SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

March 23, 2010

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RE: Tunnell Companies, L.P. v. Delaware Division of Revenue, Patrick Carter, Director of Revenue
C.A.No. S09C-10-031-ESB
Letter Opinion

Date Submitted: December 1, 2009

Dear Counsel:

This is my decision on the cross-motions for summary judgment filed by Plaintiff Tunnell Companies, L.P. and Defendants Delaware Division of Revenue and Director of Revenue Patrick Carter in this declaratory judgment action involving the interpretation of a provision of the Gross Receipts Act.[1]

STATEMENT OF FACTS

Tunnell Companies, L.P. is a Delaware limited partnership. Tunnell owns and operates manufactured housing communities in Sussex County, Delaware. The income of Tunnell from the operation of the manufactured housing communities is primarily rent from its tenants who lease the ground on which a tenant's manufactured home is situated.

[1] 30 *Del.C.* § 2301(d)(1).

The year in question in this matter is calendar year 2005.

Tunnell is subject to the license taxes imposed by Chapter 23 of Title 30 of the Delaware Code with respect to its mobile home lot leasing activity. These taxes consist of an annual license fee of $75.00 under 30 *Del.C.* § 2301(b) and a gross receipts tax under 30 *Del.C.* § 2301(d)(1) consisting of (in the year 2005) 0.384% of aggregate gross receipts paid to the license and attributable to the licensed activity, minus an exemption of $50,000 (in 2005) of gross receipts per month (the "Gross Receipts Tax"). The Division of Revenue, of which defendant Patrick Carter is the Director, is a Division within the Department of Finance of the State of Delaware and the agency responsible for administering the Gross Receipts Tax and other statutes of the State set forth in Title 30 of the Delaware Code.

The leases between Tunnell and its manufactured housing tenants provide, *inter alia,* that its tenants reimburse Tunnell the share of the Delaware Gross Receipts Tax imposed on the rent collected from that tenant. When the Lease Form was drafted, the rate of the Gross Receipts Tax was 0.44%. During 2005 and prior years Tunnell would send invoices for rent to its tenants stating the rent due and separately stating the amount of Gross Receipts Tax as a line item styled "rental tax" to be collected from the tenant.

Tunnell did not include the amount of invoiced Gross Receipts Tax in the aggregate gross receipts on which it computed its Gross Receipts Tax liability. Thus, for example, if Tunnell sent a tenant a bill listing $1,000 as rent and a separate line item for $3.84 of Gross Receipts Tax for a total of $1,003.84, Tunnell reported only $1,000 as gross receipts for purposes of the Gross Receipts Tax, not $1,003.84.

By letter dated February 16, 2000, from Ronald A. Kaminski, Business Audit Bureau Manager of the Division, the Division advised Tunnell that it had received an inquiry from one of Tunnell's tenants regarding Tunnell's requirement that the tenant pay a "Delaware Rental Tax" at the rate of 0.384% that was separately itemized on a copy of a Tunnell invoice enclosed by the tenant in its inquiry to the Division. The letter stated, "The concern of the Delaware Division of Revenue is that the license fee of 0.384% is being separately stated in the lease agreement." It quoted 30 *Del.C.* § 2110, which provides:

> No person shall agree or contract directly or indirectly to pay or assume or bear the burden of any license tax payable by any person, firm, or corporation under the provisions of this Part [III, which includes chapter 23]. Any such agreement shall be null and void and shall not be enforced or given effect by any court. This section shall not apply to the surcharge described in §2902(c)(4) of this title.

The letter went on to state:

> In accordance with Section 2110, the license tax payable to the Delaware Division of Revenue at the rate of 0.384% of the aggregate gross receipts paid to Tunnell Properties, L.P. cannot be separately stated on the lease agreement and cannot be collected as a separate cost item to the tenant. On the other hand, there is nothing in the law to preclude Tunnell Properties, L.P. from considering the license tax payable as any other business expense and adjust the lot rental to compensate for the license tax expense.

By letter dated January 9, 2001, from Ronald A. Kaminski, the Division advised Tunnell that "This tax [i.e. the Gross Receipts Tax] cannot be separately passed on to your tenants."

Tunnell has never for the 2005 year or any other year challenged the Division's position by paying the Gross Receipts Tax on the entire amount of gross receipts, including the amounts received from tenants as a separate line item reimbursing the Gross Receipts

Tax, and seeking a refund of Gross Receipts Tax from the Division. It is common business practice in commercial leases to insert provisions in these leases that require tenants to pay fixed or variable rent and to reimburse lessors for their proportional share of taxes on the leased property, as well as certain other expenses of the lessor such as insurance and common area maintenance. This practice is not a common business practice in leases of residential property that are not manufactured housing, which usually require payment of a flat rent only.

M. Jane Brady, then the Attorney General, State of Delaware (the "Attorney General"), filed in the Court of Chancery a Verified Complaint (the "Verified Complaint") dated March 5, 2003, in an action captioned "State of Delaware, *ex rel*., M. Jane Brady, Attorney General, *State of Delaware v. Tunnell Companies, L.P. and Robert W. Tunnell, Jr."* Civil Action No. 2260-S. The Verified Complaint contained, among other allegations, at paragraphs 14 through 18, the following allegations:

A. "14. 30 *Del.C.* § 2110 provides that '[n]o preson shall agree...to...bear the burden of the any license tax payable by any person, [or] firm under the provisions of this Part [30 *Del.C.* Part III, 'Occupational and Business Licenses and Taxes']."

B. "15. By letter dated February 16, 2000, the State of Delaware Department of Finance, Division of Revenue informed Tunnell and 'Tunnell Properties, L.P.' [sic] that 'the license tax payable to the Delaware Division of Revenue at the rate of 0.384% of the aggregate gross receipts paid to Tunnell Properties, L.P. cannot be separately stated on the lease agreement and cannot be collected as a separate cost item from the tenant.'"

C. "16. After receiving the aforesaid February 16, 2000, letter from the Division of Revenue, defendants continued to charge their tenants a "Rental Tax" approximately equal to 0.384% of their annual rent."

D. "17. By letter dated January 9, 2001, the State of Delaware

Department of Finance, Division of Revenue informed Tunnell and Tunnell Companies that the 0.384% gross receipts tax 'can not be separately passed on to your tenants.'"

E. "18. At all times relevant hereto defendants have charged their tenants a separate fee in the form of a Rental Tax, approximately equal to 0.384% of each tenant's annual rent."

The Attorney General alleged that the matters as set forth above, as well as other business practices of Tunnell, constituted a violation of the Delaware Mobil Home Lots and Leases Act, 25 *Del.C.* § 1001 et seq., Consumer Fraud Act, 6. *Del.C.* § 2513, Uniform Deceptive Trade Practices Act, 6 *Del.C.* § 2532(a)(12) and Deceptive Practices in Consumer Contracts, 6 *Del.C.* § 2732(1). Tunnell filed an Answer to the Verified Complaint.

After discovery, the Attorney General and Tunnell entered into a Stipulation and Consent Order to Cease and Desist (the "Consent Order") and filed that document in the Court of Chancery on October 11, 2005. The Court of Chancery approved the Consent Order the same day. The Consent Order contained the following provisions at the indicated numbered paragraphs:

A. "3. Defendants have acknowledged that for a time and continuing through 2001, they collected the gross receipts tax or its equivalent amount as a rental tax as a separately itemized fee from tenants of their manufactured home communities in Sussex County. The collection of such fees ended in 2002 after Defendants were advised that the Revenue Code prohibits the transfer of such tax to another person under Title 30 Section 2110 of the Delaware Code."

B. "4. Defendants hereby agree to Cease and Desist such practice so long as the statutory prohibition exists."

Tunnell then filed a verified complaint in the Court of Chancery on October 2, 2006, seeking a declaratory judgment that Tunnell, as a residential lessor, may pass on the

Gross Receipts Tax to its tenants in accordance with the leases negotiated between Tunnell and its tenants. After the Court of Chancery concluded that it did not have subject matter jurisdiction to hear the matter on July 13, 2009,[2] Tunnell transferred this litigation from the Court of Chancery to the Superior Court pursuant to 10 *Del.C.* § 1901 on August 19, 2009. The parties then filed cross-motions for summary judgment.

STANDARD OF REVIEW

Summary Judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[3] Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact.[4] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[5] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his case, then summary judgment must be granted.[6] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment

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[2] *Tunnell v. Delaware Division of Revenue,* 2009 WL 2217746 (Del. Ch. July 13, 2009).

[3] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[4] *Id.* at 681.

[5] Super. Ct. Civ. R. 56(3); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[6] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

is inappropriate.[7]

DISCUSSION

Tunnell argues that Section 2110 does not prohibit a tenant from directly reimbursing Tunnell the share of the Delaware Gross Receipts Tax imposed on the rent collected by Tunnell from that tenant. I disagree. This is precisely the activity that Section 2110 prohibits. The title and text of Section 2110 are set forth below:

Contract to pay another's license tax

> No person shall agree or contract directly or indirectly to pay or assume or bear the burden of any license tax payable by any person, firm or corporation under the provisions of this Part. Any such agreement shall be null and void and shall not be enforced or given effect by any court. This section shall not apply to the surcharge described in § 2902(c)(4) of this title.

Tunnell's leases require a tenant to directly reimburse Tunnell the share of the Delaware Gross Receipts Tax imposed on Tunnell on the rent that it collects from each tenant. Tunnell recoups the Gross Receipt Taxes it pays by sending an invoice for rent to a tenant stating the rent due and separately stating the amount of Gross Receipts Tax as a line item styled "rental tax" to be collected from the tenant. Thus, for example, Tunnell would send a tenant an invoice listing $1,000 as rent due and a separate line item of $3.84 of Gross Receipt Tax for a total of $1,003.84.

"The goal of statutory construction is to determine and give effect to legislative intent."[8] If the statute is unambiguous, "there is no need for judicial interpretation, and the

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[7] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[8] *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007) (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

plain meaning of the statutory language controls."[9] The title of Section 2110 is informative. It addresses contracts where one person has contracted to pay some other person's license tax. The language of Section 2110 is consistent with the title and unambiguous. It prohibits a person from agreeing to pay another person's license tax. Tunnell has entered into leases where its tenants agree to pay Tunnell's Gross Receipts Tax. The arrangement between Tunnell and its tenants falls squarely within Section 2110 and is prohibited by it. The words and phrases used in Section 2110 clearly apply to Tunnell and its tenants. "No person" refers to the tenant. "Contract" refers to the applicable lease provision between the tenant and Tunnell. "[A]ny license tax payable by any person, firm or corporation under the provisions of this Part" refers to Tunnell and its obligation to pay a tax on its gross receipts. If you rewrite the applicable portion of this section using "tenant," "Tunnell," and "Gross Receipts Tax" in the appropriate places it would read as follows:

> No [tenant] shall agree or contract directly or indirectly to pay or assume or bear the burden of any [Gross Receipts Tax] payable by [Tunnell] under the provisions of this Part.

The language of Section 2110 unambiguously prohibits a tenant from directly reimbursing Tunnell for its Gross Receipts Tax. Thus, the provision in Tunnell's leases providing for this violates Section 2110 and is not enforceable.[10]

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[9] *Lawhorn v. New Castle County*, 2006 WL 1174009, at *2 (Del. Super. May 1, 2006) (citing *Eliason*, 733 A.2d at 946).

[10] The Division has taken the position that Tunnell may set its rents to take into consideration the Gross Receipt Taxes that it pays, just as it would any other expense. Whether or not Section 2110's "indirectly" language prohibits this is not an issue given the Division's position. Moreover, it is not ripe for consideration under the Declaratory Judgment Act because the intentions of the parties are not "real and adverse." *Gannett Co. v. Bd. of Managers for the*

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

Del. Criminal Justice Information Sys., 840 A.2d 1232, 1237 (Del. 2003); *Rollins International, Inc., v. International Hydronics Corp.*, 303 A.2d at 660, 662-63 (Del. 1973); and *Energy Partners, Ltd. v. Stone Energy Corp.,* 2006 WL 2947483, at *7 (Del. Ch. Oct. 11, 2006).