IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

RUEHL NO. 925, LLC, a foreign limited liability company,

CASE NO: 2009-CA-1503

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, an agency of the State of Florida,

Defendant.
_______________________________/

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CASE is before me on cross motions for summary judgment, both parties agreeing that the material facts are not in dispute. The issue is whether the cost of certain repairs and improvements made by the Plaintiff to leased premises that they occupied should be considered rent and thus taxable pursuant to Section 212.031, Florida Statutes. There is a side issue raised by the motions as to whether Ruehl can be liable for the tax as a "occupant" since it was not a party to a lease agreement and therefore owed no "rent" to anyone. I agree with the Department on this point, but must side with the Plaintiff on the question of whether the cost of their repairs and improvements constitute rent.

The Department's position is very straightforward. Under the statutes, the rules and the case law, the construction of improvements to the leased premises was consideration in kind, furnished by the lessee (occupant) to the lessor for the privilege or as a condition of occupancy of the premises. I don't believe, however, that such a blanket application can be justified in this

case, either under the statute, the rule, or the case law. The lease in this particular case was for a store in a mall. As part of the lease, the landlord required the lessee to completely refurbish the interior of the store and to submit to the landlord all plans for improvement for its approval. There was no requirement that the tenant spend a particular amount of money on these improvements. There is no indication that such improvements or refurbishing were to be done on a periodic basis, but rather a one time expenditure in order to put the premises in a condition suitable for the operation of the business for which the lessee was to use it, consistent with the architectural requirements of the landlord, building codes, etc.

The Department concedes that, had the landlord agreed to pay the cost of such refurbishing , it would not be considered rent, but argued that if that had been the case, the amount of the monthly rental would have been higher. Perhaps, but there is no record evidence of that. There is also no record evidence to suggest that the requirement in the lease that the tenant pay for the cost of such improvements was an attempt to reclassify what would be rental payments so as to avoid the tax. There are often provisions in a lease that will require a tenant to expend funds - make improvements, maintain the property, keep the business open during certain hours for example. These expenditures of money by the tenant, however, are not, in the common sense meaning of the term, rent. Just because a lease provision contemplates the expenditure of funds by a tenant does not make that expenditure rent.

The case of Department of Revenue v. Seminole Clubs, Inc., 745 So.2d 473 (Fla. 5th DCA 1999), upon which the Department relies, is distinguishable. There, the language of the lease demonstrated that the expenditure of money by the lessee for capital improvements to the golf course, were in lieu of paying rent. That is the classic payment of consideration in kind for the

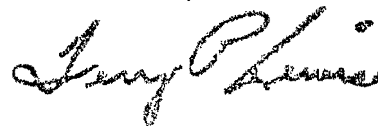
occupancy of the premises. As the court noted:

> "In order to maintain possession of the property, Mayfair was required to perform one of three things: (1) expand 5% of gross revenues on capital improvements; (2) debit an accumulated carry forward balance by 5% of gross revenues; or (3) pay cash 'rent' equal to 5% of gross revenues."

In this case, there is no record evidence to suggest that the amount the lessee spent on improvements for refurbishing of the interior of the leased premises was in lieu of rent. There was no requirement that a particular minimum amount of funds be expended. There was no provision for the lessee to be credited against rental payments for such costs. There is no evidence of record that the amount of rent to be paid was somehow manipulated by this provision. Rather, it is simply an expense which the tenant had to incur to get the premises in a condition that would be suitable for its intended purposes. It is therefore

ORDERED AND ADJUDGED that the Plaintiff's Motion for Summary Judgment is granted. The Defendant's Motion for Summary Judgment is denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 25th day of March, 2011.



TERRY P. LEWIS, Circuit Judge

Copies to:

Peter O. Larsen, Esquire
Michael J. Bowen, Esquire
50 North Laura Street, Suite 3100
Jacksonville, Florida 32202

Jeffrey M. Dikman, Esquire
Senior Assistant Attorney General
The Capitol Revenue Litigation Bureau
Tallahassee, Florida 32399-1050