THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MASTER-IN-EQUITY

HON. MIKELL SCARBOROUGH, MASTER-IN-EQUITY

APPELLATE CASE NO. 2012-213389

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56 LEINBACH INVESTORS, LLC..... APPELLANT/RESPONDENT

v.

MAGNOLIA PARADIGM, INC..... RESPONDENT/APPELLANT

RESPONDENT'S BRIEF OF APPELLANT/RESPONDENT

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REPLY BRIEF OF APPELLANT/RESPONDENT

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Appellant/Respondent 56 Leinbach Investors, LLC (hereinafter "Leinbach") respectfully submits the following brief in reply to the brief submitted by Respondent/Appellant Magnolia Paradigm, Inc. (hereinafter "Magnolia").

I. THE MASTER DID NOT ERR IN CONSIDERING THE SITE PLANS DESIGNED BY MAGNOLIA (PAROL EVIDENCE) IN HIS INTERPRETATION OF THE LEASE.

Respondent/Appellants Magnolia's first argument is that there was no designated parking area about which there was a common understanding or meeting of the minds at the time the lease was signed. Magnolia urges that the Master erred in considering the parking lot plans drawn up by Magnolia, submitted by Magnolia to the City of Charleston for approval, and ultimately constructed by Magnolia pursuant to the lease. The crux of Magnolia's argument is found on page 8 of its brief: "At the time of the creation of the lease there was nothing but an unimproved lot. There was no designated parking area." (Respondent/Appellant's Brief pg. 8).

There are 2 reasons why Magnolia's argument fails in this regard.

A. The Master in Equity was correct in interpreting the term "parking area" in the lease as being synonymous with the parking lot plans created by Magnolia.

The parol evidence rule generally holds that one should not look outside of the four corners of a contract agreement to interpret the contract if the terms are clear. It is one of the few evidence rules that has as many (or perhaps more) exceptions to it than the rule against hearsay.

One of the exceptions to the parol evidence rule is when a term in the contract is ambiguous or unclear. As stated in American Jurisprudence 2nd (Evidence Section 1140):

> The parol evidence rule permits resort to antecedent negotiations to explain the meaning of the word's use in a contract of uncertain meaning. However, previous negotiations cannot be admitted to give an integrated agreement a meaning to which the language of the instrument is not reasonably susceptible.

29A Am. Jur. 2d Evidence § 1140, 596-7 (1994).

The undisputed facts in the case are that prior to the signing of the lease Magnolia had a specific set of plans drawn up and these plans were approved for construction by the City of Charleston shortly before the lease was signed. (R. p. 171, lines 10-24; p. 258). Indeed, the signing of the lease was contingent on the City of Charleston's approval of the site plan. Of note is the following testimony of Bill Cochran who negotiated the lease for Magnolia:

> Q. The parking area that was the subject of this lease. Are you saying it was something different than what you got approved by the City?
>
> A. No, Sir. (R. p. 169, lines 18-21)

The full chronology is that a schematic drawing of the lot dated December 12, 2002 drawn by LS3P (the architectural firm hired by Magnolia) was provided to Leinbach in December of 2002. (R. p. 82, lines 1-18; p. 237). Final plans were created by LS3P in April 2003 (R. pp. 260-262) and approved by the City of Charleston in May 2003. (R. p. 168, lines 7-22; p. 171, lines 10-19). The lease was signed June 5, 2003. (R. p. 189, line 2; p. 213, lines 10-11).

In Soulios v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941), the South Carolina Supreme Court stated the following in regard to the parol evidence rule:

> When the written document is silent as to an important issue thereof, parol testimony is admissible to prove it.

198 S.C. at 362, 17 S.E.2d at 873.

In this case, the lease is silent as to the dimensions of the term "parking area". The dimensions of the intended parking area are clearly an "important issue" and it was proper for the Master in Equity to consider the undisputed evidence as to what those dimensions were intended to be. See also Newton v. Batson, 223 S.C. 545, 77 S.E.2d 212 (1953).

The underlying purpose of the parol evidence rule is to preserve the intent of the parties, not to undermine it. Magnolia's project chief, Bill Cochran, admitted that the "parking area" in the lease was the same "parking area" drawn by LS3P and approved by the City of Charleston. Magnolia's attempt to redefine the term was correctly rejected by the Master in Equity.

B. Even assuming that at the time the lease was signed the term "parking area" comprised the entire 1.21 acre tract, Magnolia's subsequent construction of the actual parking area exempted its subsequent use of the area where the tower was built.

The lease is very explicit that Magnolia has "exclusive" use of any parking area. (Section 1.02/Parking of Exhibit 1) By implication, Magnolia would not have exclusive use of any non-parking area. Magnolia built the existing lot to its own specifications and left a section of the 1.21 acre tract as a "wooded area." This was done intentionally because it was uneconomical to try to convert it to a parking area. (R. p. 172, lines 10-24). Additionally, the City of Charleston never gave approval to use the "wooded area" for parking so it would be illegal for Magnolia to try to use it for parking.

The lease is also explicit that Magnolia's only right to use the property is for parking ("Section 1.02 – Use of Space. The demised premises shall be used by Tenant as parking for employees of Tenant or Baker Motor Company and for no other purpose (emphasis added) without the prior consent of the Landlord.") and since the wooded area could not be used for parking, then Magnolia had no right to use that portion of the premises where the tower was built.

Thus, even assuming that there was the "possibility" at the time the lease was signed that every square inch of the premises would become a parking lot, Magnolia's subsequent actions

(i.e. the building of the lot) created a de facto area which Magnolia had no right to use pursuant to the explicit terms of the lease.

II. THE MASTER ERRED IN REFORMING THE LEASE BETWEEN THE PARTIES.

The Master utilized the legal concept of reformation of the contract, based on mutual breaches of contract. Appellant/Respondent agrees with Respondent/Appellant Magnolia that there was no need to reform the contract. Leinbach, however, believes that Leinbach never breached the contract and Magnolia suffered no damages.

This being said, Leinbach would point out errors in Magnolia's argument should the Court of Appeals disagree with the parties and follow the logic of the Master.

First, just because Leinbach's owner, Clyde Hiers, testified he made a "mistake" does not mean he made a "legal mistake" as that term of art is interpreted. Hiers testified he did not realize the tower was going up on the 1.21 acre tract. To that extent, he was mistaken. On the other hand, that mistake did not constitute a "legal mistake" equivalent with a breach of contract.

As to Magnolia's argument denying there was an "abandonment", Appellant/ Respondent contends that no right to use the wooded area ever even arose. The lease says the only right Magnolia had was for parking and that the sole area that could be used for parking was the parking lot. Thus, Leinbach agrees there was no abandonment because no right to use the wooded portion of the property ever existed to be subsequently abandoned.

To the extent some right to use the "wooded area" for parking ever existed, it was abandoned when Magnolia constructed the existing parking lot which left the "wooded area" unsuitable for parking. To the extent this Court feels that Magnolia had a right of "quiet enjoyment" of the wooded area (independent of the right to use the land for parking), then

nominal damages would be appropriate at the very most because no other breach has been proven.

Lastly, Magnolia argues there is no ambiguity yet there is ambiguity in the lease to some extent. One portion of the lease says that Magnolia can only use the demised premises for parking. Another (argues Magnolia) gives Magnolia the right of quiet enjoyment of the entire parcel which is arguably broader than mere parking. It should be noted that the often cited principle that any ambiguity is construed against the drafter of the document would not apply in this case. The record is clear that Magnolia's attorney had the lease document for review and corrections prior to signing. A December 2002 note of Bill Cochran stated "I have not heard back from our attorney on the lease but will call you as soon as he completes his review (R. p. 167, lines 7-23; p. 263).

III. THE MASTER WAS CORRECT IN FINDING A BREACH OF CONTRACT BY MAGNOLIA BUT ERRED IN NEVERTHELESS ALLOWING AN ABATEMENT OF THE RENT BY MAGNOLIA.

Section 6.03 of the lease allows the tenant to abate the rent "If Landlord creates a condition that substantially interferes with the normal use of the Demised Premises or appurtenant parking or services areas as allowed herein..." (emphasis added).

Magnolia never demonstrated the slightest interference with the normal use of the property much less any "substantial interference." No one at Magnolia ever complained about the tower until after Magnolia tried to buy the property. This was because Magnolia never even noticed the 160-foot tower was on the 1.21 acre parcel. The testimony of Tommy Baker himself confirms this:

Q. When the tower went up, no one on your behalf ever voiced any opposition to Mr. Hiers or anybody to say, yikes, what's that 160 ft tower doing going up, did they?

A. I had no idea.

Q. You didn't even know it was there until Mr. Bailey told you some year and a half or two years after it went up?

A. Don't know that I recall that.

Q. The first time you found out was when Mr. Bailey told you, correct?

A. I think that's right, yes.

Q. He found it out in connection with doing some work about y'all were buying the property?

A. Right.

Q. ...the tower hadn't interfered with anything in your life up to that point. You didn't even know it was there. Wasn't even on your radar, was it?

A. No.

(R. p. 181, line 20-p. 182, line 9; p. 182, lines 17-21)

and,

Q. And the tower that's there and has not interfered at all with any of the parking on any of the sites?

A. For the time being, yes.

Q. Your testimony is, basically, you just really don't know what the future brings.

A. I don't think anybody does.

Q. That's right, neither do you today, do you?

A. No.

Q. It would be speculation to say what it is.

A. Right. (R. p. 179, line 20-p.180, line7)

In sum, Magnolia, through its owner, Tommy Baker, concedes that there has been no past interference and that any future interference is speculative. The importance of this is that Magnolia's right to any abatement is contingent on "substantial interference." Despite Magnolia's argument to the contrary, the only evidence at trial was that there was no substantial interference. Thus, there is no evidence on which Magnolia would be entitled to any level of abatement under the terms of the lease.

IV. THE MASTER'S REMEDY WAS IN ERROR.

While Leinbach agrees that the Master's remedy was in error, Leinbach asserts that the Respondent/Appellant Magnolia should have received no damages, or nominal damages at most, for any transgression on the part of Leinbach. Leinbach relies on its earlier brief in this regard. In response to specific arguments of Magnolia, however, Leinbach responds as follows:

A. Assuming it was proper to apply principles of equity, the Master correctly ruled that Leinbach was entitled to relief for unjust enrichment.

Magnolia argues that Leinbach was not entitled to recover under a theory of unjust enrichment because the Master wrongly concluded that Leinbach's receiving additional rent was not at the unjust expense of Magnolia. Magnolia states that "Leinbach exploited a valuable property right of Magnolia and that it has to be at Magnolia's expense and that it is unjust to allow it to happen". (Respondent/Appellant's Brief p. 22)

Magnolia's conclusion that the property right is "valuable", as noted above, simply has no evidence to support it. The Master correctly reviewed the evidence in the record and correctly concluded that the right of Magnolia in the wooded area had no value. It is of note that

Magnolia cites no specific evidence in the record that supports the conclusion that the property right had some specific value. Magnolia only offers a bald conclusion.

As noted elsewhere, Leinbach believes that Magnolia breached the lease and should pay its full rent accordingly. The Master (incorrectly we believe) relied on the theory that both parties breached the lease and that equitable principles should apply. Under that theory (assuming it is correct), it would certainly be proper to proceed under a theory of unjust enrichment because Magnolia is, in effect, taking rent money paid by Optima to Leinbach pursuant to a contract to which Magnolia is not even a party.

B. The Master did not err in finding Magnolia was not entitled to recover under the theory of unjust enrichment.

Respondent/Appellant Magnolia correctly states that for a theory of unjust enrichment to apply, the enrichment of one party must be at the expense of the other. As noted above, Magnolia has never established any evidence of loss (i.e. "expense") which it has suffered. As reflected in the testimony of Tommy Baker, Magnolia has always received (and continues to receive) the full benefit of the use of the parking area for which Magnolia bargained. The Master's ruling in this regard was correct.

C. The Master was correct to deny Magnolia full abatement of the rent received from Optima.

First of all, as noted previously, Leinbach believes Magnolia was not entitled to any abatement since no "substantial interference" with Magnolia's ability to use the parking area was ever proven. Assuming some abatement was proper, however, Magnolia asserts that <u>any</u> abatement means <u>full</u> abatement of an amount equal to Optima's rent for the tower.

The term "abatement" simply means reduction, decrease of or diminution. There is nothing in the lease or in the application of common sense that suggests that an abatement would have to be a total abatement or would have to necessarily be equal to an amount that one party receives (as opposed to what the other party loses). Magnolia cites no cases or lease provisions to support its contention. Leinbach believes that the plain meaning of the term could certainly include the idea of a partial abatement.

D. To the extent there is an internal conflict between the working of the Master's Order and the Master's Final Award, the matter should be remanded for clarification.

Leinbach agrees there is an apparent conflict between the wording of the Master's Order and his calculations Leinbach would submit that should this honorable Court of Appeals rule that there be some abatement of the rent, then the matter should be remanded to the Master so that he can resolve the apparent contradiction in accordance with his original intent.

CONCLUSION

Leinbach urges this Court to find that Leinbach is entitled to any and all rent proceeds paid by Optima Tower based on the fact that 1) no breach of contract occurred 2) Magnolia suffered no damages and 3) to the extent that equity is deemed a proper remedy, that equity demands Leinbach receive all of the rent under the circumstances.

Aug 12, 2013

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I certify that I have served the Respondent/Appellant with the Brief of the Appellant/Respondent and the Reply Brief of the Appellant/Respondent by hand-delivering a copy of it addressed to the attorney of record, William S. Barr, Esquire, 11 Broad Street, Charleston, SC 29401.

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August 15, 2013

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