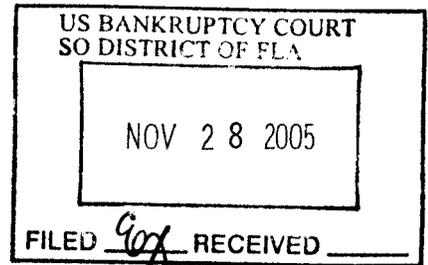


ORDERED in the Southern District of Florida on Nov. 28, 2005



*Paul Hyman*

Paul G. Hyman, Judge  
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
[www.flsb.uscourts.gov](http://www.flsb.uscourts.gov)

IN RE:

Case No.: 03-31953-BKC-PGH  
Chapter 11

Lake Worth Generation LLC,  
Debtor.

MEMORANDUM OPINION DENYING PALM BEACH COUNTY'S MOTION FOR SUMMARY JUDGMENT AND DENYING LIQUIDATING TRUSTEE'S CROSS-MOTION FOR SUMMARY JUDGMENT

**THIS MATTER** came before the Court on September 27, 2005 upon Palm Beach County's (the "County") *Motion for Finding of Entitlement to Payment of Corrected and Back Taxes from Proceeds of Sale of Debtor's Assets; Motion for Summary Judgment; and Incorporated Memorandum of Law* (the "Motion"). On November 7, 2005, Joseph F. Luzinski, not individually but as liquidating trustee, (the "Liquidating Trustee") filed *Liquidating Trustee's (I) Response in Opposition to Palm Beach County's Motion for Finding of Entitlement to Payment of Corrected and Back Taxes*

*from Proceeds of Sale of Debtor's Assets; Motion for Summary Judgment; and Incorporated Memorandum of Law; and (II) Cross-Motion for Summary Judgment (the "Cross-Motion"). On November 18, 2005, the County filed its Reply to Liquidating Trustee's (I) Response in Opposition to Palm Beach County's Motion for Finding of Entitlement to Payment of Corrected and Back Taxes from Proceeds of Sale of Debtor's Assets; Motion for Summary Judgment; and Incorporated Memorandum of Law; and (II) Cross-Motion for Summary Judgment (the "Reply"). Pursuant to the Court's Order Setting Deadline for Submission of Joint Stipulation of Facts in Connection with Palm Beach County's Motion for Summary Judgment, the County and the Liquidating Trustee filed a Joint Stipulation of Facts in Connection with Palm Beach County's Motion for Summary Judgment (the "Joint Stipulation") on November 18, 2005.*

**BACKGROUND**<sup>1</sup>

Article VII, Section 3 of the Florida Constitution, and

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<sup>1</sup> The Joint Stipulation establishes that:

a. A true and correct copy of the Debtor's application for an ad valorem tax exemption is attached as Exhibit "A" to Palm Beach County Ordinance 2000-017 which is attached as Exhibit "1" to the Affidavit of Kevin Johns which is attached as Exhibit "A" to the County's Motion;

b. A true and correct copy of Debtor's 2003 Annual Report is attached as Exhibit "2" to the Affidavit of Kevin Johns which is attached as Exhibit "A" to the County's Motion; and

c. A true and correct copy of the transcript of the October 29 2004 hearing is attached as Exhibit "E" to the Trustee's Response to COUNTY'S Motion.

The information in the "Background" section of this Order is taken from the Joint Stipulation, and the true and correct copies of the above-listed documents.

Florida Statutes §§ 196.012 and 196.1995 authorize counties to establish programs to grant "economic development ad valorem tax exemptions" whereby a county can grant and continue an exemption from ad valorem taxes to a new (or expanding) business which agrees to create 25 jobs or 10 industrial or manufacturing jobs. Pursuant to Palm Beach County Code Article VII, §§ 17-252 - 17-261 (replacing Palm Beach County Ordinance 94-21, §§ 1-11, as amended by Ordinance 95-4 §§ 1-5), the County established such a program which is administered by the County's Economic Development Office.

In 2000, Lake Worth Generation, LLC, (the "Debtor") applied for an economic development ad valorem tax exemption. On May 16, 2000, the Board of the County Commissioners of Palm Beach County (the "County Commissioners") enacted Palm Beach County Ordinance 2000-017 (Ord. 2000-017), wherein the Debtor was granted an ad valorem tax exemption on the Debtor's tangible property including the wholesale electric generating facility which was to be constructed.

Ord. 2000-017 provided for, among other things, a requirement that the Debtor file an annual report no later than March 1 of each year that the exemption was desired. In April, 2002, Debtor suspended construction of its generator project, and began marketing its incomplete generation facility. On or about February 19, 2003, Debtor submitted its 2003 Annual Report

which stated that the Debtor "will create 13 full time positions and help to preserve the remaining 21 positions at Smith Generation Facility."

On April 16, 2003, the Debtor commenced this case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor scheduled the Tax Collector of Palm Beach County (the "Tax Collector") as a creditor. However, the Debtor did not schedule the County as a creditor in its schedules and the County was not listed on the Court's matrix. Thereafter, the County did not file a proof of claim in the Debtor's case, nor did it seek an extension of time to file a proof of claim.

On May 18, 2004, the County Commissioners enacted Ordinance 2004-012 ("Ord. 2004-012") revoking the Debtor's ad valorem tax exemption effective December 31, 2004. The County had actual knowledge that the Debtor had commenced this bankruptcy case as of May 18, 2004.

On August 11, 2004, the Debtor filed and served copies of its Amended Joint Disclosure Statement in Connection with Amended Joint Plan of Liquidation (the "Disclosure Statement") and Amended Joint Plan of Reorganization (the "Plan"). No copy of the Disclosure Statement nor the Plan were served on the County.

On August 16, 2004, the Debtor filed its *Motion to*

*Determine Tax Liability Pursuant to 11 U.S.C. §§ 105(a) and 505.* The Tax Collector filed a *Motion to Dismiss Debtors' Motion to Determine Tax Liability Pursuant to 11 U.S.C. §§ 105(a) and 505 and Motion to Abstain*, wherein the Tax Collector argued that he should not be compelled to submit to the jurisdiction of the Bankruptcy Court for determination and payment of the amount of outstanding property taxes due. The Court heard argument on this matter on October 29, 2004 (the "October 29, 2004 Hearing"). The Tax Collector appeared at the hearing through its counsel, Mr. Hanlon, and the Palm Beach County Property Appraiser (the "Property Appraiser") appeared through its counsel, Mr. Wood.<sup>2</sup>

The County filed its *Joinder in Palm Beach County Tax Collector's Objection to Confirmation of Joint Chapter 11 Plan Liquidation and Objection to Disclosure Statement, Supplemental Statement of Additional Facts in Support of Objections and Motion for Continuance of Hearing on Disclosure Statement and Proposed Plan Confirmation* (the "Joinder") on December 3, 2004. The Court conducted a hearing to consider confirmation of the Plan on December 6, 2004 (the "Confirmation Hearing"). The County appeared at the Confirmation Hearing through its counsel, and objected to confirmation of the Plan. The Debtor was

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<sup>2</sup> On December 9, 2004, the Court entered an Order and Opinion Denying Palm Beach County Tax Collector's Motion to Dismiss Debtor's \$ 505 Motion, In re Lake Worth Generation, LLC, 318 B.R. 894 (Bankr. S.D. Fla. 2004) (the "Jurisdiction Order"). The Jurisdiction Order determined only that this Court had appropriate jurisdiction to determine the Debtor's tax liability.

advised, in writing by the County's Joinder, and orally by Counsel for the Tax Collector, that the County would seek to revoke the ad valorem tax exemption for the years 2003 and 2004. As a condition of Plan confirmation, the Court required the Debtor to escrow or reserve sufficient funds to pay the full amount of the corrected and back taxes relating to the proposed revocation of Debtor's ad valorem tax exemption.

On December 6, 2004, the Court signed an *Order (I) Approving Amended Joint Disclosure Statement, and (II) Confirming Amended Joint Chapter 11 Plan of Liquidation Proposed by the Official Committee of Unsecured Creditors of Lake Worth Generation, LLC, and Lake Worth Generation, LLC* (the "Confirmation Order"). The effective date of the Plan was December 20, 2004.

On December 21, 2004, the County Commissioners enacted Palm Beach County Ordinance 2004-074 ("Ord. 2004-074") revoking the Debtor's ad valorem tax exemption effective as of December 31, 2002. Section 4 of Ord. 2004-074, entitled "Repeal of Laws in Conflict," provided that "[a]ll local laws and ordinances in conflict with any provisions of this Ordinance are hereby repealed to the extent of such conflict."

In conformity with the County's revocation of the Debtor's exemption from ad valorem taxes, the Property Appraiser, through counsel, notified Debtor, through its counsel, of his intent to correct the tax rolls for 2004 and to assess the property for

2003 back taxes. The Property Appraiser did this in correspondence dated February 17, 2005. The Debtor was provided with a form for a petition to the Palm Beach County Value Adjustment Board and the Debtor was notified of its right to file a petition. The Debtor did not file such a petition. The Property Appraiser issued a certificate of correction for 2004 taxes and assessed 2003 back taxes. Pursuant to 12D-8.021 of the Florida Administrative Code, the 2004 tax roll was corrected and the 2003 taxes back-assessed on March 28, 2005.

#### **CONCLUSIONS OF LAW**

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. §157(b)(2)(O).

#### ***Summary Judgment***

Federal Rule of Civil Procedure 56(c), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056(c), provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Rice v.*

*Braniger Org., Inc.*, 922 F.2d 788 (11th Cir. 1991); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir. 1987); *In re Pierre*, 198 B.R. 389 (Bankr. S.D. Fla. 1996). Rule 56 is based upon the principle that if the court is made aware of the absence of genuine issues of material fact, the court should, upon motion, promptly adjudicate the legal questions which remain and terminate the case, thus avoiding the delay and expense associated with a trial. See *United States v. Feinstein*, 717 F. Supp. 1552 (S.D. Fla. 1989).

In considering a motion for summary judgment, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987) (citing *Anderson*, 477 U.S. at 248). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citing Fed R. Civ. P. 1). "Summary judgment is appropriate when, after drawing all reasonable inference in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the

non-moving party." *Murray v. National Broad. Co.*, 844 F.2d 988, 992 (2d Cir. 1988).

The Court finds that entry of summary judgment is inappropriate based on the existence of disputed issues of material fact in this matter.

***The Motion and the Cross-Motion's Arguments for Summary Judgment***

1. *Debtor's Alleged Knowing Misrepresentations*

The County seeks a summary determination that it is entitled to payment of "back" ad valorem taxes for 2003 and corrected ad valorem taxes for 2004 from the proceeds of the sale of the Debtor's assets, based upon the Debtor's knowing misrepresentations about its ability to create jobs.<sup>3</sup> The County argues that it continued the Debtor's tax exemption in reliance upon the Debtor's 2003 Annual Report wherein the Debtor certified to the County that it was creating 13 jobs and preserving 21 jobs. The County maintains that the 2003 Annual Report's representations regarding job creation and job preservation cannot be reconciled with the pleadings in this case that show that the Debtor discontinued construction of the generation plant in 2002 due to a lack of financing. The County alleges that the Debtor knowingly misrepresented the Debtor's

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<sup>3</sup> In the alternative, the County seeks payment of the subject taxes as a first priority administrative expense. The County's Motion however does not address its entitlement to payment of the subject taxes as a first priority administrative claim. Accordingly, the Court does not rule on the alternative relief sought by the County.

eligibility for the tax exemption for 2003 and 2004 because it would have been impossible for the Debtor to create the required jobs after the Debtor ceased construction of the generation plant in April 2002.

The County further represents that it was not until the County hired bankruptcy counsel in November 2004, that it became aware of the Debtor's inability as early as 2002, to have fulfilled the job creation and preservation requirements to maintain the exemption. Accordingly, on December 21, 2004, the County Commissioners enacted Ord. 2004-074 revoking the Debtor's ad valorem tax exemption effective as of December 31, 2002.

The Debtor's Response argues that the Debtor never intended to make, nor did it, make "knowing misrepresentations" to the County. The Debtor maintains its intention was, and continued to be, completion of the project and creation of additional jobs and preservation of existing jobs despite the collapse of its financing. The Debtor's Response states that it endeavored to sell the project as a going concern which would have facilitated the ultimate creation of jobs. The Debtor represents that it was not until December 2003, that it became clear that the Debtor would not be able to develop the project itself nor sell the project as a going concern.

The Court finds that the issue of whether or not the Debtor made knowing misrepresentations in an effort to keep a tax

exemption to which it may not have been entitled is a disputed issue of material fact. Issues involving knowledge and intent are almost inevitably questions of fact that cannot be properly resolved through summary judgment motions. See e.g. *DeRossi v. Rubinstein*, 650 N.Y.S.2d 10 (1st Dept. 1996). Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences are jury functions. Summary judgment "by no means authorizes trial by affidavits." *Anderson*, 477 U.S. at 254. Based upon the existence of this triable issue of material fact, the Court denies the County's Motion.

2. *The Post-Confirmation Injunction*

Debtor's Cross Motion argues that through Ord. 2004-074, which was enacted on December 21, 2004 and effective on December 28, 2004, the County is attempting to collect on a claim against the Debtor that arose after the Confirmation Order and as such the County's actions violate section 20.1 of the Plan which states:

[O]n and after the Confirmation Date, every holder of a Claim or Equity Interest shall be precluded and permanently enjoined from asserting against the Debtor, the Liquidating Trustee, the officers and directors of the Liquidating Trustee, the Post-Confirmation Committee, the respective professionals retained by the Debtor, the Liquidating Debtor, the Liquidating Trustee, the Post-Confirmation Committee .., or their respective assets or properties, any further claim based upon any document, instrument, judgment, award act, omissions, transaction, or other activity of any kind or nature that occurred prior to the Confirmation Date. (the "Confirmation Injunction").

The Debtor argues that the County not having asserted its claim prior to Plan Confirmation, is barred from doing so now. The Debtor also points out that the County did not appeal the Confirmation Order.

While a confirmed plan of reorganization is generally binding upon every entity with a prepetition claim against a debtor, the due process rights guaranteed by the Fifth Amendment limit the reach of 11 U.S.C. § 1141.<sup>4</sup> *Gencor Indus. v. CMI Terex Corp. (In re Gencor)*, 298 B.R. 902, 914 (Bankr. M.D. Fla. 2003). "The minimal notice required by the Fifth Amendment before a creditor's rights are adversely affected is not rigidly defined but depends upon the circumstances of the case." *Id.*

The Liquidating Trustee's Response cites *Gencor* as authority for the following proposition: "[A] creditor that received all relevant notices of deadlines but that nevertheless failed to file a proof of claim, was barred by discharge under the plan." (Response ¶ 17.) Unlike *Gencor*, in this matter there is a disputed issue of material fact as to whether or not the County received adequate notice. The Debtor and the Liquidating Trustee stipulated that although the Debtor scheduled the Tax Collector as a creditor, the Debtor did not schedule the County as a creditor, nor did it list the County on the Court's matrix. The parties further

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<sup>4</sup> 11 U.S.C. §1141 lists the effects of confirmation of a chapter 11 plan under the Bankruptcy Code.

stipulated that the County was not served with a copy of either the Disclosure Statement or of the Plan. The Liquidating Trustee's Response states that the Confirmation Order was served on all creditors, including the Tax Collector, the Property Appraiser, and the County's counsel. (Response ¶ 12.) However, the County's Reply maintains that neither its counsel nor the County itself was served with the Confirmation Order. (Reply at 5.) The Court notes that the Tax Collector, the Property Appraiser, and the County are different entities with different functions, and that each one has been represented by separate counsel in this matter. A cursory review reveals that the County's counsel, Mr. Balmuth, was not on the service list for the Confirmation Order. (Response Exhibit "3". ) The disputed factual issue of whether or not the County received adequate notice precludes entry of summary judgment.

### 3. *Judicial Estoppel*

The Debtor also maintains that the County is judicially estopped from assessing the alleged tax liability based upon the following excerpt from the October 29, 2004 Hearing transcript:

Mr. Hutton: Your Honor, without prejudice, I would say there has been a change since the last hearing. Mr. Wood is recently retained as counsel for Palm Beach County Property Appraiser.....the whole entire reason that the Confirmation Hearing was put off for a month now is because of a concern raised by the Tax Collector that as a result of a certain revocation of exemption that we learned about a couple of days before the last hearing, that there could be a back assessment. Since Mr. Gaylord Wood has come in to the case he's confirmed the Property Appraiser's position and we had a chance to look at the ordinance, which doesn't become effective until Dec. 31,

2004, and I think that Mr. Gaylord Wood has confirmed that the property appraiser is not going to seek back assessment.

Mr. Wood: That's correct, Your Honor.

The Debtor argues that the doctrine of judicial estoppel precludes the County from pursuing a claim that the County, through the Property Appraiser, waived on the record. However, Mr. Wood's affidavit states:

Prior to the hearing on October 29, 2004, I had not seen Ordinance No. 2004-74 of the Palm Beach County Board of County Commissioners. I had been advised that effective December 31, 2004, Palm Beach County was terminating the economic development exemption for Lake Worth Generation, LLC. When I responded to the observation of Mr. Hutton that the Property Appraiser's office was not seeking back assessment, I was only contemplating the increase of value permitted under §193.092, F.S. If the County determines to revoke an economic development exemption, this is not a decision made by the Property Appraiser's office, which is only acting in a ministerial capacity to extend the tax rolls.

Reply Exhibit "C": Aff. Gaylord A. Wood, Jr. Esq.

The Court has already noted that the Property Appraiser, the Tax Collector, and the County are separate entities each represented by separate counsel in this matter. Mr. Wood represents the Property Appraiser. Mr. Wood's affidavit states that his statement at the October 29, 2004 Hearing referred only to whether or not the Property Appraiser would seek a back assessment for an increase in value of the property. According to Mr. Wood, the decision to revoke the economic development exemption would be a decision made by the County rather than by the Property Appraiser. It appears that the Property Appraiser is not able to,

and did not intend to, waive the County's right to revoke the ad valorem tax exemption. "Judicial estoppel 'is an equitable doctrine invoked by a court at its discretion'". *New Hampshire v. Maine*, 532 U.S. 742,750 (2001) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). The Court finds that the requirements for invocation of judicial estoppel are not met here.

### CONCLUSION

For the reasons stated above, the Court finds that neither the County in its Motion, nor the Liquidating Trustee in his Cross-Motion, has met their burden for entry of summary judgment. The existence of disputed issues of material fact require that this matter proceed to trial.

### ORDER

The Court, having considered the County's Motion, the Liquidating Trustee's Cross-Motion, the County's Reply, the Joint Stipulation, the applicable law, and being otherwise fully advised in the premises, hereby **ORDERS AND ADJUDGES** that:

1. The County's Motion is **DENIED**.
2. The Liquidating Trustee's Cross-Motion is **DENIED**.

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Copies Furnished To:

fax  
11/28  
JS.

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Attorney Guso is directed to serve a copy of this order by fax or e-mail on all parties in interest.