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No. 22-CV-0200

DISTRICT OF COLUMBIA COURT OF APPEALS

THEODORE ALBERT NELBACH,

Appellant,

v.

WILLOW NELBACH,

Appellee.

On appeal from the Superior Court of the District of Columbia, Civil Division

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REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

The life tenant had tax arrears during a global pandemic where the District of Columbia barred tax sales of occupied properties like this one. This is not waste because there was no permanent injury to the property interest. In *Elliot v. Lamon*, the Court used an equitable remedy to ensure the tax arrears would be paid, but it did not find that tax arrears were waste, nor did it apply the severe Statute of Gloucester remedies of forfeiture and treble damages. *Elliot v. Lamon*, 1 MacArth. 647 (D.C. 1874). Here, the Court should follow that precedent and find that the tax arrears are not waste under D.C. Code § § 42-1601 and -1603. Equitable remedies are still available that would balance the interests of the life tenant and remainderman. Across the country, although many states have identical or similar waste statutes, none apply the severe remedies of forfeiture and treble damages where the life tenant has tax arrears like this. The remainderman is asking for the District of Columbia to break from *Elliot v. Lamon* and implement the strictest interpretation of a waste law in the nation. Instead, the Court should deny the motion for summary judgement and remand to the trial court to proceed with the case on the merits.

ARGUMENT

I. In the District of Columbia, it is unprecedented to treat tax arrears as waste.

District of Columbia Courts have consistently found a responsibility to pay tax arrears, but have never found that failure to pay taxes rises to the level of waste. In *Elliot v. Lamon*, the Court found that the life tenant was responsible for paying taxes, but did not identify this as a waste issue. *Elliot v. Lamon*. The Court applied a more circumspect equitable remedy, not the severe common law waste remedies of forfeiture and treble damages that are descended from the Statute of Gloucester. Ibid. Similarly, in *Stansbury v. Inglehart*, the Court found that the life tenant was responsible for tax payments, but did not find that the life tenant had committed waste. *Stansbury v. Inglehart*, 20 D.C. 134 (D.C. 1889). This approach is appropriate because it balances the interests of the remainderman and life tenant.

The tax arrears here cannot be waste because there was no permanent injury to the property interest. The life tenant first raised this argument in his Opposition to the Motion for Summary Judgment, to challenge the Superior Court's authority to terminate his life interest as a matter of law. Appendix P. 46-47. Waste requires permanent injury to the property interest. 93 C.J.S. Waste § 1. It is common for properties to have unpaid taxes on occasion, and moreover, it is unsurprising for such to happen during a global pandemic. This does not threaten the property interest unless a tax taking is recorded. *See, i.e.*, *Matteson v. Walsh*, 947 N.E.2d 44, 48 (Mass. App. 2011) (holding that life tenant commits waste when he "permit[s]

the real estate taxes assessed to the property to remain unpaid to the point that the tax authority records a tax taking"). Here, it is undisputed that a tax taking has never been recorded.

Additionally, the documentary record shows there has never been a risk of a tax taking of the property. Due to the COVID-19 pandemic, tax sales of occupied properties have been barred since March 11, 2020. The remainderman has argued that the District of Columbia threatened to sell the property based only on the April 29, 2021 letter from the Office of Tax and Revenue. However, this letter read, "Notice is given that **unless** you pay the amount stated above or **fall within one of the limited exemptions from the tax sale,** the Office of Tax and Revenue may sell this real property at tax sale." (Emphasis added), Appendix P. 27. The property is occupied, so it fell under the occupied property exemption; it is not the life tenant's fault that the remainderman did not inquire into this. In compliance with SUP. CT. R CIV. PRO. 56(c), these facts were supported in Defendant's Opposition to the Motion for Summary Judgement by the relevant document. Appendix P. 45-46, 56. The notice from the Office of Tax and Revenue stated that, "Occupied properties such as yours are <u>not</u> included in this year's tax sale." Appendix P. 56. It is undisputed that the initial letter explained there are exemptions to the tax sale, that it is an occupied property and that there was an occupied property exemption in effect, and that the follow-up notice confirmed it was an occupied property subject

to the exemption. The District of Columbia intended that property owners not be forfeited of their property interests due to tax arrears during an unprecedented global pandemic.

The remainderman points to the Illinois case *Hausmann v. Hausmann* as a case where the Court ordered a remedy prior to a tax taking being recorded, however in that case there was a risk of a tax sale, and the Court was intervening to try to avoid the eventual tax sale. *Hausmann v. Hausmann,* 596 N.E.2d 216, 219 (Ill. App. Ct. 1992). Here, there was no eventual tax sale pending. Additionally, in *Hausmann v. Hausmann*, the Court intervened to apply an equitable remedy. The remedy ordered was single damages for taxes paid by the remainderman, and punitive damages for the malicious conduct of the life tenant. Ibid, 364. This is a more circumspect ruling than finding that the severe Statute of Gloucester or its successors applies. The *Hausmann v. Hausmann* waste finding concerned the life tenant's malicious conduct; the life tenant purposefully made sure the property went to tax sale so that his stepson would buy it, in an intentional bid to divest the remainderman of his interest. Ibid, 368-9. There is no malicious conduct here; on the contrary, here, the life tenant has continued to make partial tax payments throughout.

The remainderman falsely claims that the life tenant stopped paying real estate taxes for four years. In truth, the life tenant made partial payments of the

taxes across that time period. The life tenant made tax payments of $910.55 in the First Half of 2017, $121.02, $9.17, and $910.55 on June 4, 2019, $100 on January 24, 2021, and $637.90 on August 17, 2021. In compliance with SUP. CT. R CIV. PRO. 56(c), these facts were supported in Defendant's Opposition to the Motion for Summary Judgement by documents; the Real Property Account Analysis Report and the MyTax Payment History record these payments. Appendix P. 45, 50-53.

Since there has never been a risk of a tax taking, nor malicious conduct, there has been no permanent injury to the property interest, and no waste.

II. The District of Columbia should continue to use equitable remedies to balance the interests of the life tenant and remainderman.

The District of Columbia has previously applied an equitable remedy, and not the severe remedies of forfeiture and treble damages, for tax arrears. The only District of Columbia precedent shows the Court using an equitable remedy. In *Elliot v. Lamon*, the Court ordered the life tenant to pay off the taxes within thirty days, and ordered a tax sale only if this was not completed. *Elliot v. Lamon*. There is no precedent of this Court applying D.C. Code § § 42-1601 and -1603, or the Statute of Gloucester, and their severe remedies to tax arrears.

Using equitable remedies is consistent with how other jurisdictions have

addressed tax arrears of this type. See discussion of other jurisdictions' approaches, Brief of Appellant P. 9-10. The remainderman does not identify a single case, in D.C. Courts or any other United States jurisdiction, where a Court has applied the severe remedies of forfeiture or treble damages to a tax arrears issue. There is no precedent for applying these strict remedies here. D.C. has an identical or similar waste statute to the states; use of the forfeiture and treble remedies in this situation would be anomalous and by far the most severe approach to tax arrears taken in the country. There is no evidence that the D.C. legislature intended to create the strictest waste statute in the nation.

Other jurisdictions have not found that the Statute of Gloucester and its successor statutes apply to tax arrears, even where those jurisdictions have found that certain tax arrears constitute waste. Minnesota has a statute derived from the Statute of Gloucester which provides remedies of forfeiture and treble damages, but in *Beliveau v. Beliveau*, the Court identified failure to pay taxes as permissive waste and then created an equitable remedy; the Court did not apply the statute and its remedies of forfeiture and treble damages. *Beliveau v. Beliveau*, 217 Minn. 235, 244 (Minn. 1944) ("life tenant, has committed permissive waste as to all the lands, including the homestead, in failing to pay taxes, make necessary and reasonable repairs to buildings and fences, and, by permitting the lands to become infested with noxious weeds"); Ibid., 245-246. The Court ordered the equitable remedy of

creating a trust to oversee sale of the property and preserved the rights of both the life tenant and remainderman as transferred to the proceeds of the sale. Ibid., 245-246. The Court noted that this equitable remedy is "one of American origin and development, for which there are no English precedents." Ibid., 245. Faced with permissive waste, the Court rejected applying the severe remedies derived from the Statute of Gloucester, and instead applied an equitable remedy.

While not all legal authorities have agreed that the Statute of Gloucester successor statutes should be strictly construed to apply to voluntary waste and not permissive waste, there is certainly not a settled construction that this severe statute should be applied broadly. California interprets its Statute of Gloucester adaptation to only apply to voluntary waste. 4 Simes & Smith, the Law of Future Interests (3d ed.) § 1658. The remainderman cites to a New Jersey landlord-tenant case that came to an opposite conclusion about a permissive versus voluntary waste distinction, but that opinion includes a lengthy discussion of legal authorities and cases that argue that the Statute of Gloucester does not apply to permissive waste. *Moore v. Townshend*, 33 N.J.L. 284, 303-4 (1868). That court applied a remedy of single damages, "as furnishing a more easy and expeditious remedy than a writ of waste. It is also an action encouraged by the courts, the recovery being confined to single damages, and not being accompanied by a forfeiture of the place wasted. Ibid., 301. Permissive waste can be the basis of effective relief through the

application of equitable remedies.

A Statute of Gloucester successor statute has never been applied to tax arrears. It should not be applied here, where there was no risk of a tax sale and the remainderman made partial tax payments. Equitable remedies offer a way to respect the rights of both the remainderman and the life tenant.

CONCLUSION

Appellant respectfully requests that this Court deny the motion for summary judgement and remand to the trial court to proceed with the case on the merits.

Submitted: September 23, 2022

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that the aforegoing was served to all parties by the Court's electronic filing system if registered on this 23rd day of September, 2022, to the following persons:

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Anna L Nathanson
Signature

No. 22-CV-0200
Case Number(s)

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