IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., and PHILLIP EVANS,	)	
Plaintiffs,	)	Civil Action No.:
v.	)	2014-CV-253810
THE ATLANTA BOTANICAL GARDEN, INC.,	)	
Defendant.	)	

DEFENDANT'S BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Garden's lease with the City of Atlanta creates an estate for years. The lease's 50-year term carries a presumption of an estate for years. The explicit language of the lease states an intent to create a "leasehold estate." And even the limited restrictions on the Garden's leasehold estate are consistent with an estate for years under the Court of Appeals' decision in *Jekyll Development Associates L.P. v. Glynn County Board of Tax Assessors*, 240 Ga. App. 273, 275, 523 S.E.2d 370, 372 (1999).

Plaintiffs' Motion for Summary Judgment ignores the clear intent of the Garden's lease, its incontrovertible language, and the Court of Appeals' *Jekyll* decision. Instead, Plaintiffs compare the Garden's lease to a wholly distinguishable lease analyzed by the Court of Appeals in *Diversified Golf, LLC v. Hart County*

Board of Tax Assessors, 267 Ga. App. 8, 11, 598 S.E.2d 791, 794 (2004) – a case where the court used its own decision in *Jekyll* to determine whether a lease created an estate for years or usufruct. The Garden's lease passes the *Jekyll* test, and Plaintiffs have failed to overcome the significant presumption of an estate for years created by the lease's term and stated intent to create a "leasehold estate." Accordingly, the Garden requests that the Court deny Plaintiffs' Motion for Summary Judgment.

I. SUMMARY JUDGMENT STANDARD

Plaintiffs moving for summary judgment "must demonstrate that there is no genuine issue of material fact [as to every element of his or her claims] and that the undisputed facts, viewed in the light most favorable to the [defendant], warrant judgment [in the plaintiff's favor] as a matter of law." *BAC Home Loans Servicing, L.P. v. Wedereit*, 297 Ga. 313, 316, 773 S.E.2d 711, 715 (2015) (quoting *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991)); *see also* OCGA § 9–11–56(c).

II. ARGUMENT AND CITATIONS OF AUTHORITY

Plaintiffs' Motion for Summary Judgment alleges that the Garden's lease is a usufruct based on two arguments: (1) that the Garden's lease is similar to the lease in *Diversified Golf*, which was found to be a usufruct by the Georgia Court of Appeals, and (2) that the provision in the Garden's lease noting that the Garden has been exempted from paying *ad valorem* taxes shows that the City of Atlanta intended

to create a usufruct because the holder of a usufruct is not required to pay *ad valorem* taxes. The Garden's lease bears little resemblance to the lease in *Diversified Golf* and, instead, is substantially similar to the lease in *Jekyll*, which was found to create an estate for years. Further, the fact that the lease indicates that the Garden has been exempted from the requirement for an estate for years to pay *ad valorem* taxes (in accordance with the City's Code of Ordinances with oversight by the City Council) is confirmation that the lease creates an estate for years and not a usufruct, which cannot be subject to *ad valorem* taxation and would never require such an exemption.

A. The Garden's Lease is Distinguishable from the Lease in *Diversified Golf*

Plaintiffs' Motion contends that "the City [of Atlanta] so pervasively retains control over the use and operations of the Garden's interest that the interest is merely a usufruct." Plaintiffs' Brief at 5. As support, Plaintiffs compare the Garden's lease to the lease analyzed by the Georgia Court of Appeals in *Diversified Golf* by simply listing a number of restrictions in that lease and comparing it to different restrictions in the lease at issue in this case. A thorough review of the opinion in *Diversified Golf*, however, reveals little similarity between that lease and the Garden's lease with the City of Atlanta and uncanny similarity to the estate for years found in that court's *Jekyll* decision.

First, the leases in this case and *Diversified Golf* are markedly different. In *Diversified Golf*, the property at issue was 445 acres of land purchased by the City

of Hartwell to use as a spray field for treated wastewater. *Diversified Golf,* 267 Ga. App. at 8, 598 S.E.2d at 793. After facing public opposition for that use of the land, Hartwell decided to develop a municipal golf course on a portion of the land. *Id.* at 8-9, 793. Hartwell entered into a series of agreements with Diversified Golf, LLC ("Diversified"), whereby Diversified agreed to a 50-year lease agreement that required Diversified to construct and operate a golf course on 60 acres of the land and operate wastewater disposal and storage facilities on the remainder of the property. *Id.* at 9, 793.

The Court of Appeals' analysis of the *Diversified Golf* lease immediately shows the difference between it and the Garden's lease. The court noted that the *Diversified* lease "did not specifically state in the lease whether they intended an estate for years or a usufruct." *Id.* at 11, 794. But the Garden's lease states that it transfers a "leasehold estate" from the City of Atlanta to the Garden. Exhibit A at p. 19, Section 12.4. The Court of Appeals noted that the *Diversified* lease specifically gave the LLC mere "possession, use or occupancy" of the golf course (which the court noted "suggests a usufruct"). *Id*. But the Garden's lease goes beyond that to grant "quiet enjoyment" and "exclusive control and management" of the property to the Garden. Exhibit A at p. 5, Section 3.1; p. 6, Section 5.5.

And the Court of Appeals' *Diversified Golf* decision found that the "most important restriction" in determining that the lease was a usufruct was that

Diversified "must accept all treated municipal wastewater sent to it and spray it on the property." 267 Ga. App. at 12, 598 S.E.2d at 795. The court noted that the *Diversified* lease "makes clear that wastewater treatment overrides any other use of the property." *Id.*[1] The court found that, because of this extremely burdensome requirement, "Diversified's use is severely restricted and always subject to use as a wastewater spray field." *Id*. at 16, 797-98. The Garden's lease does not have anything remotely comparable to this restriction – which was pivotal in the court's finding that the *Diversified* lease was a usufruct – and Plaintiffs do not even attempt to argue that it does.

Second, Plaintiffs' Motion fails to analyze or even reference the Court of Appeals' 1999 decision in *Jekyll*. The Court of Appeals' decision in *Diversified Golf*, however, concludes by using the opinion in *Jekyll* as a measure for when a lease qualifies as an estate for years:

> Finally, the board primarily relies on *Jekyll Dev. Assocs. L.P. v. Glynn County Bd. of Tax Assessors*, 240 Ga. App. 273, 523 S.E.2d 370, but that case is distinguishable. In *Jekyll*, the parties stated in the lease that the interest of the lessee was an estate for years and that the lease created a "leasehold estate." Id. at 275 (3). Second, the lessee had a right to extend the lease upon expiration of the 55-year term. Id. Third, the lessee had the right to encumber its interest in the property as security for loans. Id. at 277 (5). Fourth, the lease contained a covenant of quiet enjoyment for the lessee's benefit. Id.

[1] Specifically, the *Diversified* lease stated, "In the event there is any conflict between the needs of the Golf Course and the needs of the Waste Water disposal, the Waste Water disposal requirements shall have absolute priority." *Id.*

> at 277 (5). Finally, the restrictions placed on the use of the land in the present case are much greater than those in *Jekyll*, where use of the property was not burdened with wastewater disposal. Here, Diversified's use is severely restricted and always subject to use as a wastewater spray field.

Diversified Golf, 267 Ga. App. at 16, 598 S.E.2d at 797-98.

The Garden's lease transfers an estate for years like the *Jekyll* lease. The Garden is granted a "leasehold estate" by terms of the lease (*see* Exhibit A at p. 19, Section 12.4) – like *Jekyll.* The Garden is granted "quiet enjoyment" by the lease (*see* Exhibit A at p. 5, Section 3.1) – like *Jekyll*. And, most importantly, the Garden, like *Jekyll*, is not burdened by any restriction as severe as the requirement to dispose of approximately one billion gallons of wastewater on the property. The Court of Appeals' decision in *Jekyll* and *Diversified Golf* leave no doubt – the Garden's lease creates an estate for years.

Third, Plaintiffs incorrectly contend that the Garden's lease creates a usufruct because it imposes "pervasive restrictions on the Garden's use of the property." Plaintiffs' Brief at 8. The Supreme Court of Georgia has explained that "a contract which ordinarily would be construed to create an estate for years is not reduced to a mere usufruct because certain limitations are put upon its use." *Warehouses, Inc. v. Wetherbee*, 203 Ga. 483, 490-91, 46 S.E.2d 894, 899 (1948). The restrictions listed in Plaintiffs' brief are designed to protect the City of Atlanta's reversionary interest in the property, which is consistent with an estate for years. *See e.g. Jekyll*, 240 Ga.

App. at 277, 523 S.E.2d at 374 (holding that restrictions like those in the Garden's lease are "designed to preserve the hotel as a historic structure and protect the lessor's reversionary interest").

And ***fourth***, Plaintiffs cite to two additional decisions - *Searcy v. Peach County Board of Tax Assessors*, 180 Ga. App. 531, 349 S.E.2d 515 (1986) and *Southern Airways Company v. DeKalb County,* 216 Ga. 358, 116 S.E.2d 602 (1960) – to argue that the Garden's lease contains restrictions consistent with a usufruct. Both cases involve leases that are inapposite to the Garden's lease. The lease in *Searcy* did not expressly state whether it conveyed an estate for years or a usufruct and included a provision limiting the lessee's rights in the property to "cultivation matters" (requiring the property to be maintained for row-crop or grain cultivation at all times) and excluding "other rights of every kind and nature." *Searcy*, 180 Ga. App. at 532-33, 349 S.E.2d at 517. The Garden's lease expressly states that it conveys a "leasehold estate" and extends "exclusive control and management" of the property to the Garden. Similarly, the lease in *Southern Airways* contained pervasive restrictions not found anywhere in the Garden's lease – specifically, the requirement that the lessee manage and operate a pre-existing airport by the detailed rules and requirements established by DeKalb County in the lease. *Southern*

Airways, 216 Ga. at 365, 116 S.E.2d at 607.[2] Unlike the Garden, Southern Airways Company essentially operated as a franchisee, operating a business that pre-dated the lease under the strict supervision and control of its landlord, DeKalb County.

Ultimately, the Garden's lease carries the presumption of an estate for years, it bears the express intent to convey an estate for years in its terms, and none of its restrictions convert the lease into a mere usufruct. Accordingly, Plaintiffs' Motion for Summary Judgment should be denied.

B. The Lease Provision Indicating the Garden is Exempted from Paying *Ad Valorem* Taxes Shows the Parties Intended to Create an Estate for Years.

Plaintiffs also argue that the Garden's lease shows an intent to create a usufruct because the lease states that the Garden has been exempted from paying *ad valorem* taxes on the property. Plaintiffs' Brief at 8. Plaintiffs argue that "[t]he City of Atlanta has no authority by contract to waive a person's obligation to pay ad valorem taxes." *Id.* The City of Atlanta's Code of Ordinances, however, outlines the procedures for the City Council to grant exemptions to the requirement to pay *ad valorem taxes*, and this provision in the Garden's lease – which was approved by

[2] DeKalb County's micro-managing lease also required that the lessee to "maintain a bulletin board" to the County's specifications, had requirements for the rest rooms that must be maintained on the premises, and required the lessee to offer aviation training programs to the public.

a vote of the City Council – is further proof that the parties intended to create an estate for years.

For decades, it has been black letter Georgia law that a lessee in possession of a usufruct cannot be required to pay *ad valorem* taxes. *See e.g. Camp v. Delta Air Lines, Inc.*, 232 Ga. 37, 39, 205 S.E.2d 194, 196 (1974) ("An estate for years is a taxable estate. On the other hand, a mere usufruct, sometimes referred to as a license to use, is not a taxable estate.") (internal citations omitted). Here, section 3.4 of the Garden's lease states:

> 3.4 Ad Valorem Taxes. Lessor covenants and agrees that throughout the Lease Term neither the Demised Premises, nor Lessee's leasehold interest therein pursuant to this Agreement shall be subject to ad valorem taxes or assessments or any other Imposition imposed by the City.

Exhibit A at 5. Because the parties intended to convey an estate for years, the default position under Georgia law is that the City of Atlanta could charge the Garden *ad valorem* taxes for the Garden's leasehold interest. Therefore, if the parties wished to exempt the Garden from paying those taxes, an exemption would be necessary unless the Garden's use of the property otherwise qualified for exemption from *ad valorem* taxes under O.C.G.A. § 48-5-41.

The City of Atlanta can consider exemptions to the obligation to pay *ad valorem* taxes through the oversight of Atlanta's City Council. Section 146-37 of the

City's Code of Ordinances (attached as **Exhibit B**[3]) outlines the City's authority to grant exemptions to entities subject to *ad valorem* taxes, with the approval of the City Council. The Garden's lease and the terms therein were approved by an ordinance voted on and adopted by the City Council on March 20, 2017. *See* Exhibit A at p. 1. The Garden's lease attaches the ordinance as an internal "Exhibit B" which authorized the City to enter into the lease (under Section 2) and waived all ordinances "in conflict herewith" the ordinance approving the lease and its terms. *See* Exhibit B at 24.

But more importantly, whether the City has that authority is immaterial for the Court's analysis here. What matters is that the City felt it needed to include the exemption because the Garden, holding an estate for years in the property, would be obligated to pay taxes unless – again – the Garden's use of the property otherwise qualified for exemption from *ad valorem* taxes under O.C.G.A. § 48-5-41.

Plaintiffs' attempt to compare the *ad valorem* tax provision in the Garden's lease to the tax provision in *Diversified Golf* is unpersuasive. The *Diversified* lease contained a provision requiring Diversified to pay "an amount equal to the *ad valorem* property taxes" that would have been owed if the golf course were located in the City of Hartwell. *Diversified Golf,* 267 Ga. App. at 11-12, 598 S.E.2d at 795.

[3] Chapter 146 of the City of Atlanta's Code of Ordinances is publicly available at https://library.municode.com/ga/atlanta/codes/code_of_ordinances?nodeId=PTIICOORENOR_CH146TA_ARTIIADVATA

The Court of Appeals found this term to be consistent with a usufruct because the term necessarily assumes that Diversified did not owe *ad valorem* taxes as a result of the lease (which granted a non-taxable usufruct) but would still be contractually required to pay the equivalent of *ad valorem* taxation to the City. *Id.* The Court of Appeals noted if the parties intended an estate for years, this provision would require "double" *ad valorem* taxation (i.e., both a payment-in-lieu of taxes *and* the regular tax payment due on the leased property). *Id.*

The Garden's lease contains the opposite tax provision as was found in *Diversified*. The Garden's lease assumes that a taxable estate for years has been created and takes the affirmative step of stating that the Garden has been exempted from owing *ad valorem* taxes on that leasehold estate – a step that would be completely unnecessary if the parties intended to create a usufruct. Accordingly, the Garden's *ad valorem* tax exemption is further confirmation that the lease creates an estate for years.

III. Conclusion

The Garden's 50-year lease creates an estate for years and a private property interest that allows the Garden to exclude pursuant to OCGA § 16-11-127 (c). To overcome the presumption created by the lease's 50-year term, the terms of the Garden's lease would need to explicitly negate the presumption and demonstrate the parties' intent to create only a usufruct. *Camp*, 232 Ga. at 39-40, 205 S.E.2d at 196.

Ultimately, Plaintiffs' Motion for Summary Judgment only further confirms that the Garden's lease is an estate for years as outlined in the Garden's Motion for Summary Judgment. For these reasons, the Garden respectfully requests that the Court deny Plaintiffs' Motion.

This 26th day of August 2020.

/s/ James C. Grant
James C. Grant
Georgia Bar No. 305410
David B. Carpenter
Georgia Bar No. 292101
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: (404) 881-7000
Facsimile: (404) 881-7777

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on counsel of record via the Court's e-filing system and via United States First Class Mail, postage prepaid, at the following address:

John R. Monroe
156 Robert Jones Road
Dawsonville, GA 30534

Respectfully submitted this 26th day of August, 2020.

s:\ James C. Grant
James C. Grant