, or anyone else for that matter, may have advised a plaintiff that in his opinion the improvements were not taxable as real property under existing law does nothing to change or alter the issues in this case and is completely immaterial and irrelevant. Furthermore, any advice a Plaintiff may have received from his attorney is privileged.

Interrogatory 18

Defendants ask Plaintiffs to identify any and all persons residing at the property who have attended public schools in Escambia or Santa Rosa Counties.

The classification of property, whether the subject property is exempt from taxation, and the valuations of property for purposes of taxation is not dependent upon whether a taxpayer has children residing with him who attend public schools. Whether children of a taxpayer attend public schools does not cause the statutes in question to be constitutional or unconstitutional. The Interrogatory has no relevance to the issues in this case.

Interrogatory 22

Defendants ask Plaintiffs to identify any and all Escambia County services they have received or benefited from over the term in which they have had a right of possession or control over the property.

There is no issue over whether governmental services have been provided to the Plaintiffs, some of which Plaintiffs pay for in the form of MSBU assessments and others of which are defrayed through their lease payments. Some Plaintiffs receive more governmental services than others do. The Interrogatory, however, seeks information which has absolutely no bearing on the issues in this case.

Interrogatory 23

Defendants ask Plaintiffs to identify any and all instances in which they have made claims to a governmental entity in connection with storm damage.

Again, the question is raised whether a lessee whose leasehold improvements are damaged by a storm and who files a claim with a governmental entity is the "equitable owner" of the improvements, but the lessee who suffers no storm damage and who makes no claim to a governmental entity is not an "equitable owner"? The raising of the question demonstrates the irrelevance of the Interrogatory.

We trust that the foregoing review of the Interrogatories and the related production requests to which the Plaintiffs have objected demonstrates to the Court that the actual purpose of these discovery requests is to harass the

Plaintiffs, to make their pursuit of this litigation very expensive and to obfuscate the real issues in this case.

Judicial Estoppel

In the memoranda filed with the trial court and the brief filed with the First District Court of Appeal in Ward v. Brown, legal counsel for the Property Appraiser and Tax Collector for Santa Rosa County, who also represent the Defendants in this case, argued that the Navarre Beach leaseholders represented to the IRS that they were the legal or equitable owners of the improvements on their leased premises because they took depreciation deductions and mortgage interest deductions on their federal income tax returns.

Further, they argued that the Navarre Beach leaseholders were judicially estopped in the Ward v. Brown litigation from claiming that they were not the equitable owners of the improvements because of their alleged contrary representations on their federal income tax returns.

Plaintiffs anticipate that legal counsel for the Defendants will raise those same arguments in this case to support their requests for copies of any tax returns filed by Plaintiffs in which mortgage interest was reported or depreciation was deducted in connection with the leased properties. Defendants may also attempt to justify certain of their other discovery requests on the theory that Plaintiffs may have made inconsistent statements to other governmental entities regarding their interests in the improvements.

In the first place, the Plaintiffs are entitled under IRS Regulations to take depreciation deductions on their leasehold improvements. A legal owner or an equitable owner of residential rental property or nonresidential property is allowed to depreciate their capital investments and deduct interest paid on mortgages covering the property, but that does not exclude a lessee who invests capital in the improvements or has an economic interest in the property from also recovering his capital investments by taking allowable depreciation deductions and deducting interest payments made by the lessee on his leasehold mortgage. The primary determining factor is whether the lessee has an economic interest in the property. Section 1.167(a) - - 4, Income Tax Regs.; Geneva Drive-In Theatre v. Commissioner, 67 T.C. 764, 769 (1977).

The taking of depreciation deductions and mortgage interest deductions by a lessee is allowed as a matter of law and definitely is not a representation that the lessee is the legal or equitable owner of the improvements.

Even if the lessees had submitted tax returns to the IRS or other forms to a governmental agency from which the Defendants could argue that the lessees represented they were the equitable owners of the improvements, the lessees would not be judicially estopped in this case from denying that they are the equitable owners of the improvements.

To invoke the doctrine of judicial estoppel in Florida, the party being estopped must have taken inconsistent positions in separate judicial proceedings. As stated in 22 Fla. Jur. 2d, Estoppel and Waiver § 62, "There are limitations

upon, or qualifications of, the rule against assuming inconsistent positions in judicial proceedings. Thus, in order to establish an estoppel under the rule that a position taken in an earlier action estopped the one taking such position from assuming an inconsistent position in a later action, the following must appear: (1) the inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the questions must be the same; (5) the party claiming the estoppel must have been misled and had changed his or her position; and (6) it must appear unjust to one party to permit the other to change his or her position."

In Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061 (Fla. 2001), the Florida Supreme Court concurred that for the doctrine of judicial estoppel to apply, the position assumed by the party being estopped must have been successfully maintained in a prior judicial proceeding and the position taken by the party being estopped in the prior judicial proceeding must be clearly inconsistent with the position being taken by that same party in the subsequent judicial proceeding.

The Fourth District Court of Appeal in Grau v. Provident Life and Acc. Ins. Co., 899 So. 2d 396 (Fla. 4th DCA 2005), was even more on point in its statement that, "The requirement that a party successfully maintain a position in an earlier proceeding distinguishes judicial estoppel from a prior inconsistent

statement the doctrine of judicial estoppel does not elevate mere prior inconsistent statements into a case busting equitable defense.”

Statements made or positions taken in tax returns or filings with other governmental agencies are not “judicial proceedings.” It is clear in Florida that for the doctrine of judicial estoppel to be invoked, the Plaintiffs would have had to clearly claim in a prior judicial proceeding that they were the equitable owners of the improvements and they would have had to have been successful on their claim. That is not the case here.

Further, to invoke the doctrine of judicial estoppel, the party seeking to invoke the doctrine must have been prejudiced by the prior inconsistent position, and the parties must have been the same in both judicial proceedings, subject to certain exceptions inapplicable in this case.

There is no relevance between any statements the Plaintiffs may have made in their federal income tax returns and the Defendants’ decision to appraise and tax the Plaintiffs’ leasehold improvements as real property. Any statements by the Plaintiffs on their federal tax returns did not prejudice the Defendants. And since mere statements on tax returns or other governmental forms do not constitute a prior judicial proceeding, the Defendants cannot claim they were parties with the Plaintiffs in a prior judicial proceeding in which the Plaintiffs took a clearly inconsistent position.

The doctrine of judicial estoppel does not apply to this case, and does not support Defendants' attempts to have Plaintiffs respond to irrelevant Interrogatories or produce immaterial documents.

CONCLUSION

The objectionable discovery sought by the Defendant Chris Jones is irrelevant and immaterial. The information requested in the objectionable interrogatories and request for production would be inadmissible in court and would not lead to admissible evidence.

It would be extremely burdensome for all of the Plaintiffs to respond to these far-reaching discovery requests. It has proven to be very time consuming and expensive to respond to those discovery requests that were relevant and material under the circumstances that existed after Hurricane Ivan. When the burdensomeness of responding to these meaningless and irrelevant inquiries is weighed against the information the Defendant Jones seeks, the scales tilt significantly in favor of the Plaintiffs.

The Plaintiffs did not object to producing their leases even though the Defendant Chris Jones stated in his deposition (p. 16-17), that he and some of his senior staff had read all the leases indicating that he already had what he asked the Plaintiffs to take the time and expense to produce. Plaintiffs do not object to producing information or documents that are relevant and material, but they should not be harassed by having to respond to completely irrelevant and immaterial discovery requests.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Plaintiffs' Memorandum in Support of Their Motion for Protective Order and In Opposition to Defendants' Motion to Compel, has been furnished to Elliott Messer and Thomas M. Findley, of Messer, Caparello & Self, P.A., 215 S. Monroe Street, Suite 701, Tallahassee, FL. 32302, by U.S. Mail, this ~~24th~~ day of October, 2005.



M. J. Menge

Bar No: 54275

DANNY L. KEPNER

Bar No: 174278

Shell, Fleming, Davis & Menge, P.A.

226 South Palafox Street, 9th Floor

Pensacola, Florida 32502

Telephone 850-434-2411

Attorneys for Plaintiffs