THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

APPELLATE CASE NO. 2012-213389

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56 Leinbach Investors, LLC..Appellant/Respondent,

vs.

Magnolia Paradigm, Inc.. Respondent/Appellant.

REPLY BRIEF OF RESPONDENT/APPELLANT

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Respondent/Appellant Magnolia Paradigm, Inc. (hereinafter "Magnolia") respectfully submits the following Brief in Reply to Leinbach's Initial Respondents Brief.

ARGUMENT I

THE MASTER ERRED IN CONSIDERING THE SITE PLANS IN HIS INTERPRETATION OF THE LEASE

The Master correctly found at Page 4, Paragraph 12 of the Order "based on the Court's review of the Lease itself and hearing the testimony of the Plaintiff and Defendant's witnesses and, in particular, Mr. Carnevale, who is Plaintiff's real estate agent at the time, the Court finds that Section 1.01 of the Lease entitles "demised premises" describes the demised premises as the entire 1.21 acre parcel shown on the plat at Plat Book DB, Page 47" (Exhibit 10) (R.p. 006).

Having made this finding, Magnolia asserts that description unambiguously describes the demised premises as the entire 1.21 acre parcel. To allow evidence that would reduce the size of the "demised premises" based on matters outside of the four corners of the lease, is clearly erroneous.

In addition to the foregoing, the Lease contains an integration clause. Section 14.13. Entire Agreement Representations. States "This Lease embodies the entire agreement between the Landlord and Tenant with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral. Landlord and Tenant have neither made or relied upon any promises, representations or warranties in connection with this Lease that are not expressly set forth in this Lease. In entering into this Lease, Landlord and Tenant have relied on the representations and warranties contained in this Lease" (R.p. 210).

This integration clause should have been a further basis for the Court's not considering the plans for the proposed parking lot on the subject premises.

A. THE DEMISED PREMISES IS THE ENTIRE 1.21 ACRE PARCEL, THERE IS NO "PARKING AREA" WITHIN THE DEMISED PREMISES

The plans for the use of the subject property were given to Leinbach in accordance with Section 5.01 Construction of the Demised Premises. Which states "any improvements on the demised premises will be constructed by Tenant, at Tenant's sole cost and expense. Tenant's plans and specifications for the improvements must first receive written approval by the Landlord" (R.p. 192). Thus the plans which were given to the Landlord were given in accordance with Section 5.01 of the Lease.

Had Leinbach wished to reduce the size of the demised premises or considered the demised premises to be the site plan prepared by LS3P, it clearly could have done so. In Mr. Carnevale's testimony, he testified:

Q. Y'all prepared the lease, okay.

At the time of the preparation of the proposal to lease and the execution of the lease, was there any question that Mr. Baker's company was going to acquire the entire 1.2 acre parcel?

A. No question in my mind.

Q. Were they restricted? Could the use the entire parcel for parking, or were they restricted to just use a part of the parcel for parking?

A. Didn't make any difference to us.

Q. Didn't make any difference?

A. They were leasing it. Whatever they could do with it was fine as long as it was legal.

Q. As long as they paid the rent?

A. Right (R.p. 150, line 15, p151, line 4).

BY MR. WILLIAM BARR:

Q. The exhibit that Mr. Howe has just shown you, did you consider this parking lot layout a restriction on the area of the parking or the area that they could use?

MR. HOWE: Objection; relevance.

THE COURT: I'm going to allow it. Go ahead.

THE WITNESS: I looked at it, and it really didn't concern us. Didn't concern me. If they were happy with what they got, that was fine with us, you know. We were just glad that they were able to get approval so that they would lease it (R.p. 153, line 16, p154, line 2).

Based on the foregoing and the fact that the Lease unambiguously describes the parcel as the entire 1.2 acre parcel and the fact that the plan for construction of the parking on the subject site was prepared prior to the execution of the Lease but never incorporated into the Lease, it was error for the Court to consider it and to make references to the "parking area within the demised premises".

Parking is merely the "use" that the property is utilized for.

B. **THE CONSTRUCTION OF THE PARKING LOT ON THE DEMISED PREMISES DID NOT "EXEMPT" ITS SUBSEQUENT USE BY MAGNOLIA IN THE AREA WHERE THE TOWER WAS BUILT**. This argument is tantamount to

stating that Magnolia had abandoned the area upon which the cell tower was built. This was clearly erroneous and was argued in the Magnolia's Appellant's Brief.

Clearly Magnolia did not construct parking in the area which was ultimately leased to the tower company, however, there was never any indication that it "exempted" it from its use nor abandoned it to the Landlord.

Regardless of the fact that Magnolia was or was not using the area upon which the cell tower was built, it still was, nonetheless, part of the demised premises. Unless Leinbach can show that Magnolia abandoned that property in favor of the Landlord and explicitly or implicitly granted to the Landlord the ability to re-let that portion to another tenant, then Leinbach's argument must fail.

Mr. Hiers testified:

Q. What I'm asking you, in the Lease itself, is there a reservation that you could utilize unused portions of parcel H2 for your future development?

A. I do not believe so.

Q. When it was pointed out to you in 2007 that the Optima Tower was on parcel H2 did that come as a surprise to you?

A. Yes sir it did.

Q. My next question is: did you make a mistake here, or did you intentionally do what you did?

A. Mr. Barr, there was no intention on my part to attempt to make a mistake or to defraud Mr. Baker... (R.p. 105, lines 4-17)

This argument goes to the root of the problem as argued in Magnolia's Appellant's Brief. That is, the rights to the subject property, the entire 1.2 acres belongs

to Magnolia for the period of the Lease. Unless the Landlord can show some explicit or implicit right to re-let the property to another tenant, then for the entire demised term, the property belongs to Magnolia as well as all rights and incidents of ownership for the entire demised term.

ARGUMENT II

THE MASTER ERRED IN REFORMING THE LEASE BETWEEN THE PARTIES

It appears that Leinbach agrees with the proposition that the Master erred in reforming the Lease between the parties, however, he argues that Leinbach never breached the Lease with Magnolia.

Common sense and logic will tell you that if Leinbach leases 1.21 acres to Magnolia for a period of years and then leases a portion of that same property to another tenant, then Leinbach has breached the Lease, and the Master so found. (R.p. 009, para 21)

This is not a case where Leinbach intentionally took a portion of the property that was not being used by Magnolia and leased it to a third party. This is a matter where Leinbach did this inadvertently and has come back and tried to excuse its default through a contorted interpretation of the Lease. Leinbach argues that he did not make a "legal mistake". There are mistakes of law and mistakes of fact. Leinbach made a unilateral mistake of fact and unilateral mistake of fact does not allow the reformation of the Lease. The breach of the Lease need not have been intentional. It could have been inadvertent which is the case here. Nonetheless, it still is a breach of the Lease to lease a property to two different people.

Mr. Hiers testified at several places that he had made a mistake.

Q. My next question is: did you make a mistake here, or did you intentionally do what you did?

A. Mr. Barr, there was no intention on my part to make a mistake to defraud Mr. Baker.... (R.p. 105, lines 12-17)

Q. It's fair to state then that you made this unilateral mistake and leased out a portion of the property that you had previously leased to Mr. Baker to Optima Towers?

A. Clearly that is why we're in Court today. (R.p.106, lines 16-25)

Q. You subsequently made a mistake and you leased a portion of that property to Optima Towers?

A. It clearly was an inadvertent mistake. (R.p. 117, lines 16-18)

Q. You still made a mistake right?

A. I made an inadvertent mistake. (R.p. 120, lines 14-15)

Q. The bottom line here, Mr. Hiers, you made a mistake, and you leased out a single piece of property to two people?

A. We have never denied that the parcel has been inadvertently leased to two people.... (R.p. 128, lines 1-5)

Leinbach, in this same argument, argues that Magnolia was only nominally damaged. This is not the position that Magnolia has taken in its Appellant's Brief. Magnolia asserts that it is the "owner of the subject property for the full term of the Lease". Inasmuch as it is the owner of the subject property for the term of the Lease, then it is entitled to all rights and incidents of ownership thereto as argued in its Appellant's Brief, including the right to receive lease payments from what in actuality is a sub-tenant, Optima Towers. Magnolia's retention of the lease payments from Optima

does not damage Leinbach. Leinbach still receives the full benefit of the lease payments it bargained for from the terms of the lease, part from Magnolia and part from Optima Towers.

Mr. Hiers testified:

Q. And you bargained for $21,600.00 per year in the first three years and then 3 percent increases on parcel H2 for the next 20 years. And now you're getting, based over the same period of time, now you're getting $207,000.00 or $14,000.00 more year-to-date than what you originally bargained for?

A. I agree with the calculation. (R.p. 128, lines 10-16)

ARGUMENT III

THE MASTER ERRED IN FINDING A BREACH OF THE CONTRACT BY MAGNOLIA.

As argued in its Appellant's Brief, Magnolia asserts that to exercise a remedy that was clearly allowed under the terms of the Lease should not have been considered a breach. The Master found that the abatement was excessive and therefore Magnolia breached the Lease. Magnolia asserts that the excessiveness of its abatement, if any, which it denies, would go to the issue of damages and not to the breach of the Lease.

Leinbach further argues that it did not substantially interfere with the normal use of the demised premises or appurtenant parking or services. Clearly the language of this particular sentence contemplated two different areas, the demised premises or parking appurtenant to the demised premises. In this case there is no "appurtenant parking" because the demised premises sole use is for parking. Constructing a tower on a portion of the demised premises completely ejects Magnolia from that area of the subject

property and the Master so found. (Para 22, p. 7) (R.p. 009) Clearly that is a substantial interference with the normal use of the demised premises.

Again, the issue is, as between the Landlord and the Tenant, Leinbach and Magnolia, who is entitled to the rent payments from Optima Towers. As previously argued, clearly those property rights belong to Magnolia.

ARGUMENT IV

THE MASTER'S REMEDY WAS IN ERROR.

A. IT WAS ERROR FOR THE COURT TO ALLOW LEINBACH RECOVERY UNDER ITS THEORY OF UNJUST ENRICHMENT.

Responding to some specific points in the Respondent's Brief of Leinbach, Leinbach asserts that the Court correctly reviewed the evidence in the record and "concluded that the right of Magnolia in the wooded area had no value". Clearly the value of that particular portion of the property does have value and that value is the income stream being derived from that site from Optima Towers. If that particular area had no value, this action would not be pending. Magnolia asserted that a leasehold interest is a valuable property right, not as a matter of fact but as a matter of law. Therefore, there are no references to the record to be made. Clearly, however, as a matter of fact, the area does have value as evidenced by the erection of the cell tower on that area and the income stream being derived therefrom.

In order for Leinbach to recover under its theory of unjust enrichment, the alleged enrichment to Magnolia would have had to have been at the expense of Leinbach. In order to establish this key element of the cause of action, Leinbach would have to establish that it has been damaged by Magnolia's abatement of the rent. As argued in its Appellant's Brief and is argued in this Reply Brief, Leinbach has not been damaged.

Leinbach continues to receive the full value from the demised premises for the full term allbeit from two sources, that is, Magnolia and Optima Towers.

Leinbach asserts that it is entitled to the income stream from Optima due to a contract that Magnolia is not even a party. This argument avoids the issue that Optima Towers is nothing more than a sub-tenant of Magnolia and not a direct tenant of Leinbach. The only thing that could be created on the area in question was a sub-tenancy and that sub-tenancy belongs to Magnolia, not to Leinbach. At the end of Magnolia's lease term, then the relationship of Landlord and Tenant between Leinbach and Optima will be restored, however, in the meantime, Optima is nothing more than a sub-tenant of Magnolia and as a result, the revenue from Optima properly belongs to Magnolia.

B. THE MASTER ERRED IN FINDING THAT MAGNOLIA WAS NOT ENTITLED TO RECOVER UNDER ITS THEORY OF UNJUST ENRICHMENT.

In this argument, Leinbach argues that receipt by Leinbach of rents from Optima was not at the expense of Magnolia. Clearly the loss of the rental revenue from Optima Towers has to be at Magnolia's expense. Further, inasmuch as Leinbach agreed to lease the subject premises for 20 years at $20,000.00 a year plus increases, it is receiving more rent over the 20 year term that then it originally bargained for. As a result, it is being unjustly enriched in an amount equal to the amount of the rental payments from Optima Towers and at Magnolia's expense.

C. THE MASTER ERRED IN NOT ALLOWING MAGNOLIA FULL ABATEMENT OF THE RENT RECEIVED FROM OPTIMA.

Leinbach argues that "nothing in the Lease or the application of common sense that suggests that abatement would have to be total abatement." The problem with this argument is that the Lease itself provides at Section 6.03 "the rent and other charges due

hereunder shall be abated during the time such interference persists". This is the clear language of the Lease which allows total abatement because that particular section does not refer to a partial abatement based upon a partial interference. Therefore, the only remedy to Magnolia would have been the total abatement of the rent.

D. THE COURT SHOULD CORRECT THE MATHEMATICAL ERROR OF THE MASTER AND NOT REMAND IT FOR CLARIFICATION.

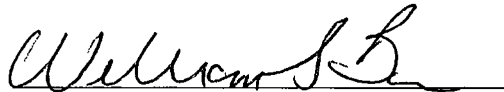
In the interest of judicial economy, the Appellate Court can clearly recalculate and correct mathematically the calculation if that becomes an issue and issue a correct Order resolving that matter without the necessity of remanding the case to the Master-In-Equity.

CONCLUSION

Based on the foregoing, Magnolia urges the Court to grant it the relief in its Appellant's Brief.

Respectfully submitted:

BARR UNGER & McINTOSH



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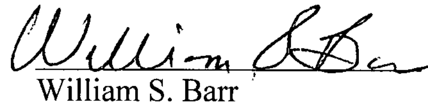
Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.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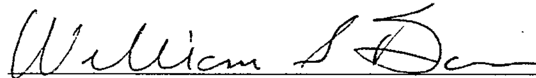
PROOF OF SERVICE

I certify that I have served the Appellant/Respondent with the Reply Brief of Respondent/Appellant, Respondent's Brief of Respondent/Appellant and Appellant's Brief of Respondent/Appellant by hand-delivering a copy of it addressed to the attorney of record, Donald H. Howe, Esquire, 47 State Street, Charleston, S.C., 29402



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