IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., and PHILLIP EVANS, Plaintiffs, v. THE ATLANTA BOTANICAL GARDEN, INC., Defendant.	)	Civil Action No.: 2014CV253810

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs commenced this action for declaratory and injunctive relief, seeking a declaration that Defendant Atlanta Botanical Garden, Inc. (the "Garden") may not prohibit people with Georgia weapons carry licenses ("GWLs") from carrying weapons on property Defendant leases from the City of Atlanta, together with an injunction prohibiting the Garden from banning such visitors. Plaintiffs now move for summary judgment.

Background

Plaintiff Phillip Evans ("Evans") is a resident of Gwinnett County and in 2014 was a member of the Garden. Affidavit of Phillip Evans, ¶ 3. On August 30, 2014, Evans called the Garden to inquire about its policy regarding weapons and spoke to Jason Diem, a member of the Garden management team. *Id.*, ¶ 4. Evans also emailed on August 31, 2014 and September 26, 2014. *Id.*, ¶ 5. Diem emailed back on September 30, 2014 and told Evans "The Garden's policy is no weapons except as permitted by law." *Id.*, ¶ 6. Evans construed this statement to mean that the Garden allows possession of weapons permitted by law, including by those with Georgia Weapons Carry Licenses ("GWLs"). *Id.*, ¶ 7. Evans visited the Garden with his wife and

children on October 12, 2014 while openly carrying a firearm at his waist; no employee of the Garden objected to Evan's possession of a firearm during his visit. *Id.*, ¶ 8. Evans again visited the Garden with his wife and children on October 19, 2014 while openly carrying a firearm at his waist; this time, after gaining admission, Diem accosted Evans and told him that the Garden does not permit any weapons. *Id.*, ¶ 9. Although Evans reminded Diem about his earlier communications by email, Diem insisted that the Garden does not permit weapons. *Id.*, ¶ 10. Diem summoned a Garden security officer, who detained Evans and called the Atlanta Police Department. *Id.*, ¶ 11. APD Officer P.A. White arrived and escorted Evans off of the premises. *Id.*, ¶ 12. After the October 19, 2014 incident, Evans emailed the president and CEO of the Garden, Mary Pat Matheson to clarify the policy. *Id.* Matheson responded that the Garden prohibits weapons except in the possession of police officers. *Id.*, ¶ 13.

The property on which the Garden maintains a botanical garden is owned in fee by the City of Atlanta and leased to the Garden. The lease documents have been stipulated to by the parties and filed previously with this Court (*See* the Original Lease and the Current Lease).

Procedural History

Plaintiffs commenced an action seeking declaratory and injunctive relief, seeking a declaration that Defendant may not prohibit people with GWLs from carrying weapons on property Defendant leases from the City of Atlanta. The Garden filed a motion to dismiss. The trial court granted Defendant's motion to dismiss, ruling that: 1) Plaintiffs impermissibly asked the trial court to interpret a criminal statute; 2) Plaintiffs impermissibly asked the trial court to declare how The Garden may or should act; and 3) that Plaintiffs impermissibly asked the trial court to restrain or obstruct the enforcement of criminal laws. On appeal, the Supreme Court of Georgia ruled that the trial court erroneously dismissed the case, and specifically that a

declaratory judgment action is an available remedy to test the validity and enforceability of a statute where an actual controversy exists. *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.,* 299 Ga. 26, 785 S.E.2d 874 (2016) ("*GeorgiaCarry.Org I*").

The Supreme Court further held that a declaration that Evans (or similarly licensed individuals) may carry on The Garden's premises requires no action on the part of The Garden, as it would simply delineate what the applicable legal authority requires or prohibits. Finally, the Supreme Court held that a request by Plaintiffs for an interlocutory injunction does not improperly implicate the administration of criminal law.

On remand, this Court converted the Garden's Motion for Judgment on the Pleadings to a motion for summary judgment and granted judgment in favor of the Garden. This Court reasoned that a line of tax cases holds that leased property is "private" and therefore not subject to taxation.[1] The Court of Appeals affirmed. *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.,* 345 Ga.App. 160, 812 S.E.2d 527 (2018) ("*GeorgiaCarry.Org II*").

The Supreme Court reversed again. *GeorgiaCarry.Org., Inc. v. Atlanta Botanical Garden, Inc.,* 834 S.E.2d 27 (2019) ("*GeorgiaCarry.Org III*"). The Court ruled that the applicability of taxes was not the appropriate test, but rather the entire case turns on whether the Garden's interest in the property at issue is a usufruct or an estate for years. Because the lease documents were not part of the record, the Court was not able to make that determination. The Court remanded for an analysis of the lease to determine if there is a usufruct or an estate for years.

[1] Ad valorem taxes are applied to the lessor (fee owner) in the case of a usufruct and to the lessee in the case of an estate for years. *Whitehead v. Kennedy,* 206 Ga. 760, 761, 58 S.E.2d 832 (1950); *Delta Air Lines v. Coleman,* 219 Ga. 12, 131 S.E.2d 768 (1963).

The case is once again before this Court for that determination. Now that the Supreme Court has set out a clear path for resolution of this case, Plaintiffs will show that there are no disputes of material fact and they are entitled to judgment as a matter of law.

Argument

The statute at issue in this case is O.C.G.A. § 16-11-127(c), which states in pertinent part:

> A licenseholder… shall be authorized to carry a weapon … in every location in this state … provided, however, that private property owners or persons in legal control of private property through a lease … shall have the right to exclude or eject a person who is in possession of a weapon or long gun….

The parties' dispute is over whether the Garden, which leases its property from the City of Atlanta, is a "private property owner or [a] person() in legal control of private property through a lease." If the property in the Garden's hands is "private property", then the Garden has the right to exclude visitors for carrying weapons. If the property is not private property, the Garden lacks that right.

With the aid of the Supreme Court's decision in *GeorgiaCarry.Org III*, this Court's task is clear. If the lease between the City of Atlanta and the Garden conveys a usufruct, the conveyance is one of public property (the City of Atlanta being the owner). If the lease conveys an estate for years, the leasehold interest is private property and the Garden is free to exclude weapons carriers from its property. This brief will focus on that issue.

Fortunately, there is statutory and case law to assist the Court in differentiating between a usufruct and an estate for years. A usufruct is created "when the owner of real estate grants to another person … the right simply to possess and enjoy the use of such real estate…." O.C.G.A. § 44-7-1(a). A lease of less than five years is presumed to convey only a usufruct, "unless the contract is agreed by the parties to the contract and is so stated in the contract." O.C.G.A. § 44-

7-1(b). A usufruct is a lesser interest in real estate than is an estate for years. *Searcy v. Peach County Board of Tax Assessors,* 180 Ga.App. 531, 349 S.E.2d 515 (1986).

An estate for years "carries with it the right to use the property in as absolute a manner as may be done with a greater estate, provided that the property or the person who is entitled to the remainder or reversion interest is not injured by such use." O.C.G.A. 44-6-103. Placing some limitations on the use of the estate does not reduce it to a usufruct. *State v. Davison,* 198 Ga.27, 31 S.E.2d 225 (1944). But if the restrictions are so pervasive, they are fundamentally inconsistent with an estate for years. *Allright Parking of Ga., Inc. v. Joint City-county Board of Tax Assessors,* 244 Ga. 378, 260 S.E.2d 315 (1979).

By way of example, when the Board of Regents leased property to a fraternity for 99 years, and the fraternity could erect a building on it, convey the property to another fraternity, and execute a mortgage, the lease was an estate for years. *Davison.* On the other hand, when a lease completely restricted assignments without the lessor's written consent, expressly stated what use was to be made of the property, and that the property must be maintained in "the usual high standard of care," it was merely a usufruct and not an estate of years. *Searcy.*

Whether an estate in land passes to the tenant or he obtains merely the usufruct depends upon the intention of the parties; and this is true without regard to the length of the term. *Diversified Golf v. Hart County Board of Tax Assessors*, 267 Ga.App. 8, 10, 598 S.E.2d 791, 794 (2004) ("[A]ll provisions of the lease must be scrutinized objectively to determine whether the legal effect of the agreement is to grant an estate in the property or merely a right of use.") Plaintiffs will show that the City so pervasively retains control over the use and operations of the Garden's interest that the interest is merely a usufruct.

In *Diversified Golf*, Hart County had leased land to Diversified for use as a golf course (and only a golf course). The Court ultimately ruled that even though there was a 50-year lease, the lease only granted a usufruct. The Court noted several factors indicating a usufruct:

- Lease did not state if it conveyed a usufruct or an estate
- Lease gave Diversified "possession, use, or occupancy."
- Lease said property was not subject to ad valorem taxation.
- Diversified was required to accept all wastewater sent to it and spray it on the property.
- Lease required Diversified to develop, construct, operate, and maintain a public golf course for the benefit of the community, but the lease regulated how Diversified could operate the golf course.
- Lease prohibited Diversified from selling or disposing of the golf course.
- Lease required Diversified to maintain insurance and name government as additional insured.
- Lease required Diversified to make financial records of golf course available for inspection by government.
- Lease imposed several generic operating restrictions on Diversified (e.g., to operate efficiently and to employ an adequate number of employees).

Moreover, in *Southern Airways Company v. DeKalb County*, 216 Ga. 358, 116 S.E.2d 602 (1960), where a county leased property to a corporation but the county reserved rights of all members of the public, the lease did not convey an estate for years.

The Parties have stipulated to the authenticity of two lease documents, both of which were filed on July 2, 2020. First, there is the original lease between the Garden and Atlanta was

dated March 31, 1980 (the "Original Lease"). Second there was a subsequent lease entered into on August 17, 2017 (the "Current Lease"). The Current Lease is the operative lease, but the Original Lease is included because the Current Lease makes reference to and is partially dependent on actions taken by the parties under the Original Lease.

Applying the factors discussed above to the Current Lease, we find:

- The Current Lease does not state if it conveys a usufruct or an estate
- The Garden is obligated to use the property as a botanical garden, and only in accordance with the "Master Plan" approved by the City. § 5.1, § 5.2
- The Garden is prohibited from assigning its rights under the Current Lease. § 1.12, § 8.4
- The Garden pays no ad valorem taxes on the property. § 3.4
- The City prohibits the Garden from discriminating in its visitors the way a private property owner is otherwise permitted to do. §5.4
- The City retains the right to disapprove of future developments. § 5.2
- The City retains title to all improvements during the lease term. § 2.2
- The Garden pays no rent. §4.1
- The Garden must make its books available to the City for inspection. § 10.2(d)
- The Garden must carry insurance and name the City as an additional insured. §9.1, § 9.2
- The Garden must maintain the property for the benefit of the City and the people of Atlanta. § 5.4
- The Garden has to maintain the property in a clean condition. § 6.1

- The Garden has to maintain the plants, do lawn care and pest control, and maintain the roads. § 7.1
- The Garden has to maintain a "first class green" parking facility. § 8.1
- The Garden and the City share the parking facility (i.e., the City retains partial possession). § 8.2.2
- City approval is required for changes to parking fees. § 8.6
- If the parking facility suffers a casualty, the Garden must rebuild it or give the City the insurance proceeds. § 8.8
- The Garden is required to file compliance reports with the City. § 10.2(e)

We also know from the Original Lease that the City had to approve the "Master Plan" before the Garden could implement it. Original Lease, § 5.2.

As can be seen from the list above, the City has imposed pervasive restrictions on the Garden's use of the property. The Garden can use the property for only one thing: a botanical garden. It must use the property as a botanical garden for the benefit of the City. The City agrees that the Garden pays no ad valorem taxation.

The City of Atlanta has no authority by contract to waive a person's obligation to pay ad valorem taxes. The property in the hands of the Garden is either subject to taxation or it is not. As with the golf course in *Diversified Golf*, where the agreement from Hart County that Diversified did not have to pay taxes was an admission that Diversified's interest was a mere usufruct, the City of Atlanta can only state that the Garden does not have to pay taxes if the Garden's interest is a usufruct and not an estate for years.[2]

[2] Whether the property is taxable because it is being used by a non-profit corporation is not at issue. The Current Lease states, "[N]either the Demised Premises, nor Lessee's leasehold interests therein ... shall be subject to ad valorem taxes...." The Current Lease

The City retains control over 1) what the Garden does with the property; 2) whom the Garden can (or must) allow access to the property; 3) how the Garden maintains the property; 4) how often the Garden

Because the City so pervasively controls what the Garden does with the property, prohibits the Garden from any assignments of the Current Lease, and because the City concedes the Garden's interest in the property is not taxable, the Garden holds a mere usufruct and not an estate for years. The property is not "private" because it is a usufruct and the fee owner is a public entity (the City). *GeorgiaCarry.Org III.* The Garden is prohibited under O.C.G.A. § 16-11-127(c) from banning guns on its property, and this Court must declare the same. Plaintiffs also are entitled to an appropriate injunction against the Garden.

/s/John R. Monroe
John R. Monroe
John Monroe Law, P.C.
Attorney for Plaintiffs
156 Robert Jones Road
Dawsonville, GA 30534
678-362-7650
State Bar No. 516193
jrm@johnmonroelaw.com

applies to the Garden's successors and assigns. § 12.3. Any successor or assign of the Garden, whether a non-profit or not, would not pay taxes on the property.

CERTIFICATE OF SERVICE

I certify that on July 16, 2020, I served a copy of the foregoing via efile and serve upon:

David B. Carpenter
Alston & Bird LLP
1201 W. Peachtree Street
Atlanta, GA 30309

/s/John R. Monroe
John R. Monroe
John Monroe Law, P.C.
Attorney for Plaintiffs
156 Robert Jones Road
Dawsonville, GA 30534
678-362-7650
State Bar No. 516193
jrm@johnmonroelaw.com