COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0451

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

RUPENA'S, INC.,

PLAINTIFF-RESPONDENT,

V.

CITY OF WEST ALLIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. The City of West Allis (City) appeals from a summary judgment granted in favor of Rupena's, Inc., declaring that the State of Wisconsin is the beneficial owner of the Rupena's building located on leased land at the Wisconsin State Fair; therefore, Rupena's is exempt from personal property

tax liability under WIS. STAT. § 70.11(1) (1997-98).[1] The City argues that Rupena's is the beneficial owner of the leasehold improvement, and therefore is taxable under WIS. STAT. § 70.17(1). Because we agree with the trial court that more of the factors used to determine who is the beneficial owner of the building favor the state as the beneficial owner, we affirm.

BACKGROUND

¶2 The property that is the subject of this dispute is a building erected by Rupena's on the grounds of Wisconsin State Fair Park. The City reassessed the building in 1998 for personal property tax purposes. The new assessment increased from $80,960 to $297,200. The new assessment resulted in a tax liability of $8,918. It is undisputed that the land upon which the building is located is owned by the State of Wisconsin, and is called Wisconsin State Fair Park. The land is tax exempt. The dispute in this case involves the building located on the tax-exempt land, which is operated by Rupena's. If Rupena's is the beneficial owner of the building, it is obligated to pay the personal property taxes. If the state is the beneficial owner, no personal property taxes are owed because the state is exempt pursuant to WIS. STAT. § 70.11(1).

¶3 A board of directors manages and operates the fair park by authority of WIS. STAT. Ch. 42. Rupena's has conducted the business of dispensing food on the fair grounds for approximately forty years. In 1979, the board advised Rupena's that if Rupena's constructed a permanent building, Rupena's could move to a better location at the fair. A written lease agreement was executed on

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

April 26, 1979, between Rupena's and the board, wherein Rupena's agreed to erect a permanent type of building at the new location on the fair grounds. After that agreement was signed, Rupena's built the original structure, which housed a kitchen facility, and was adjoined to a concrete slab covered by a canvas tent. Structural additions and improvements were made in 1981 and 1994. As of 1998, the building constructed by Rupena's at the site occupied 5,101 square feet.

¶4 After the reassessment in 1998, the City sent Rupena's a personal property tax bill, which increased its personal property tax liability on the building from $2,897.09 in 1997, to $8,918 in 1998. Rupena's paid the tax bill, but filed an action for a refund. Both parties filed motions for summary judgment. The trial court granted summary judgment in favor of Rupena's, ruling that the "State's indicia of ownership … trumps Rupena's indicia of ownership," thereby making the structure exempt from taxation. The City now appeals.

ANALYSIS

A. Standard of Review.

¶5 When reviewing a trial court's order for summary judgment, we apply the same standards as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). This appeal involves the interpretation and construction of a contract, which we review independently. ***Id.*** We do, however, value the trial court's analysis. ***Id.*** When the language of the contract is unambiguous, its construction is a matter of law. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990).

¶6 Determining "ownership" for the purposes of personal tax liability depends not on legal title but rather, upon who is the owner of the beneficial

interest in the personal property. ***Gebhardt v. City of West Allis***, 89 Wis. 2d 103, 108, 278 N.W.2d 465 (1979). In reaching this judgment, a court always looks to the substance, and not to the form. ***Id.*** In tax exemption cases "ownership" of the beneficial interest is often referred to as a bundle of rights, one or more of which can be separated from the bundle; yet, the bundle will still be considered "ownership." ***Id.*** at 108-09. What combination of rights, less than the whole bundle, will constitute "ownership" is a question that must be determined in each case in the context of the purpose of the determination. ***Mitchell Aero, Inc. v. City of Milwaukee***, 42 Wis. 2d 656, 662, 168 N.W.2d 183 (1969). This requires a balancing test, the determination of which is a question of law.

B. Analysis.

¶7 The City contends that the contractual documents that govern its relationship with Rupena's favor the City's position that the beneficial interest in the building rests with Rupena's. Not surprisingly, Rupena's relies on the same documents, and some additional affidavits and depositions, to arrive at a contrary conclusion, supporting exemption. It is also noteworthy that both parties cite the same four cases, i.e., ***Mitchell Aero*** (***Mitchell*** I); ***State ex rel. Mitchell v. Board of Review***, 74 Wis. 2d 268, 246 N.W.2d 521 (1976) (***Mitchell*** II); ***Gebhardt***; and ***City of Franklin v. Crystal Ridge, Inc.***, 180 Wis. 2d 561, 509 N.W.2d 730 (1994) to bolster their positions. Thus, we shall examine the content of these decisions as they relate to the submissions made for the purposes of cross-motions for summary judgment.

¶8 In all four decisions, our supreme court acknowledged the difference between, and significance of, bare legal title versus beneficial ownership for the purposes of taxation. In ***Mitchell*** I and II, after examining the lease terms, our

supreme court concluded that the greater beneficial interest in the hangers located on Milwaukee county airport grounds rested in the lessee—Mitchell Aero. *See* ***Mitchell*** I, 42 Wis. 2d at 665; ***Mitchell*** II, 74 Wis. 2d at 273. In ***Gebhardt*** and ***Crystal Ridge***, however, the court came to the opposite conclusion in favor of exemption. ***Gebhardt***, 89 Wis. 2d at 114-15; ***Crystal Ridge***, 180 Wis. 2d at 571.

¶9 The City argues that the distinction between these two sets of decisions is "the reason or motivation" for government control as in ***Mitchell*** I and II rather than the "degree of control" in ***Gebhardt*** and ***Crystal Ridge***. It then asserts that an appropriate balance between these two factors must be reached for a rational conclusion, which ought to result in the conclusion that the greater beneficial interest rests with Rupena's. We are not persuaded.

¶10 ***Gebhardt***, decided in 1979, and ***Crystal Ridge***, decided in 1994, were both decided after ***Mitchell*** I and II. In each instance, the supreme court took into account the rationale of the ***Mitchell*** decisions. In ***Gebhardt***, the court stated that the "primary difference between the *Mitchell Aero* lease and the lease under present review pertains to the control exercised by the respective lessors over the business operation of their tenants." ***Id.*** at 110. The ***Gebhardt*** court then declared that a detailed analysis of the control factor was not made in the ***Mitchell*** cases, and it then proceeded to engage in such an analysis. ***Gebhardt***, 89 Wis. 2d at 110-14. In engaging in this exercise it then set forth eleven instances of interference[2] in Gebhardt's operation of its skating rink and, as a result, concluded that the

[2] The eleven instances of interference noted are set forth in the ***Gebhardt*** opinion. *See* ***Gebhardt v. City of West Allis***, 89 Wis. 2d 103, 110-11, 278 N.W.2d 465 (1979).

indicia of ownership attributed to Gebhardt were not sufficient to constitute true and beneficial ownership. ***Id.*** at 114-15.

¶11 When the supreme court considered the ***Crystal Ridge*** appeal, the City of Franklin was attempting to tax buildings on county land used in the operation of a ski hill. ***Crystal Ridge***, 180 Wis. 2d at 564. Franklin attempted to demonstrate that the indicia of ownership attributed to Crystal Ridge were similar to those found in ***Mitchell*** I.[3] The supreme court rejected this reasoning by declaring that the county's "indicia of ownership … actually resemble the indicia of ownership of the state in ***Gebhardt***." ***Crystal Ridge***, 180 Wis. 2d at 569. It then observed:

> The following provisions are present in the lease in both cases: 1) the lessor must approve the plans and location of the buildings; 2) the lessee can only use the land for one purpose—skating in *Gebhardt* and skiing in this case—unless the lessor gives permission to conduct other activities on the land; 3) the lessor enjoys exclusive use of the land for other purposes for a significant length of time each year; 4) the lessor may enter and leave the buildings at any reasonable time; 5) the lessee may not sublet the buildings or any portion of the buildings without the lessor's prior approval; 6) the lessee must maintain insurance on the buildings naming the lessor as an additional insured; and 7) upon expiration of the lease, the lessor acquires a full possessory interest in the buildings.

Id. at 569-70 (footnotes omitted.) In addition to other controls over operations, the ***Crystal Ridge*** court determined that the county imposed restrictions on accounting

[3] The City argued that the following indicia indicated that Midwest Development Corp. and Crystal Ridge were the beneficial owners: (1) Midwest constructed the buildings at its own expense; (2) Midwest and Crystal Ridge enjoyed the use and profits from the ski facility for three and one-half months each year; (3) Midwest carried fire and liability insurance on the buildings; (4) Midwest was responsible for repairs and maintenance on the buildings; and (5) Midwest agreed to pay all licenses, fees, and taxes on the property. *See* ***City of Franklin v. Crystal Ridge, Inc.***, 180 Wis. 2d 561, 569, 509 N.W.2d 730 (1994).

procedures, menu content, prices, hours of operation, and prohibited the creation of any obligations against the premises. ***Id.*** It further concluded that financial institutions did not recognize the operator as an owner. ***Id.*** at 571. After balancing these apparently conflicting indicia of ownership, the supreme court concluded that the county was the beneficial owner of the ski chalet and the rental building. ***Id.*** Thus, the two leasehold improvements were exempt from the general property tax under WIS. STAT. § 70.11(2).

¶12 In retrospect and in summary, the supreme court distinguished ***Gebhardt*** from ***Mitchell*** I and II because the "control over operations factor" was not even addressed in the earlier cases. In ***Crystal Ridge***, the supreme court found that many of the same factors of indicia present in ***Gebhardt*** not only were present in ***Crystal Ridge***, but also were present to a greater extent. ***Id.*** at 570. Thus, from a chronological and textual standpoint, the two more recent cases have given more weight to public control over the operations of private enterprise than to the rationale for the control.[4] This is in keeping with the balancing test. ***Id.***

¶13 Having addressed the leading cases on the question, we now compare Rupena's and the state's competing indicia of ownership. The relationship between Rupena's and the fair park is governed by three documents: (1) a Space Lease Agreement; (2) a Space License Agreement; and (3) the Rules and Regulations of the Wisconsin State Fair. We now review the provisions of each document as relevant to the issue of beneficial interest, and additional documents contained in the summary judgment motions.

[4] *See* ***Gebhardt***, 89 Wis. 2d at 106, 110; ***Crystal Ridge***, 180 Wis. 2d at 569.

Space Lease Agreement.

¶14 In general, the Space Lease Agreement permits Rupena's, Inc. to lease and occupy space on the grounds of Wisconsin State Fair Park, subject to the board's restrictions and supervision. More specifically, this agreement, executed on April 26, 1979, provides that, as consideration for a new leased site on the corner of Central Avenue and Central Street, Rupena's shall erect a permanent-type building at its own expense, of such design and construction as the fair park shall solely determine. The agreement leases an area of land. The agreement expressly provides that any building erected on the leased space is the personal property of the lessee.

¶15 The lease is for a term of one year, with an option for a one-year annual renewal provided that Rupena's has operated its business in compliance with the fair park's rules and regulations, which also includes the execution and compliance with a Space Lease Agreement. If Rupena's decides not to exercise its one-year option to renew its lease, it has two further options: (1) remove its building from the leased premises and restore the site to its original condition; or (2) sell or lease the building to another party. These options, however, are qualified by a proviso that Rupena's may not sell the building or assign any lease interest or sublet any portion of the premises without the written consent of the fair park.

¶16 In addition to other restrictions set forth in the annual Space Lease Agreement, Rupena's sales are restricted to hot lamb, spanferkel, chicken dinners, cold potato salad, hot dogs, polish sausage, carbonated soft drinks and beer. Other relevant provisions provide that Rupena's may only engage in dispensing food and beverage during the period of the Wisconsin State Fair unless otherwise agreed.

The net result of this provision is a use period lasting for seventeen days. There is a hold harmless provision and a guaranty of stated minimum insurance coverage of various sorts.

Annual Space License Agreement.

¶17 This document sets forth the minimum rental amount or 15% of gross sales, whichever is greater. It repeats the types of food and drink that can be sold. It limits the capacity of drinking cups and makes any entertainment subject to approval. Further, it reserves the right of final approval for all products and services rendered.

¶18 The addendum to the Space License Agreement further provides that the fair park shall have the unlimited right to audit Rupena's sales revenues and Rupena's shall produce all business records to the fair park for inspection and copying. The fair park reserves the right to determine the soft drink beverage of choice. Rupena's is responsible for all licensing fees. Rupena's shall maintain the premises, but not make any changes or alterations without the fair park's written consent. The addendum further grants to the fair park unlimited access to the premises.

¶19 Rupena's failure to comply with any of the terms or conditions of the Space License Agreement shall constitute default. If Rupena's defaults, the fair park, in its sole discretion, may declare it in default and terminate the Space License Agreement immediately. Upon termination, "the Premises and all of the rights and interests of the Lessee therein immediately shall be surrendered to the Board, and the Board shall be entitled to immediate possession and control of the premises, free and clear of this contract and lessee's rights and interests hereunder."

¶20 Lastly, Rupena's cannot assign the Space License Agreement, or any portion of the premises, to any other person.

Rules and Regulations of Wisconsin State Fair.

¶21 Both the Space Lease Agreement and the Space License Agreement are subject to the rules and regulations of the fair park. As relevant to our analysis, the rules provide that a privately owned building on the fair park grounds may not be used for any public purpose without the written approval of the director of the fair park.

¶22 In addition to the documents referred to, the record contains the affidavits and depositions of Matthew Rupena, vice-president of Rupena's, and Richard J. Bjorklund, director of the fair park. The contents of these documents stand uncontroverted. They clearly indicate that because of the restrictions placed upon the building, it is not regarded as having any collateral value for financing purposes.

¶23 The City presents four factors to support its argument that it has significantly less control over the building compared to the facts in ***Gebhardt*** and ***Crystal Ridge***: (1) the fair park does not have the contractual authority to use Rupena's building for fair park purposes or business; (2) the fair park does not have unabated access to the building or to the space area; (3) the fair park does not acquire the building upon expiration of the space lease; and (4) there is no agreement that the building reverts or is forfeited to the State of Wisconsin. We are not persuaded by this argument.

¶24 We first address the use of the building. A major portion of the fair park's purpose is to conduct the Wisconsin State Fair. The reason for granting

Rupena's a better location was to further develop pedestrian traffic. The essence of the contractual relationship is a further enhancement of the purpose of the fair park and, by all the controls placed on its use, it exerts contractual authority over the building for the fair park's purpose and business.

¶25 The second question of access to the premises is easily resolved. Whether it is characterized as "unabated" or "unlimited" is of no consequence in the face of the following language contained in the addendum of the Space License Agreement: "The Board and its agents shall, at any time, have the right to enter upon the Premises for the purpose of inspecting them and observing Lessee's business and other activities." Therefore, the City's second reason has no merit.

¶26 The last two reasons relate to the status of the building should the relationship between Rupena's and the fair park terminate for whatever reason. Although it is true that if the contractual relationship is not renewed, Rupena's "may remove the building" or it may sell or lease it, this right is so restricted by the approval control of the fair park, that the right is not fully exercisable. As the trial court observed when considering this issue:

> [A]lthough the lease allows the lessee to remove the building once the lease terminates, this … is not practical or economical to remove this permanent type of structure which is made of brick and mortar. It is more likely that the lessee would attempt to sell or lease the building, however, pursuant to the lease the lessee must obtain the Board's approval in order to sell or lease the building. Thus, the lessee has limited control over the disposal of the building.

¶27 We agree with the trial court's common sense assessment of the reality of this relationship.

¶28 The City asks us to rely upon the standards set forth in the ***Mitchell*** decisions. We decline the invitation because we conclude that the control analysis set forth in ***Gebhardt*** and ***Crystal Ridge*** is more applicable. If the lease terms and the amount of use time present in ***Gebhardt*** and ***Crystal Ridge*** were sufficiently restrictive to place the beneficial ownership in the state and county, respectively, *a minore ad majus*, the even more restrictive circumstances in which Rupena's finds itself ineluctably leads to the conclusion that the beneficial ownership rests in the state. In applying the balancing test to the facts and circumstances here, we conclude that the fair park is the beneficial owner of the building. Therefore, the building is tax exempt.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

¶29 SCHUDSON, J. *(concurring).* Although I agree that the circuit court correctly concluded that the State of Wisconsin is the beneficial owner of Rupena's building located at Wisconsin State Fair Park, I do not join in the majority opinion. Accordingly, I respectfully concur.

¶30 FINE, J. *(dissenting).* I agree with the lead opinion that this appeal is governed by ***City of Franklin v. Crystal Ridge***, 180 Wis. 2d 561, 509 N.W.2d 730 (1994), but disagree that the building owned by Rupena's, Inc., is tax exempt.

¶31 As the lead opinion recognizes, ***Crystal Ridge*** looked to seven factors in determining that the property in that case was tax exempt:

> 1. the governmental lessor of the land "must approve the plans and location of the buildings";
>
> 2. the private lessee may "only use the land for one purpose ... unless the lessor gives permission to conduct other activities on the land";
>
> 3. the governmental "lessor enjoys exclusive use of the land for other purposes [that is, for purposes other than the lessee's use of the property] for a significant length of time each year";
>
> 4. the governmental "lessor may enter and leave the buildings at any reasonable time";
>
> 5. "the lessee may not sublet the buildings or any portion of the buildings without the [governmental] lessor's prior approval";
>
> 6. "the lessee must maintain insurance on the buildings naming the [governmental] lessor as an additional insured";
>
> 7. "upon expiration of the lease, the lessor acquires a full possessory interest in the buildings."

Id., 180 Wis. 2d at 570, 509 N.W.2d at 733–734 (footnotes omitted). Factors 1, 2, 4, 5, and 6 are common to commercial property in general, and, to the best of my knowledge, have never immunized the owner of the building that sits on another's

land from the payment of taxes attributable to that building or shifted from the owner of the building to the owner of the land responsibility for the payment of those taxes. Thus, in my view, these factors, if they were standing alone, would have minimal, if any, impact on whether Rupena's building was taxable to it—especially in light of the command of WIS. STAT. § 70.109: "Exemptions under this chapter shall be strictly construed in every instance with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption." Accordingly, factors 3 and 7 are, to me at least, dispositive.

¶32 Here, unlike the situation in ***Crystal Ridge***, the governmental owner of the land does not enjoy "exclusive use of the land" for *any* purpose for *any* time, no less for "a significant length of time each year" as in ***Crystal Ridge***. Additionally, here, unlike the situation in ***Crystal Ridge***, the governmental owner of the land does not "acquire[] a full possessory interest in the buildings" after expiration of the land lease. Indeed, Rupena's contract with the State Fair Board provides that the building "shall be and shall remain personal property" of Rupena's. Thus, in my view, the only factors that are material here support Rupena's liability for taxes levied on the property—a liability that it specifically

assumed in its contract with Wisconsin State Fair Park Board.[5] Accordingly, I would reverse.

[5] The lessee in ***Crystal Ridge*** also agreed to pay the taxes, but the supreme court held that the obligation was merely an "an allocation of risk clause" because, in the supreme court's view, the lessee did not "voluntarily and intentionally" agree to pay the taxes. ***Crystal Ridge***, 180 Wis. 2d at 571–572, 509 N.W.2d at 734. The agreement-to-pay-taxes clause in ***Crystal Ridge*** obligated the lessee to "pay all licenses, fees and taxes levied by any and all levying authorities for the term of this lease against Leased Premises including buildings and other improvements." ***Id.***, 180 Wis. 2d at 571, 509 N.W.2d at 734. The clause in Rupena's contract with the State Fair Park Board provides: "Any real estate or personal property taxes imposed on such property by the local governmental taxing authority shall be the obligation of [Rupena's]." The record reveals no reason why Rupena's should be relieved of this obligation that it not only assumed voluntarily but also with which it complied without complaint from, insofar as the record reveals, 1982 to 1998.