IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

USCARDIO VASCULAR, INCORPORATED,

Appellant,

v.

FLORIDA DEPARTMENT OF REVENUE,

Appellee.
_______________________________/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D07-3811

Opinion filed September 23, 2008.

An appeal from the Circuit Court for Leon County.
Terry P. Lewis, Judge.

J. Nels Bjorkquist of Broad and Cassel, Tallahassee, for Appellant.

Bill McCollum, Attorney General; Charles Catanzaro and John Mika, Assistant Attorneys General; and Bruce Hoffman, General Counsel, Tallahassee, for Appellee.

ROBERTS, J.

The appellant, USCardioVascular, Inc., appeals the trial court's final summary judgment for the appellee, the Department of Revenue (DOR). The appellant argues that DOR does not have the authority to assess taxes on the total amount it billed as

base rent, as that amount encompassed more than just the total rent it charged to the physician groups. We agree and reverse.

FACTS

The facts of this case are not in dispute. The appellant develops and leases special purpose medical centers and provides administrative, management, and support services to physician groups. The appellant and the physician groups enter into a Center Development, Administration and Management Agreement (Agreement) which sets out the rights, duties, and responsibilities of the parties. Article II of the Agreement, entitled "Definitions," provides the following relevant definitions:

> 2.4 **"Base rent"** means the base rent amount due under the Lease which shall equal the Center Expenses[.]
>
> * * *
>
> 2.7 **"Center Expenses"** shall mean Physician Group's Share (as defined below) of all operating and non-operating expenses of the facility utilized for the Center . . . including, without limitation:
>
> (a) salaries, benefits and other direct costs (including without limitation any payroll expenses) for all Company employees leased to Physician Group . . . ,
>
> (b) obligations under any real estate leases for the premises utilized for the Center,
>
> (c) the expenses and charges incurred in conjunction with the Center and in conjunction with the operation of the Center, including without limitation, repairs and maintenance, postage, utilities,

telephone, furniture, fixtures, equipment and other personal property, including operating leases for any of the foregoing,

(d) personal property and intangible taxes assessed against Company's assets utilized by Physician Group during the term of this Agreement,

(e) insurance related to the facility and personnel for the Center, including workers' compensation insurance expenses for Company's employees working at the Center and fire and general liability insurance (including Center liability insurance) premiums for the Center,

(f) the costs of any goods and supplies purchased for use or resale, and used or resold in conjunction with Center Services . . . ,

(g) the costs and expenses for Center start-up . . . ,

(h) the depreciation . . . for any equipment or depreciable property owned or acquired by Company and used in connection with the Center . . . ,

(I) the costs of personnel engaged to provide services at or in connection with the Center . . . ,

(j) expenses of the Center related to billing and collection services and payroll services in connection with the Center . . . ,

(k) [c]osts and expenses of the Company arising from or related to the management or administration of research projects undertaken at the Center, and

(l) property taxes, sales, use and other taxes associated with the business of the Center, and any and all other ordinary and necessary expenses incurred by the Company for the benefit of Physician Group in carrying out their respective obligations under this Agreement.

* * *

2.31 **"Rental Fee"** shall mean Base Rent.

* * *

2.33 **"Service Fee"** shall have the meaning given in Section 7.1.

Article VII of the Agreement, entitled "Financial Arrangements," provides the following relevant provisions:

> 7.1 **Service Fee.** During the term of this Agreement, Company shall receive a "Service Fee" equal to a percentage of Center Net Income determined in accordance with **Exhibit 7.1.**
>
> 7.2 **Rental Fee.** During the term of the Lease and Leased Employee Agreement, Company shall receive the Rental Fee, and the Lease shall so provide.
>
> 7.3 **Nature of Fees.** Payment of the Rental Fee and the Service Fee is not intended to be, and shall not be interpreted or applied, as permitting the Company to share in Physician Group's fees for medical services or any other services, but is acknowledged as the parties' negotiated agreement as to the reasonable fair market value of the premises, equipment, and personnel that are the subject of the Lease and Leased Employee Agreement, and of the development, planning, administration and management services of the Company furnished under this Agreement, considering the nature and value of the services required and the risks assumed by the Company[.]

On a monthly basis, the appellant provides the physician groups with a financial summary and an invoice. The financial summary provides, *inter alia*, a breakdown of the center expenses. These include salaries and benefits, medical director fee, rent,

maintenance, medical supplies, insurance, utilities, property taxes, office supplies, equipment leases, depreciation, patient meals, other, and medical supplies adjustment. The sum of the center expenses and the sales tax is referred to as both the current month base rent and the rental fee. The invoice provides the total amount due for the month, broken down as the base rent, the service fee, and the sales tax due.

In June of 2004, after conducting an audit on the appellant for the period of November 1, 2001, to October 31, 2003, DOR issued a notice of proposed assessment to the appellant. The proposed assessment included additional sales tax due on items included in the amount billed as the base rent, specifically the center expenses for the salaries, benefits, and insurance of the employees leased by the appellant to the physician groups. The appellant filed an informal written protest and a petition for reconsideration. DOR, however, sustained its assessment. The appellant then filed a complaint in the trial court. The parties filed cross-motions for summary judgment. The trial court entered summary judgment for DOR. The trial court found that the Agreement identified what items were to be included in calculating the base rent amount, defined the rental fee to mean the base rent amount, and provided that the use of the premises was conditioned upon payment of the rental fee.

ANALYSIS

Summary judgment is proper only if there is no genuine issue of material fact

and if the moving party is entitled to a judgment as a matter of law. See Menendez v. The Palms W. Condo. Ass'n, 736 So. 2d 58, 60 (Fla. 1st DCA 1999). Thus, this Court's standard of review is *de novo*. See id. at 60-61. It is undisputed that there is no genuine issue of material fact in the instant case. Accordingly, the issue before this Court is whether the trial court correctly determined that DOR was entitled to prevail as a matter of law.

Section 212.031(1)(a) provides that every person who engages in the business of renting or leasing any real property is exercising a taxable privilege, unless such property is otherwise exempt from taxation. Fla. Stat. (2001-2003). Section 212.031(1)(c) provides:

> For the exercise of such privilege, a tax is levied in an amount equal to 6 percent of and on the total rent . . . charged for such real property by the person charging or collecting the rental . . . fee. The total rent . . . charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges. Such charges shall be included in the total rent . . . subject to tax under this section . . . . *In the case of a contractual arrangement that provides for both payments taxable as total rent . . . and payments not subject to tax, the tax shall be based on a reasonable allocation of such payments and shall not apply to that portion which is for the nontaxable payments.*

Fla. Stat. (2001-2003) (emphasis added).

In the Agreement, the terms base rent, rental fee, and center expenses are used interchangeably and given the same meaning. The sum of the center expenses

encompasses the base rent amount. Some of the center expenses are taxable as total rent, such as the rent, property taxes, maintenance, utilities, and insurance. See § 212.031(1)(c), Fla. Stat. (2001-2003); Fla. Admin. Code R. 12A-1.070(4)(c)-(e); Fla. Admin. Code R. 12A-1.070(12). Some of the center expenses, however, are not subject to tax, such as salaries, benefits, and insurance for the employees leased by the appellant to the physician groups.[1] Thus, it is clear that the Agreement provides for both payments taxable as total rent and payments not subject to tax. As a result, under section 212.031(1)(c), DOR only has the authority to assess taxes on the center expenses that are taxable as total rent, not on the total amount billed as base rent.

We note that, although undoubtedly a poor choice of words by the appellant, the terms used in the Agreement are of no consequence in the instant case. Section 212.031(1)(c) requires only that the contractual arrangement between the parties provide for both payments taxable as total rent and payments not subject to tax. This requirement has been met in the instant case.

For these reasons we conclude that the trial court erred in entering summary

---

[1] On July 1, 1987, the legislature enacted an excise tax on the sale of services and a complementary excise tax on the use of services in Florida. See § 212.059, Fla. Stat. (1987). Effective January 1, 1988, however, the legislature repealed section 212.059. See Ch. 87-548, § 37, at 51, Laws of Fla. Subsequently, the only services that appear to be taxable in Florida include detective, burglary, and other protection services and non-residential cleaning and pest control services. See §§ 212.05(l)(i)1.a. & 212.05(l)(i)1.b., Fla. Stat. (2001-2003).

judgment for DOR. DOR does not have the authority to assess taxes under section 212.031(1)(c) on the total amount billed as base rent, as that amount encompasses more than just the total rent charged. Therefore, we hold that DOR was not entitled to prevail as a matter of law.

Because it appears that there may be remaining issues as to whether all of the center expenses that the appellant claims are excluded from taxation are in fact excluded, we REVERSE and REMAND for proceedings consistent with this opinion.

LEWIS, J., CONCURS; BENTON, J., DISSENTS with opinion.

BENTON, J., dissenting.

At issue in the present case is nothing more or less than whether "base rent"–unambiguously defined as such for purposes of the leases in question–is subject to the excise tax levied by section 212.031, Florida Statutes. For the three tax years in dispute, the statute provided (as it still provides):

> [A] tax is levied in an amount equal to 6 percent of and on the total rent . . . charged for . . . real property [like appellant's] . . . The total rent . . . shall include base rent . . . .

§ 212.031(1)(c), Fla. Stat. (2001). The present case poses a straightforward question of statutory construction, which the trial court got right. The landlord, not the Department, drew the agreements and specified the "base rent" it required in order for its lessees to avoid eviction. Having made its bed, the landlord should now lie in it.

The parties to a commercial lease can agree to a fixed sum as rent or to calculate rent any number of ways, based on any number of variables. The taxability of the rent does not depend on the independent tax consequences of any variable chosen for this purpose. Where, for example, total rent is tied to a percentage of the lessee's retail sales, total rent remains subject to tax even though the sales themselves are also taxable. § 212.031(1) (c), Fla. Stat. (2001). Similarly, an insurance premium paid by the landlord is viewed as part of the total rent subject to sales tax. See Boudreau v. M & H Food Corp., 895 So. 2d 501, 502 (Fla. 2d DCA 2005); Fla. Admin. Code R.

12A-1.070(12) (1995). In another, simpler commercial lease, a formula for the amount of rent might have included as variables the costs only of janitorial or security services. But this would not have rendered the janitorial or security services themselves taxable.

The agreements at issue here contemplate both a "service fee," not subject to tax, and a "rental fee" (defined as "base rent") that alone constitutes the (taxable) "total rent." The Department does not seek to tax the "service fee" or any portion of it, only the total rent, which the agreements define as the rental fee or "base rent." That the parties to these leases agreed to tie "base rent" to, among other things, repair, maintenance, postage, insurance and certain personnel costs does not turn "base rent" into something else. The very landlord who drew the agreements and defined "base rent" under the leases should not now be heard to argue that "base rent" is something else altogether or to disown its own formula for "base rent" as not representing a "reasonable allocation."

The majority opinion invokes inapposite statutory language, enacted to protect public revenues (excise taxes on rents for commercial property) from efforts to shortchange the public fisc by manipulating leases in a way that ignores economic realities. This statutory language reads:

> In the case of a contractual arrangement that provides for both payments taxable as total rent or license fee and

> payments not subject to tax, the tax shall be based on a reasonable allocation of such payments and shall not apply to that portion which is for the nontaxable payments.

§ 212.031(1)(c), Fla. Stat. (2001). But this statutory language does not apply in the present case. The Department in no way challenges any "contractual arrangement" into which the landlord has entered. It accepts the parties' written agreements as good faith statements of the terms that the contracting parties settled on after bargaining at arms' length, and asserts that the landlord should do likewise.

Accordingly, perceiving no error in the trial court's grant of summary judgment in favor of the Florida Department of Revenue, I respectfully dissent from today's decision reversing the judgment below. As the majority opinion notes, moreover, the trial court entered judgment on cross motions for summary judgment, which makes remand inappropriate.