IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

SEVILLE HARBOUR, INC., a Florida Corporation, and MERRILL LAND, LLC, a Florida Limited Liability Company,

Plaintiffs,

CASE NO.: 2014-CA-000081

vs.

THE CITY OF PENSACOLA, a Florida Municipal Corporation,

Defendant/Third-Party Plaintiff

vs.

GREAT SOUTHERN RESTAURANT GROUP OF PENSACOLA, INC., a Florida Corporation,

Third-Party Defendant

FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court at a duly noticed hearing on Thursday, January 7, 2016 on the parties' respective Motions[1], and the Court having considered the evidence presented and the arguments of counsel, having reviewed the written briefs of the parties, and being otherwise fully advised in the premises and finding that (i) proper and timely notice of this hearing was given to the parties; and (ii) there is no genuine issue as to any material fact appearing from the pleadings and affidavits on file and summary judgment is appropriate as a matter of law as to the issues presented, finds that:

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[1] Plaintiff, Seville Harbour, Inc.'s, Amended Motion for Partial Summary Judgment, Plaintiff/Counter-Defendant, Merrill Land, LLC's Motion for Partial Summary Judgment, Defendant/Third-Party Plaintiff, The City of Pensacola's Motion/Memorandum for Partial Summary Judgment, and Third-Party Defendant, Great Southern Restaurant Group, Inc's, Motion for Summary Judgment on the Third Party Complaint.

I. BACKGROUND AND FACTS

1. On or about September 18, 1985, Florida Sun International (FSI) and The City of Pensacola entered into the "Pitt Slip Marina Lease Agreement" ("Marina Lease")

2. The Marina Lease included two categories of property. Property owned by the City (Parcels I and III), and property leased by the City from the State (Parcel IA) pursuant to an agreement dated May 18, 1983 between the City and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida.

3. On July 25, 1990, the Historic Pensacola Preservation Board of Trustees deeded Parcel IA to The City of Pensacola.

4. The Marina Lease was assigned to South Florida Marina Investors, Inc. on or about October 21, 1996. South Florida Marina Investors, Inc. later changed its name to Seville Harbour, Inc. ("Seville Harbour").

5. On or about April 20, 2000, Seville Harbour and Merrill Land, LLC ("Merrill Land") entered into an agreement entitled "Pitt Slip Marina Sublease Agreement" ("Marina Sublease"). All parties agree that the Marina Lease and the Marina Sublease are not ambiguous. The parties disagree, however, about the nature of the Marina Sublease. Seville Harbour and Merrill Land characterize the Marina Sublease as a sublease. The City characterizes the same document as a partial (or *pro tanto*) assignment.

6. Merrill Land then entered into a Sub-Sublease Agreement ("Marina "Sub-Sublease") with Great Southern Restaurant Group of Pensacola, Inc. ("Great Southern"), which owns and operates two restaurants on the premises, the Fish House and Atlas Oyster House. Great Southern has owned and operated the Fish House on the premises since entering into the Marina Sub-Sublease Agreement and has owned and operated Atlas Oyster House on the premises since

2002.

7. Marina Management Corp., on behalf of Seville Harbour, notified the City on July 21, 2011 of Seville Harbour's renewal of the 1985 Pitt Slip Marina Lease Agreement as to "all parcels of property leased under the…lease agreement."

8. On November 15, 2013, counsel for the City of Pensacola sent a letter entitled "Notice of Default." The letter was sent to Seville Harbour and Merrill Land. The City, in its letter, claimed that Merrill Land is a "partial assignee of the Marina Lease" and stated that Seville Harbour and Merrill Land were "in default under Article III, Section B of the Marina Lease for their failure to pay to the City, as additional rent, amounts equal to five percent (5%) of the gross sales of the Fish House restaurant and the Atlas Oyster House restaurant . . . and . . . amounts equal to five percent (5%) of gross rentals (2.5% with respect to office rentals) received by Merrill Land, LLC from subleases of Parcel IA described in the Marina Lease." Id. The City also stated that, unless Seville Harbour and Merrill Land delivered the money demanded within ninety (90) days, "the City intends to declare the Marina Lease forfeited." Moreover, the City claimed that Merrill Land and Seville had been in breach of the Marina Lease for a failure to pay certain rents from April 20, 2000 to the present.

9. The Second Amended Complaint (herein "Complaint") was filed against the City by Seville Harbour and Merrill Land on or about February 11, 2015.

10. The Complaint asserts a single Count for declaratory relief seeking a judicial determination that:

a. The Sublease Agreement between Seville and Merrill Land is, as it states and as the City recognized and accepted for 13 years, a sublease, and not a partial assignment of the Marina Lease between the City and Seville;

b. That the notice of renewal of the Marina Lease was properly given, and the Marina Lease is renewed for the additional thirty (30) year term stated in the Marina Lease.

11. The Complaint does not include a request for damages against the City.

12. In response to the Complaint the City filed its Amended Answer, Counterclaim and Third-Party Complaint.

13. In its Counterclaim, the City added Third-Party Defendant Great Southern and, in addition to seeking declaratory relief, sought an accounting and damages by way of a breach of contract claim.

14. The City's breach of contract count is the only claim for damages in this case.

15. On or about March 24, 2015, Merrill Land filed its Answer and Affirmative Defenses to the City's Amended Counterclaim, asserting, among other defenses, the following:

a. Each and all of the claims and causes of action asserted by the City with the exception of those items alleged in paragraphs 10(a) (first sentence only), 10(b), and 10(c), are barred by the applicable statute of limitations.

b. Each and all of the claims and causes of action asserted by the City with the exception of those items alleged in paragraphs 10(a) (first sentence only), 10(b), and 10(c), are barred by equitable estoppel in that the actions of the City in its historical interpretation of the Marina Lease were detrimentally relied upon by Seville, Merrill Land, and Great Southern.

16. On or about December 16, 2015, Seville Harbour filed its Amended Motion for Partial Summary Judgment seeking the following determinations:

a. The Sublease between Merrill Land and Seville Harbour is a sublease, not

an assignment.

b. Gross sales factor into lease payments due from lessee only if they are from the "business enterprises of the lessee, its subsidiaries, business combinations and agents."

c. Fish House and Atlas are owned and operated by Great Southern, a sub-sub-lessee. They are, therefore, not the "business enterprises" of Seville Harbour, or its "subsidiaries, business combinations and agents."

d. Notice of Renewal of the Lease was properly given and the Lease was successfully renewed by virtue of that Notice of Renewal.

17. On or about December 18, 2015, Great Southern filed its Motion for Summary Judgment seeking a determination that Great Southern is not a "subsidiary" or "business combination" of Merrill Land.

18. On or about December 17, 2015, Merrill Land filed its Motion for Partial Summary Judgment seeking the following determinations:

a. Requests (d)-(f) of Count I of the City's Amended Counterclaim should be denied pursuant to the applicable five (5) year statute of limitations;

b. The City is estopped from asserting all of its claims of breach notwithstanding the anti-waiver clause of the Marina Lease, due to the City's acceptance of rent payments for over thirteen years, without objection;

c. The statute of limitation has run on the City's claims of breach, as the City is not seeking a debt payable by installments, but is instead seeking to define the rights and obligations of the parties under the Marina Lease and Sublease (a definition contrary to the definition applied by the City, Plaintiffs, and Third-Party

Defendant for thirteen years);

19. In support of its Motion for Partial Summary Judgment, Merrill Land cites the "Notice of Default" which included, among other claims, that:

a. For the first time, the City claimed Merrill Land was a lessee of the City, in that Seville had partially assigned its interest under the Marina Lease to Merrill Land;

b. That Merrill Land and Seville had been in breach of the Marina Lease for a failure to pay certain rents from April 20, 2000, to present.

20. The Notice of Default was the first time the City had communicated such an alleged breach to Merrill Land and Seville, and it was sent in response to Seville's request to renew the Marina Lease, in its entirety.

21. In support of its Motion for Partial Summary Judgment, Merrill Land also filed the Affidavit of J. Collier Merrill, which, among other facts, stated the following:

a. On April 20, 2000, Merrill Land, as sublessor, and Seville as lessor, entered into the Pitt Slip Marina Sublease Agreement (herein "Sublease");

b. At that time, Merrill Land intended the Sublease to be a sublease, as it is titled;

c. In turn, Merrill Land entered into a Sub-Sublease Agreement with Great Southern for a portion of the premises it was leasing from Seville;

d. Great Southern owns and operates two restaurants on the premises, the Fish House and Atlas Oyster House. Great Southern has owned and operated the Fish House on the premises since entering the Sub-Sublease Agreement, and has owned and operated Atlas Oyster House on the premises since 2002;

e. Merrill Land would not have entered the Sublease if the same was an assignment

or partial assignment;

f. At the time it entered the Sublease, it was Merrill Land's understanding the City did not consider Merrill Land to be the City's lessee. Instead, it was Merrill Land's intention, as well as its understanding, that the City considered only Seville to be the City's lessee;

g. Since entering into the Sublease with Seville, Merrill Land has made substantial improvements to the subleased property, which improvements cost Merrill Land approximately $1,580,000.00 dollars;

h. Since entering into its Sub-sublease with Merrill Land, Great Southern has made substantial improvements to the sub-subleased property, said improvements costing Great Southern approximately $4,200,000.00;

i. For thirteen years after the Sublease was entered, the City never placed Merrill Land on notice that it contended that Merrill Land was the City's lessee;

j. The City, for thirteen years, never requested that Merrill Land pay rent to the City directly, as its lessee, and instead, Merrill Land only paid rent to Seville;

k. Had the City ever indicated that it would consider the Sublease anything other than a Sublease, as it is titled, Merrill Land would not have entered the Sublease, and would not have spent millions of dollars improving the subleased property;

l. Had the City ever indicated that it would consider the Sublease anything other than a Sublease, as it is titled, Great Southern would not have entered into its Sub-Sublease with Merrill Land, and would not have spent millions of dollars improving the Sub-Subleased property;

22. On or about December 14, 2015, the City filed its Motion for Partial Summary

Judgment. Within that Motion, the City sought partial summary judgment on certain Affirmative Defenses asserted by Merrill Land, specifically, on the aforementioned affirmative defenses of the statute of limitations and equitable estoppel.

II. *PRO TANTO* ASSIGMENTS ARE PERMITTED BY FLORIDA LAW

The Court agrees with the parties that Florida law regarding *pro tanto* assignments is scant. It appears that only one Florida state court has mentioned partial assignments and that mention was in the context of a complete assignment, not a partial assignment. In C.N.H.F., Inc. v. Eagle Crest Development Co., 128 So. 844, 845 (Fla. 1930), the Florida Supreme Court explained, "An assignment by a lessee transfers his entire interest in the demised premises ***or a part thereof*** for the unexpired term of the original lease." Id. (emphasis added).

The highlighted language was not necessary to the court's decision in *Eagle Crest*. Thus, it is *dicta*; but "dicta of the highest court should be given persuasive weight by lower courts unless it is contrary to previous decisions of the highest court." State Com'n on Ethics v. Sullivan, 430 So. 2d 942 (Fla. 1st DCA 1983), Shaw, Leander J., Jr., concurring; *accord* Tall. Mem. Reg. Med. Center, Inc. v. Wells, 634 So. 2nd 655, 658 (Fla. 1st DCA 1994) (same); Horton v. Unigard Ins. Co., 355 So.2d 154, 155 (Fla. 4th DCA 1978) (same); O'Sullivan v. City of Deerfield Beach, 232 So.2d 33, 35 (Fla. 4th DCA 1970) (same); Milligan v. State, 177 So.2d 75, 76 (Fla. 2d DCA 1965) (same). In its research, this Court can find no other Florida cases contrary to the *dicta* expressed in Eagle Crest.

Not only is the language in Eagle Crest not contrary to any of the Florida Supreme Court's previous decisions, but it is consistent with the common law that has been adopted in Florida and is controlling:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned,

> down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

§ 2.01, Fla. Stat. (2015).

While no Florida case appears to have stated what the common law is with respect to partial assignments; other states have addressed the matter. *See, e.g.,* Harris v. Frank, 52 Miss. 155, 157 (1876) ("The doctrine of the common law is that, if the entire interest in different parts or parcels of the land passes by assignment to separate and distinct individuals, a covenant which runs with the land will attach on each parcel *pro tanto*."); Van Home v. Crain, 1 Paige, 435. (The assignee of each part would be answerable for his proportion of any charge upon the land, which was a common burden. Astor v. Miller, 2 Paige's Ch., 78."); Groth v. Continental Oil Co., 373 P. 2d 548, 550 (Idaho 1962) ("And at common law, a leasing by the lessee for the entire term, even at a different rent, reserving the right of re-entry for condition broken, as between landlord and sublessee, was regarded as an assignment of the term."). Further, various treatises on real property have acknowledged that tenants may assign parts of interest in leased property to one or more assignees. Griswold v. Income Properties II, 1995 WL 256756, P. 4-5 (Tenn.Ct.App. 1995)(relying upon *2 American Law of Property, supra, Section 9.6; 1 Friedman, supra, Section 7.402: Restatement (Second) of Property, Section 15.1, comment i (1976)*).

Based on the above authority, this Court finds that Florida has adopted the English common law and that the common law recognized *pro tanto* assignments. There is no Florida case abrogating the common law. Rather, a Florida Supreme Court case in *dicta* recognizes that an assignment may be for a part of the premises, and no other Florida court has expressed an opinion to the contrary. Thus, this Court finds that *pro tanto* assignments are recognized in Florida.

III. THE MARINA SUBLEASE IS A LEASE AND NOT A PARTIAL ASSIGNMENT

Given the Court's determination that *pro tanto* assignments are recognized in Florida, the Court still must determine whether indeed the Marina Sublease between Seville Harbour and Merrill Land is a partial assignment or a lease. This case illustrates the tension between the law on contracts and the law on property. In contract law, the cardinal rule in construing a contract is the intention of the parties thereto. Sound City, Inc. v. Kessler, 316 So.2d 315, 316 (Fla. 1st DCA 1975). However, when examining whether a conveyance of property is a lease or an assignment, the Eagle Crest court made clear that the interest conveyed was the determinative factor, and not the wording of an instrument. Also, based on the language of Eagle Crest, it appears the intent of the parties is not controlling either. The Court believes it must apply Eagle Crest to its decision, and examine what interest was conveyed rather than what the parties intended the interest to be.[2] [3]

The Court must apply a two-part analysis for determining whether the Marina Sublease is a partial assignment. First, the transfer would have to be of the lessee's "entire interest" as to that portion of the land that was the subject of the agreement. Estate of Basile v. Famest, 718 So.2d 892 (Fla. 4th DCA 1998). Second, the transfer of the "entire interest" would have to be for the "unexpired term of the original lease." Tollis v. Dutch Inns of America, Inc., 244 So.2d 467, 471 (Fla. 3rd DCA 1970).

The Court finds that the agreement between Seville Harbour and Merrill Land was indeed a lease, and not a partial assignment. In support of its determination, the Court finds that Seville

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[2] Interestingly, in MDS (Canada) Inc. v. Red Source Technologies, Inc., 143 So.3d 881 (Fla. 2014), the Florida Supreme Court, when analyzing whether a patent license was assigned or sublicensed, held that the intent of the parties was to govern, rather than the interest conveyed. In its decision, the Court made reference to Jaber v. Miller, 239 S.W.2d 760, 761 (Ark. 1951), which held that the determination whether real property was leased or assigned should be based upon the intent of the parties.

[3] The Court would note that the evidence presented shows that Seville Harbour and Merrill Land intended their agreement to be a sublease, rather than an assignment.

Harbour's entire interest as to that portion of the land subject to the Marina Sublease was not transferred to Merrill Land. In looking at the language of the lease, the Court notes several provisions that show Seville Harbour's entire interest in the leased property was not transferred to Merrill Land.

Section I, Part A, of the Marina Sublease defines "the property" that is the subject of the sublease; i.e., the "leasehold estate."[4] The leasehold estate in the Marina Lease consists of three parcels: I, IA, and III. The leasehold estate in the Marina Sublease consists of two parcels, IA and III. Thus, the issue is whether Seville Harbour retained any interest in Parcels IA and III.

Section I, Part B of the Marina Sublease, defines what interests in the leasehold estate were retained. It states:

> Lessor hereby retains a perpetual non-exclusive easement over and on the property described in Exhibit A, attached hereto and hereby incorporated by reference, for ingress, egress, parking, signage, utility lines (including but not limited to water, electrical, sewer, gas, telephone, cable TV, and fuel storage and delivery systems) as well as for maintenance, construction, and reconstruction of the Submerged Properties, (including but not limited to dredging operations).

Section VII of the Marina Sublease provides as follows:

> During the term of this Sublease, any renewal or extension hereof, Lessee shall permit the representatives of the City of Pensacola and the Lessor access to the Upland Properties at all reasonable times deemed necessary for the purpose of the Marina Lease.

In Eagle Crest, the Florida Supreme Court referenced the treatise "Ruling Case Law" That treatise states the following:

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[4] "Estate" is defined as "the amount, degree, nature, and quality of a person's interest in land..." A "leasehold" is defined as "[a] tenant's possessory estate in land or premises." Black's Law Dictionary (8th ed. 2004).

> "As regards the original lessor, the criterion for determining whether a transaction in the form of a lease constitutes an assignment or a sublease is whether the *entire interest* in the term is transferred, without a reversion being retained by the original lessee; and it has been said that by the word "term," as used in the statement of this principal of law, is meant something more than the *mere time* for which the lease is given; and the instrument must convey *not only the entire time* for which the lease runs, but *the entire estate or interest* conveyed by the lease..."
>
> ...
>
> Where a lessee leases a part of the premises to another, for the remainder of his term, *with easements in the other part*, this is [a sublease] and not an assignment, since to constitute an assignment by a lessee of the whole, or of a specific part of this leasehold estate, *the entire interest of the lessee in all of the premises included in the assignment must pass to the assignee*."

16 R.C.L. 825-826 (emphasis supplied)

The Court also finds Damaro Restaurant Group, LLC v. Gazette Realty Holdings, LLC, 873 N.Y.S.2d 510 (Supreme Court, Westchester County, New York, November 17, 2008) instructive. In this case, Damaro operated a restaurant owned by the Yonkers Waterfront Development Corporation. Damaro's leased property from Gazette which itself leased the property from Yonkers. Damaro contended that its agreement with Gazette was an assignment. Gazette contended that the agreement was a sublease.

The Damaro Court ultimately held that the agreement between the parties was a sublease, and not an assignment. The Court held that Gazette did not transfer its entire interest in the estate because Gazette reserved the right to enter the premises at all times during usual business hours for inspection purposes, and also reserved the right to enter the premises at any time to make repairs and improvements and to use the pipes and conduits. The Court acknowledged that the rights reserved by Gazette were small, but they were enough to defeat Damaro's claim that Gazette transferred its entire estate.

Likewise, the Court finds that Seville Harbor did not transfer its entire interest in the lease property to Merrill Land. Seville retained its rights to use the majority of the leasehold

estate in the same manner used by Merrill Land for parking. Seville also retained a perpetual non-exclusive easement for ingress, egress, parking, signage, and other utility purposes. Additionally, Seville retained the right to have access to all of the Upland Properties at all reasonable times. Whether the interest Seville retained is classified as big or small is immaterial. What is important is that Seville retained some interest, and that interest was more than simply an ability to enter the leased premises should a condition of the lease be breached. Because Seville retained an interest in the leased premises, its agreement with Merrill Land should be construed as a Sublease, rather than an Assignment.

IV. THE CITY IS NOT ENTITLED TO ADDITIONAL RENT

Even if the sublease from Seville Harbour to Merrill Land could be deemed a partial assignment, that alone is not enough to entitle the City to additional rent to account for the income generated by the Fish House and Atlas Oyster House restaurants. Instead, Paragraph 1B of the Marina Lease defines "gross sales" to include monies received from "all business conducted on or from the subject property by Lessee, its *subsidiaries* or *business combinations*, including without limiting the foregoing, all sales to subsidiaries, business combinations, employees or agents of Lessee." Second Am. Compl. at Exh. 2, pp. 3-4 *(emphasis added).* Thus, for the City to prevail, the Court would need to conclude that Great Southern is either a "business combination" or subsidiary of Merrill Land. For the reasons set forth below, the Court cannot reach those conclusions.

The Lease does not define the phrase "business combination," so the Court must give the phrase its plain and ordinary meaning. See Wheeler v. Wheeler, Erwin & Fountain, P.A., 964 So. 2d 745, 751 (Fla. 1st DCA 2007) ("[w]e are, of course, obliged to construe contract provisions according to their plain and ordinary meaning unless the agreement specifically

provides for a different meaning"). To determine the plain and ordinary meaning of terms not defined elsewhere in a contract, courts typically look to dictionaries. See Bean v. Chohonis, 740 So. 2d 65, 67 (Fla. 3d DCA 1999) ("[o]ne looks to the dictionary for the plain and ordinary meaning of words"). This is especially true here because neither Great Southern nor Merrill Land existed in 1985 when the Lease was drafted, and its principals played no role in the 1985 negotiations.

The Court finds the phrase "business combination" is a term of art that has two established meanings. First, in the world of corporate finance, a "business combination" is a combination of two or more entities for accounting purposes. See, Bryan A. Garner, Black's Law Dictionary 226 (9th ed. 2009) (defining "business combination" as "the consolidation, for accounting purposes, of a corporation and one or more incorporated or unincorporated businesses" or "[t]he two entities considered as one entity for accounting purposes"); Jack P. Friedman, Dictionary of Business and Economic Terms 81 (5th ed. 2012) (defining "business combination" as "bringing together a company and one or more incorporated or unincorporated businesses into a single accounting entity that then carries on the activities of the separate entities"). Second, in mergers and acquisitions law, a "business combination" is a "'general term used to cover the acquisition of one business by another or the consolidation of two or more businesses, whether by merger, stock sale, asset sale, or other method.'" Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1111 n.156 (Del. Ch. 2012) (quoting M & A Dictionary Task Force Committee, ABA, Dictionary of M & A Terms: Proposed Definitions 23 (Mar. 17, 2010)).

The undisputed evidence in the record confirms that the only relationship between Great Southern and Merrill Land is that of landlord and tenant pursuant to the Sub-Sublease. They are

not subsidiaries. The entities are entirely separate and distinct, and have always been controlled by a different slate of directors and managers. The entities have never merged their operations or their corporate status. Moreover, Great Southern and Merrill Land have always maintained separate books for accounting purposes, prepared separate financial statements, maintained separate tax identification numbers, and filed separate tax returns. Based upon the evidence presented, the Court finds that their relationship does not fit any definition of a "business combination", and that the entities cannot be classified as subsidiaries.

Because Great Southern and Merrill Land are entitled to summary judgment on this issue, it is not necessary for the Court to address issues of statute of limitations, laches, and estoppel.

V. THE MARINA LEASE WAS PROPERLY RENEWED AND ITS RENEWAL TERM IS 30 YEARS

On July 21, 2011, Seville Harbour, via its agent Marina Management Corp., provided a "Notice of Renewal of Pitt Slip Marina Lease Dated September 18, 1985, as amended" to the City of Pensacola ("notice of renewal"). The notice of renewal sought to renew the Marina Lease Agreement "for all parcels of property leased" under the agreement. At the hearing of this matter, the parties agreed that the "property leased" by the City to Seville Harbour was Parcel I, Parcel IA, and Parcel III. No objection was made by the City as to the form of this notice of renewal, and no demand was made by the City for a certain amount of a "lease fee" in conjunction with the renewal. Furthermore, it is undisputed, that the "Notice of Default" sent by the City on November 15, 2013, makes no mention of Seville Harbour having failed to pay a "lease fee."

The City does not dispute that if the Marina Sublease was a sublease as opposed to an assignment, the notice of renewal was effective as to Parcel I and Parcel III. However, the City maintains that the notice of renewal was not effective to renew the Marina Lease as to Parcel IA because Seville Harbour failed to pay a "lease fee" required by the Marina Lease as a condition precedent to renewal of Parcel IA.

Paragraph II.C. of the Marina Lease states in relevant part:

> The term of this Lease/Sublease for Parcel IA shall be for a period of thirty (30) years, commencing from the date that the State of Florida (through the Board of Trustees of the Internal Improvement Trust Fund) approves the sublease from the Lessor to the Lessee. Upon expiration of the thirty (30) year term, the Lease/Sublease may be renewed in successive five (5) year increments subject to the Lessee, as the sublessee, complying with all terms and conditions during the preceding lease period and upon payment of a lease fee from the Lessee to the Lessor equal to the appraised rental value as established by a fee appraisal conducted during the last year of the preceding lease term as charged to the Lessor by the state of Florida under its Lease Agreement. The Lessor and the Lessee agree to cooperate in securing renewals of the state lease.[5]

The Court disagrees with the City's position that the notice of renewal was not effective as to Parcel IA because no "lease fee" was paid or agreed upon. Under the plain language of the Marina Lease, the "lease fee" (as distinguished from lease payment) for Parcel IA was to be the amount "as charged to the Lessor by the state of Florida under its Lease Agreement." The payment of a "lease fee" by the Lessee to the City upon renewal was contingent upon a reciprocal amount ("as charged") being owed by the City to the State. It is undisputed that no amount was charged as a lease fee to the City by the State of Florida. This is because the City purchased Parcel IA from the State on June 25, 1990 and eliminated any "appraised rental value" being charged to it by the State. If no "appraised rental value" was "charged to the [City] by the state of Florida," then, under the unambiguous language of paragraph II.C., nothing was owed by

[5] Paragraph II.C. was amended by separate agreement of the parties to provide that the initial term would only be 27 years. However, the remainder of the lease terms remained intact.

Seville Harbour to the City as a "lease fee." Had the City intended to require a "lease fee" as a condition precedent for renewal even in the absence of an equal amount being charged to it by the State of Florida, the City could have bargained for such a requirement. As an example of such bargaining, the Court notes the Marina Lease required Seville Harbour to pay ad valorem taxes as required by the law. However, in the event ad valorem taxes were no longer required by law, the City bargained for payment to the City of an amount equal to the amount ad valorem taxes would have been had they been required by law. (See Section XII.C)

Under the unambiguous language of the Marina Lease, Seville Harbour was not required to pay a "lease fee" as a condition precedent to renewal because no "appraised rental value" was charged to the City by the State of Florida. Rather, the only action required by Seville Harbour to renew its lease as to Parcel IA was contained in Paragraph II.B. of the Marina Lease Agreement:

> B. This Lease Agreement may be renewed and extended for an additional thirty (30) years on the terms and. conditions contained herein. To renew and extend this lease, Lessee shall give written notice to Lessor at least one (1) year prior to the expiration of the initial thirty (30) year lease term of its desire to renew and extend the term of this lease. (emphasis supplied)

The Court finds that Seville Harbour complied with the renewal provision of the Marina Lease, thus renewing the lease for an additional 30 year period.

The Court also finds that concepts of merger of title form a basis to finds that Seville Harbour validly renewed its lease. When examining the entirety of the Marina Lease, it is clear that such lease was intended to cover Parcels I, IA, and III as a whole. Paragraphs V, VI, and XII of the Marina Lease clearly contemplate construction and improvements on all three parcels. Nowhere in the Marina Lease is there a provision that permits construction, improvements, or uses on one particular parcel, and excludes these acts on another parcel. It is evident to the Court

that the purpose of Paragraph II.C was to take into account that the City did not own Parcel IA at the time the Marina Lease was executed, but rather the State of Florida. This paragraph contemplated the State of Florida being an active participant in the renewal process, as well as establishing lease fees and conducting fee appraisals. Once the City became the owner of Parcel 1A, though, there was no purpose for Paragraph II.C.

Once the City purchased Parcel IA from the State of Florida, its leasehold estate in Parcel IA was merged into the greater estate. Walter J. Dolan Properties v. Vonnegut, 184 So.757, 762 (Fla. 1938). That merger resulted in the extinguishment of the leasehold estate held by the City, and effectively converted the sub-leasehold estate of Seville Harbour into a leasehold estate similar to that held by Seville Harbour in Parcels I and III. See, Whiteside v. Sherman, 122 So. 2d 799, 803 (Fla. 2^{d} DCA 1960) (holding that "[u]nder the common-law definition...merger is the absorption of one estate in another, where a greater estate and a less coincide and meet in one and the same person...whereby the less is immediately merged or absorbed in the greater); See also, 49 Am. Jur.2d Landlord and Tenant §195. Consequently, the doctrine of merger of title operates as a separate and independent basis to find that Seville Harbour was not required to pay a lease fee as a condition precedent to renew its lease as to Parcel IA.

The City argues, in the alternative, that, even if the lease as to Parcel IA was properly renewed, it may only be renewed for two successive 5-year periods – i.e. until October 17, 2022. The purported rationale for that argument is that successive five (5) year renewals would make the lease as to Parcel IA perpetual, and the law does not favor perpetual leases. This argument fails legally and factually. It fails legally because Florida courts will recognize a perpetually-renewing lease when that is the clear intent of the parties. See, e.g., Ward v. Brown, 919 So. 2d 462 (Fla. 1st DCA 2005), and Accardo v. Brown, 139 So. 3d 848 (Fla. 2014) (stating that a

perpetually renewing lease is not a lease, but is a conveyance with reservation of rents). Those courts rejected the argument that perpetual leases are not recognized in Florida.

The "perpetual lease" argument fails factually as the plain language in Paragraph II.B of the Marina Lease Agreement limits the renewals to "an additional thirty (30) years. The Marina Lease makes it clear that the sublease of Parcel IA was intended to run concurrent with the remaining portions of the lease. Therefore, Paragraph II.C. must be read in conjunction with Paragraph II.B. It is clear to the Court that the language of Paragraph II.C. must be read to provide for renewal up to 30 years from the end of the original term. To read the Marina Lease Agreement otherwise, as the City requests, would require ignoring the intent of the parties manifested in Paragraph II.B, and would thus violate the rules of contract construction as discussed above. Courts are to construe leases giving effect to all terms to carry out the intent as reflected in the document, and are not to interpret leases to reach an absurd result, or one that frustrates the clear intent of the parties as reflected in the document when read as a whole. Am. Employers' Ins. Co. v. Taylor, 476 So. 2d 281, 284 (Fla. 1st DCA 1985) cause dismissed, 485 So. 2d 426 (Fla. 1985) (holding that the interpretation which provides the more reasonable and probable contract should be adopted and a construction leading to an absurd result should be avoided.)

The City cites multiple cases on the issue of perpetual renewals and the proper way to interpret a lease that provides for renewal in successive five-year increments. However, all of those cases are distinguishable because, unlike this case, none involve contract language in which the parties established within the four-corners of the lease a limited duration for the lease. The parties clearly limited the number of 5-year renewals intended by stating in Paragraph II.B. that the "Lease Agreement," a defined term that includes Parcel IA, is renewable for "an

additional thirty (30) years." Because the five (5) year incremental renewals for Parcel IA are clearly limited to the 30-year renewal period for the Marina Lease, the City's attempt to limit the renewal period to two 5-year terms fails under the unambiguous language of that agreement.

For reasons stated earlier in this order, the merger of title doctrine also provides separate and independent basis for finding the lease of Parcel IA renewable for an additional 30-year period. The plain language of the Marina Sublease, as amended, demonstrates that the five-year renewals for Parcel IA are directly linked to Seville Harbour's interest in Parcel IA being a sub-leasehold interest subject to the renewal provisions of the lease between the City and the State.[6] Now that the City no longer leases Parcel 1A from the State there is no reason for Paragraph II.C to apply. It was intended to address matters that were relevant when the State owned Parcel IA. Under the merger-of-title doctrine, the 1990 purchase of Parcel IA by the City resulted in the extinguishment of the leasehold estate held by the City, and effectively converted the sub-leasehold estate of Seville Harbour in Parcel IA into a leasehold estate similar to that held by Seville Harbour in Parcels I and III which were held for an initial 30 year term renewable for one additional 30 year period. Accordingly, the renewal period for Parcel IA was effective to renew that parcel for an additional 30 year period along with Parcels I and III.

It is, therefore,

ORDERED AND ADJUDGED that

1. The Amended Motion for Partial Summary Judgment filed by Seville Harbour, Inc., Motion for Partial Summary Judgment filed by Merrill Land, LLC and Motion for Summary

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[6] The Amendment states in relevant part:

WHEREAS Lessor and Lessee desire to amend a particular provision of the aforesaid Pitt Slip Marina Lease Agreement *in order to conform the term of the agreement to the term of that certain Lease Agreement,* dated May 18, 1983 between Lessor and the Board of Trustees of the Internal Improvement Trust Fund of the state of Florida for a portion of the Pitt Slip property... (emphasis supplied)

Judgment on the Third Party Complaint filed by Great Southern Restaurant Group of Pensacola, Inc. are GRANTED, except to the issues of statute of limitations, laches, and estoppel which are rendered moot.

2. The Motion/Memorandum for Partial Summary Judgment by the Defendant, City of Pensacola, is DENIED.

3. The Court reserves jurisdiction as to all issues relating to attorney's fees and costs.

WHEREFORE the Court enters Final Summary Judgment against Defendant, The City of Pensacola, and in favor of Seville Harbour, Inc., Merrill Land, LLC, and Great Southern Restaurant Group of Pensacola, Inc.

DONE AND ORDERED this 1st day of April, 2016, in Chambers in Pensacola, Escambia County, Florida.

Honorable J. SCOTT DUNCAN
Circuit Court Judge

Conformed Copies sent to:

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CERTIFICATE OF SERVICE

The undersigned deputy clerk hereby certifies that he/she delivered a true and correct copy of the foregoing via email to those listed herein on the e-service distribution list. The attorney who submitted the proposed order is responsible for distribution of the order to any party who is not on the e-service distribution list.

Witness my hand and seal of the court on this ___ day of _____, 2016, as Clerk of the Circuit Court.

Pam Childers
Clerk of the Circuit Court

BY:_____