

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' MOTION FOR A STAY AND DECLARATORY ORDER

Plaintiffs move this Court for the entry of an Order staying any and all further procedures to collect the real property taxes assessed on their respective leasehold improvements pending final disposition of this action and for the entry of an Order declaring that no liens exist on their respective leaseholds, including their leasehold improvements, for collection of the real property taxes assessed on their leasehold improvements, and in support therefore, would show unto the Court the following:

1. Because the Defendant, Janet Holley, Tax Collector for Escambia County, Florida, has sent copies of the tax statements for the real property taxes assessed against Plaintiffs' leasehold improvements to those mortgagees holding liens on Plaintiffs' leasehold estates, many of those mortgagees believe the assessment of the real property taxes on Plaintiffs' leasehold improvements has

created a lien on their leasehold estates that could have priority over their mortgages and are demanding that those Plaintiffs pay the real property taxes even though those taxes are being contested before this Court.

2. Because the Defendant, Chris Jones, Property Appraiser for Escambia County, Florida, has appraised Plaintiffs' leasehold improvements as real property, and Defendant, Janet Holley, Tax Collector for Escambia County, Florida, has levied real property taxes on the appraised value of Plaintiffs' leasehold improvements, closing agents handling the assignment of leasehold estates on Pensacola Beach are in doubt as to whether the assessed real property taxes constitute liens on Plaintiffs' leasehold estates, and accordingly, are either requiring the real property taxes to be paid or escrowed.

3. The Florida Legislature has provided for judicial review of all matters relating to property taxation and through the adoption of Section 194.171(3), Florida Statutes (2004), has mandated that payment of the taxes the taxpayer admits to be due and owing and the timely filing of an action pursuant to this section will suspend all procedures for the collection of taxes prior to final disposition of the action. In their Complaint, Plaintiffs allege that they do not owe any real property taxes on their leasehold improvements. This action has been timely filed.

4. The Florida Legislature has also mandated through the adoption of Section 196.199(8)(a), Florida Statutes (2004), that any and all taxes assessed

against leasehold interests in governmental property shall not become a lien on the leasehold interests or on the property itself.

5. Plaintiffs are entitled to an Order declaring that the real property taxes assessed on their leasehold improvements do not create liens on their leaseholds, including their leasehold improvements, and an Order staying any further procedures to collect the real property taxes assessed on their leasehold improvements.

6. The requested Orders are necessary to eliminate the misconceptions that presently exist on the part of the mortgagees and closing agents that the assessment of real property taxes on Plaintiffs' leasehold improvements have created liens on their leasehold interests in the improvements.

7. Affidavits from William J. DeLeo, Mary B. Bolman, Deedra L. Lamy, Nancy Nelson and Rhonda Sellars in support of this Motion are attached hereto.

WHEREFORE, Plaintiffs move this Court to enter an Order staying any further procedures to collect the real property taxes assessed on Plaintiffs' leasehold improvements pending final disposition of this action, and to enter an Order declaring that no liens exist on Plaintiffs' leasehold interests, including their leasehold improvements, for collection of the real property taxes assessed on their leasehold improvements.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Motion for a Stay and Declaratory Order and of the supporting Affidavits have 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 28th day of February, 2005.



THOMAS J. GILLIAM, JR.

Bar No: 146821

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

226 South Palafox Street, 9th Floor

Pensacola, Florida 32502

Telephone 850-434-2411

Attorneys for Plaintiffs

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Defendants.

AFFIDAVIT

Before me the undersigned authority, personally appeared William J. DeLeo ("Affiant"), who being by me first duly cautioned and sworn, deposes and says:

1. Affiant is sui juris and has personal knowledge of the facts stated herein.
2. Affiant is a plaintiff in the above-captioned lawsuit.
3. On or about December 7, 2004, Affiant was notified by GMAC Mortgage Corporation ("GMAC"), which corporation holds a mortgage on Affiant's leasehold interests in and to Unit G, Seahorse Condominium, 955 Fort Pickens Road, Pensacola Beach, Florida, that it had received a notice from the Tax Collector for Escambia County, Florida, that real property taxes for 2004 in the amount of \$4,439.90 were owed on Affiant's leasehold improvements, and in response to that notice, GMAC had paid the 2004 real property taxes assessed on Affiant's leasehold improvements.

4. GMAC advised Affiant that the amount Affiant was to pay into escrow was being increased from \$42.11 to \$812.26 a month to cover the 2004 real property taxes GMAC had paid and the real property taxes to be assessed in 2005.

5. Affiant advised GMAC that the Circuit Court for Escambia County had previously ruled that leasehold improvements on Pensacola Beach had been classified by the Florida Legislature as intangible personal property and that the leasehold improvements were not subject to real property taxes.


6. Affiant further advised GMAC that the decision of the Circuit Court had been appealed to the appellate courts in Florida and had been affirmed.

7. Further, Affiant advised GMAC that Affiant was a party to the above captioned litigation in which the taxation of Affiant's leasehold improvements as real property was being challenged.

8. Notwithstanding the foregoing, GMAC advised Affiant that if Affiant did not deposit the sums into escrow to cover the 2004 and 2005 real property taxes, GMAC would classify his account as delinquent and after two months would forward Affiant's mortgage to its attorneys for foreclosure.

FURTHER AFFIANT SAYETH NAUGHT.

Signed by Affiant this 16th day of February, 2005.


WILLIAM J. DeLEO
Affiant

STATE OF FLORIDA
COUNTY OF ESCAMBIA

Sworn to and subscribed before me by WILLIAM J. DeLEO, who is known to me, or has produced as identification Florida Drivers License and who swears that the foregoing is true and accurate to the best of his knowledge and belief.

DATED this 16th day of February, 2005.



Paula S. Hardoin
My Commission DD318852
Expires June 10, 2008

Paula S. Hardoin
NOTARY PUBLIC

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AFFIDAVIT

Before me the undersigned authority, personally appeared Mary B. Bolman ("Affiant"), who being by me first duly cautioned and sworn, deposes and says:

1. Affiant is sui juris and has personal knowledge of the facts stated herein.
2. Affiant is Administration Leasing and Marketing Manager of the Santa Rosa Island Authority (SRIA).
3. SRIA, as an agency of Escambia County, Florida, is charged with the responsibility of leasing the properties on Santa Rosa Island owned by Escambia County (hereinafter referred to as "Pensacola Beach"), and of administering and enforcing the leases it enters into with the lessees.

4. The property known as Pensacola Beach was deeded to Escambia County, Florida, by the United States Government in 1947, and Escambia County, Florida, is the present owner of the property at Pensacola Beach.

5. As part of its responsibilities, the SRIA maintains records on the leases it executes, the assignments of any leasehold interests, and the sublease of any leasehold interests.

6. According to the records maintain by the SRIA, the Plaintiffs named in the captioned case have possessory or leasehold interests in properties on Pensacola Beach by virtue of either a direct lease from SRIA, an assignment of a leasehold, or a sublease.

7. The properties leased by the Plaintiffs in the captioned case are used predominantly for residential purposes.

8. All leases entered into by the SRIA with residential lessees, including leases under which the Plaintiffs in the captioned action hold possessory or leasehold interests in properties on Pensacola Beach, contain the following provisions:

a. The original term of the leases exclusive of renewal options, is for a period of 99 years or less.

b. Rental payments to SRIA are due on each of the leases.

c. Each lease provides that title to any building or improvements of a permanent character that shall be erected or placed upon the leased property by the lessee shall forthwith vest in Escambia County, Florida, subject to the possessory rights granted to the lessee by the terms of the lease. No lessee has the right to remove such fixed and permanent improvements from the leased premises.

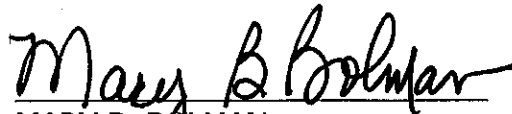
d. Lessees are required to repair, replace and maintain the leased property in a good, safe and substantial condition.

e. In the event of damage or destruction of any buildings or improvements on the leased property, the lessee is required to repair or rebuild such building or improvement. Failure to rebuild or replace the building or improvement constitutes a breach of the lease.

f. Upon the expiration or sooner termination of the leases, the lessees are required to surrender possession of the land and improvements in as a good state and condition as reasonable use and wear will permit.

FURTHER AFFIANT SAYETH NAUGHT.

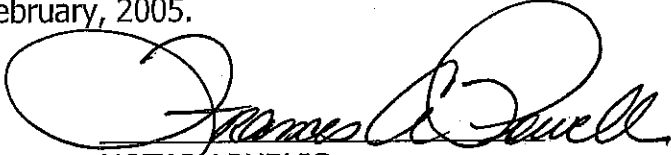
Signed by Affiant this 23 day of February, 2005.


MARY B. BOLMAN
Affiant

STATE OF FLORIDA
COUNTY OF ESCAMBIA

Sworn to and subscribed before me by MARY B. BOLMAN, who is known to
me, or has produced as identification _____ and who
swears that the foregoing is true and accurate to the best of his knowledge and
belief.

DATED this 23 day of February, 2005.


NOTARY PUBLIC

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AFFIDAVIT

Before me the undersigned authority, personally appeared Deedra L. Lamy ("Affiant"), who being by me first duly cautioned and sworn, deposes and says:

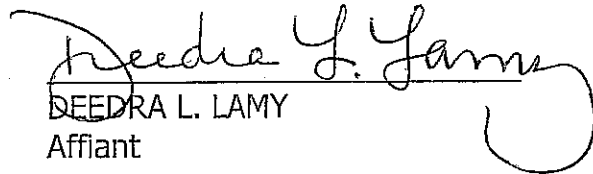
1. Affiant is sui juris and has personal knowledge of the facts stated herein.
2. Affiant is a Closing Officer for Emerald Coast Title ("Emerald Coast"), a duly licensed title insurance company operating in the State of Florida.
3. Over the last few months, Affiant has handled a number of closings in which various leaseholders on Pensacola Beach were assigning their leasehold interests to purchasers of their leasehold estates or refinancing existing mortgages on their leasehold estates.

4. Because the Tax Collector for Escambia County, Florida, has levied real property taxes for 2004 on the leasehold improvements on Pensacola Beach, our title insurance underwriter is unwilling to insure the purchaser's or the mortgagee's interest in the leasehold estate are superior to the 2004 real property taxes levied by the Tax Collector.

5. This situation has created substantial confusion, because the holder of the leasehold estate who is assigning his leasehold interests or refinancing his mortgage insists his leasehold estate, including his leasehold improvements, have been classified as a matter of law as intangible personal property.

FURTHER AFFIANT SAYETH NAUGHT.

Signed by Affiant this 15th day of February, 2005.



DEEDRA L. LAMY
Affiant

STATE OF FLORIDA
COUNTY OF ESCAMBIA

Sworn to and subscribed before me by DEEDRA L. LAMY, who is known to me, or has produced as identification _____ and who swears that the foregoing is true and accurate to the best of her knowledge and belief.

DATED this 15th day of February, 2005.




NOTARY PUBLIC

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Defendants.

AFFIDAVIT

Before me the undersigned authority, personally appeared Nancy Nelson ("Affiant"), who being by me first duly cautioned and sworn, deposes and says:

1. Affiant is sui juris and has personal knowledge of the facts stated herein.
2. Affiant is a Mortgage Lender with Peoples First Community Bank ("Bank").
3. The Bank has several customers who hold leasehold interests in properties located on Pensacola Beach in Escambia County, Florida.
4. A number of the Bank's customers have indicated a desire to refinance their existing mortgages in order to obtain additional funds to repair or reconstruct their leasehold improvements which were damaged or destroyed by Hurricane Ivan.

5. The Bank has advised these customers that it will be necessary for them to pay the 2004 real property taxes assessed on their leasehold improvements upon the closing of their refinancing loans.

6. Attached to this affidavit is a fax received by the Bank from the Tax Collector for Escambia County advising that 2004 property taxes on Pensacola Beach, if unpaid, are subject to the normal statutory procedures for collection.

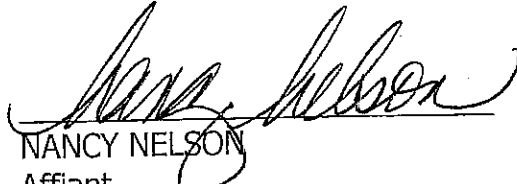
7. Although the fax from the Tax Collector states that no further procedures to collect real property taxes will be pursued against those leaseholders who bring an action contesting the tax assessment and meets all statutory requirements of Florida Statute 194.171 pending final disposition of the litigation, the title insurance companies utilized by the Bank to close its loans are not willing to insure the Bank's refinancing mortgages on its customers leasehold estates as a first lien superior to the 2004 real property taxes assessed on the leasehold improvements. For that reason, the Bank must insist that the leaseholders obtaining a loan from the Bank and securing that loan with a mortgage on their leasehold estates either pay the 2004 real property taxes or escrow sufficient funds with the Bank with which the Bank can pay the taxes.

8. The assessment of real property taxes for 2004 on the leaseholders' improvements places the Bank in a difficult position with its customers, because its customers vehemently deny that they owe any real property taxes on their leasehold estate, including their leasehold improvements.

The Bank's customers say that prior court cases have held that the leaseholders' improvements are not subject to real property taxes.

FURTHER AFFIANT SAYETH NAUGHT.

Signed by Affiant this 23rd day of February, 2005.

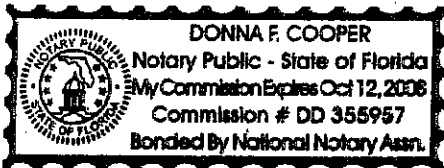

NANCY NELSON
Affiant

STATE OF FLORIDA
COUNTY OF ESCAMBIA

Sworn to and subscribed before me by NANCY NELSON, who is known to me, or has produced as identification _____ and who swears that the foregoing is true and accurate to the best of her knowledge and belief.

DATED this 23rd day of February, 2005.


NOTARY PUBLIC



2004 TAX INFORMATION
PENSACOLA BEACH, ESCAMBIA COUNTY, FLORIDA
November 23, 2004

2004 property taxes on Pensacola Beach located in Escambia County, if unpaid, are subject to the normal statutory procedures for collection. If a taxpayer brings an action to contest any assessment and meets all statutory requirements of Florida Statute 194.171, all procedures for the collection of taxes on that account are suspended pending final disposition of the action. (This includes selling tax certificates and accepting tax deed applications on these accounts.) The certified date for collection mentioned in 194.171(2) is October 20, 2004. Attached for review are Florida Statutes 194.171, 194.181, and 194.192.

It is not the intent of the Tax Collector to offer legal advice. You should consult your own attorney.

Florida Statute 194.171 Circuit court to have original jurisdiction in tax cases.--

(1) The circuit courts have original jurisdiction at law of all matters relating to property taxation. Venue is in the county where the property is located, except that venue shall be in Leon County when the property is assessed pursuant to s. 193.085(4).

(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the value adjustment board if a petition contesting the assessment had not received final action by the value adjustment board prior to extension of the roll under s. 197.323.

(3) Before an action to contest a tax assessment may be brought, the taxpayer shall pay to the collector not less than the amount of the tax which the taxpayer admits in good faith to be owing. The collector shall issue a receipt for the payment, and the receipt shall be filed with the complaint. Notwithstanding the provisions of chapter 197, payment of the taxes the taxpayer admits to be due and owing and the timely filing of an action pursuant to this section shall suspend all procedures for the collection of taxes prior to final disposition of the action.

(4) Payment of a tax shall not be deemed an admission that the tax was due and shall not prejudice the right to bring a timely action as provided in subsection (2) to challenge such tax and seek a refund.

(5) No action to contest a tax assessment may be maintained, and any such action shall be dismissed, unless all taxes on the property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent.

(6) The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5).

Florida Statute 194.181 Parties to a tax suit.--

(1) The plaintiff in any tax suit shall be:

(a) The taxpayer or other person contesting the assessment of any tax, the payment of which he or she is responsible for under a statute or a person who is responsible for the entire tax payment pursuant to a contract and has the written consent of the property owner, or the condominium association, cooperative association, or homeowners' association as defined in s. 723.075 which operates the units subject to the assessment; or

(b) The property appraiser pursuant to s. 194.036.

(2) In any case brought by the taxpayer or association contesting the assessment of any property, the county property appraiser shall be party defendant. In any case brought by the property appraiser pursuant to s. 194.036(1)(a) or (b), the taxpayer shall be party defendant. In any case brought by the property appraiser pursuant to s. 194.036(1)(c), the value adjustment board shall be party defendant.

(3) In any suit involving the collection of any tax on property, as well as questions relating to tax certificates or applications for tax deeds, the tax collector charged under the law with collecting such tax shall be the defendant.

(4) In any suit involving a tax other than an ad valorem tax on property, the tax collector charged under the law with collecting such tax shall be defendant. However, this section does not apply in any instance wherein general law provides for some other person to be the party defendant.

(5) In any suit in which the assessment of any tax, or the collection of any tax, tax certificate, or tax deed is contested on the ground that it is contrary to the State Constitution, the official of the state government responsible for overall supervision of the assessment and collection of such tax shall be made a party defendant of such suit. Any such suit shall be brought in that county having venue under s. 194.171 or, when that section is inapplicable, in the Circuit Court of Leon County, and the attorney for the defendant county officer shall upon request represent the state official in any such suit or proceeding, for which he or she shall receive no additional compensation.

(6) In any suit in which the validity of any statute or regulation found in, or issued pursuant to, chapters 192-197, inclusive, is contested, the public officer affected may be a party plaintiff.

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Florida Statute 194.192 Costs; interest on unpaid taxes; penalty.--

(1) In any suit involving the assessment or collection of any tax, the court shall assess all costs.

(2) If the court finds that the amount of tax owed by the taxpayer is greater than the amount the taxpayer has in good faith admitted and paid, it shall enter judgment against the taxpayer for the deficiency and for interest on the deficiency at the rate of 12 percent per year from the date the tax became delinquent. If it finds that the amount of tax which the taxpayer has admitted to be owing is grossly disproportionate to the amount of tax found to be due and that the taxpayer's admission was not made in good faith, the court shall also assess a penalty at the rate of 10 percent of the deficiency per year from the date the tax became delinquent.

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Defendants.

AFFIDAVIT

Before me the undersigned authority, personally appeared Rhonda Sellars ("Affiant"), who being by me first duly cautioned and sworn, deposes and says:

1. Affiant is sui juris and has personal knowledge of the facts stated herein.
2. Affiant is a Closing Officer for Lawyers Title Insurance Corporation ("Lawyers Title"), a duly licensed title insurance company operating in the State of Florida.
3. Over the last few months, Affiant has handled a number of closings in which various leaseholders on Pensacola Beach were assigning their leasehold interests to purchasers of their leasehold estates or refinancing existing mortgages on their leasehold estates.

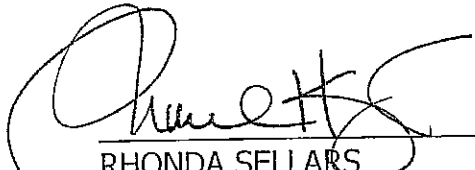
4. Because the Tax Collector for Escambia County, Florida, has levied real property taxes for 2004 on the leasehold improvements on Pensacola Beach, Lawyers Title is unwilling to issue a title insurance policy to the purchaser or mortgagee without an exception for the 2004 and 2005 real property taxes that have been levied or will be levied on the leasehold estate.

5. Under these circumstances, the purchaser of the leasehold estate and the mortgagee of the leasehold estate are requiring that the 2004 real property taxes assessed on the leasehold improvements be paid and that the 2005 real property taxes be pro-rated or escrowed.

6. This situation has created substantial confusion, because the holder of the leasehold estate who is assigning his leasehold interests or refinancing his mortgage insists his leasehold estate, including his leasehold improvements, have been classified as a matter of law as intangible personal property.

FURTHER AFFIANT SAYETH NAUGHT.

Signed by Affiant this 18th day of February, 2005.


RHONDA SELLARS
Affiant

STATE OF FLORIDA
COUNTY OF ESCAMBIA

Sworn to and subscribed before me by RHONDA SELLARS, who is known to me, or has produced as identification _____ and who swears that the foregoing is true and accurate to the best of her knowledge and belief.

DATED this 18th day of February, 2005.


NOTARY PUBLIC

