

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No.: 2008-CP-10-3590

56 Leinbach Investors, LLC.....Appellant/Respondent,

vs.

Magnolia Paradigm, Inc..... Respondent/Appellant.

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING *EN BANC*

William S. Barr
Barr, Unger and McIntosh
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-577-5083
Facsimile: 843-723-9039
wsb@barrungermcintosh.com
Attorney for Respondent/Appellant

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SEP 24 2014

SC Court of Appeals

Other Counsel of Record:

Donald H. Howe, Esquire

818 Wappoo Road

Charleston, SC 29407

Telephone: 843-225-2523

Facsimile: 843-225-2698

donaldhowelaw@gmail.com

Attorney for Appellant/Respondent

Respondent/Appellant Magnolia Paradigm, Inc. petitions for re-hearing, and suggests a hearing *en banc*, pursuant to SCAR Rule 221(a) and 219(b).

Introduction. In its opinion filed on September 10, 2014, this Court affirmed the Trial Court's judgment that the Appellant/Respondent 56 Leinbach Investors, LLC (Leinbach) had breached the lease between the parties. The Court of Appeals reversed the Trial Court on the issue of reformation of the lease based upon mutual mistake. The Court found that Respondent/Appellant Magnolia Paradigm, Inc. (Magnolia) breached the lease, by abating rent payments and the Court found that Magnolia was only entitled to nominal damages and not entitled to abatement, attorney's fees or recovery for unjust enrichment.

This Court's ruling overlooks the broad perspective and its effect on decades of landlord tenant law that Leinbach undisputedly leased the entire parcel to Magnolia; that Leinbach undisputedly usurped Magnolia's quiet enjoyment of the lease parcel by leasing a portion of it to the tower company; and that Leinbach's breach and trespass diminished Magnolia's opportunity to use the entirety of its leased property for the balance of the lease until June 2023. Because Leinbach derives substantial profit from the tower lease, its breach of the Magnolia lease and Magnolia's damages can hardly be said to be nominal or speculative or insubstantial.

1. Magnolia's Breach and Abatement.

Introduction: In its opinion filed on September 10, 2014, this Court stated "The Master concluded the tower was not a substantial interference with the normal use of the demised premises, and evidence in the record supports that finding. Consequently, Magnolia breached the lease by failing to pay the agreed upon rent, and Leinbach is

entitled to payment of those funds”. The Court further stated “Because Magnolia’s normal use of the property was not substantially interfered with, it is not entitled to abate rent under section 6.03 of the lease.”

Statement of the Issue for Reconsideration:

This Court did not address the Master’s finding that the “leasing of the property in dispute effectively ejected Magnolia and that leasing of a portion of the property to another, including fencing off the entire area, prevents Defendant's access to that area and from future use of this part of the original demised premises.” Magnolia seeks reconsideration by this Court in accordance with Rule 221(a), SCACR

Argument:

The Master found at paragraph 22 of his order, (Tr pp 009) “Plaintiff contends that Defendant breached the lease by reducing its lease payments by the amount of the lease payments received by Plaintiff from Optima Towers. I agree. Article 6.03 of the lease clearly allows for abatement of the rent. The leasing of a portion of the property to another, including fencing off the entire area, prevents Defendant's access to that area; however, I specifically find that the Plaintiffs action does not interfere with the Defendant's normal use of the area of the demised premises. **It does however effectively eject Defendant from future use of this part of the original demised premises.**”

(emphasis added)

The demised premises is the entire 1.21 acre parcel not just the area the tenant is now occupying for parking. Although the cell tower may not interfere with the portion of the demised premises presently used for parking, it completely and permanently ejects and prevents tenant from entering or using the area now occupied by the cell tower for

any purpose, as found by the Master. The effect of this Court's holding is a defacto reformation of the lease sanctioning the ejectment of the tenant, Magnolia. Since this Court found that reformation was not appropriate, and since the area in question cannot be separated from the whole, this Court should consider the fact that Magnolia has been ejected from that area of the demised premises for the remainder of the lease, until June 2023, and that ejectment constitutes substantial if not total interference with Magnolia's use of the area.

Magnolia should have been allowed to abate the rent proportionately and should not have been deemed in default for non-payment of the total rent.

2. Magnolia's Damages.

Introduction: This Court also stated "Additionally, although we conclude Leinbach breached the lease, Magnolia's proof as to damages was only speculative and does not support an award of actual damages".

Statement of the Issue for Reconsideration:

Magnolia did not submit a claim for actual damages, as found by this Court, but asserted in its counter claim and in its arguments that it was entitled to the rent payments from the cell tower as a result of its position as a tenant, Magnolia seeks reconsideration by this Court in accordance with Rule 221(a), SCACR.

Argument:

This Court, in the finding quoted above did not address Magnolia's argument that in this landlord/tenant situation as in all landlord/tenant situations, the rights in the subject property belong to the tenant for the entire 20 year term. "The right to use the leased premises during the term specified in the lease was transferred from the landlord to

the tenant. Thus the landlord and tenant have separate estates in the demised premises during the term of the lease, the tenant's being a possessory interest, while the landlord has reversionary interest in the land. In other words during the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted, with the landlord's right being confined to the reversionary interest." 9 Am Jur 2nd Landlord/Tenant § 889, 52 CJS Landlord and Tenant §337. (emphasis added)

Here, the Landlord's has unlawfully seized the property of Tenant and is putting it to profitable use for only the Landlord's benefit. Having leased the entire parcel to Magnolia for use as parking, Leinbach has carved out a section of Magnolia's leasehold and has leased it to a third-party for the "parking" of a cell tower. How could this not be a substantial and material breach, measured by the additional compensation received by Leinbach for "parking" the cell tower?

Magnolia further asserts that this Courts reference to its failure to file a "notice of lease or recognize at the time of the tower's construction it was being built within the demised premises" was not at issue. The Master found that Leinbach's cause of action for estoppel did not lie and this finding was not appealed by Leinbach. (Tr. pp 010)

Magnolia respectfully submits that given the forgoing statement of law that the rights to the rents from the cell tower properly belong to the tenant.

Additionally the Court failed to consider or address Magnolia's argument that the landlord, having changed the nature of the use of the area in question, that the value of the area in question should be determined by its present use, a cell tower, and not by its use as a parking area as originally contemplated. The value of the area as a cell tower

would be the income stream derived from the cell tower rent. Restatement, Property, Landlord and Tenant § 11.1 Abatement comment *e* (1977).

3. Unjust Enrichment

Introduction: In its opinion filed on September 10, 2014, this Court stated: “Magnolia claims Leinbach is being unjustly enriched by Optima's monthly rent payment. However, Magnolia failed to demonstrate it is entitled to that money. While Magnolia may have had the opportunity to sublease the wooded area to a tenant, any sublease was subject to Leinbach's approval and did not exist as a matter of right. In fact, the record demonstrates Hiers consent to a sublease for the tower construction would have been questionable at best. Hiers testified the Optima lease was incredibly beneficial to him because it could offset the failure of the Charleston Montessori School to timely pay its rent. Additionally, the construction of the cell tower was a matter of public concern and debate because of its proximity to the school. Therefore, the record suggests Leinbach's agreement to the tower, in the face of public controversy, was because of the benefit *Leinbach* would receive from the Optima lease and was not given simply as a matter of course. Accordingly, Magnolia was not entitled to the lease payments, and it is not unjust or inequitable for Leinbach to retain them. ”

Statement of Issue for Reconsideration:

The foregoing fails to take into consideration the rights that Magnolia had and has as a tenant as stated in the previous citation of authority. Magnolia seeks reconsideration by this Court in accordance with Rule 221(a), SCACR.

Argument:

The statement “Magnolia failed to demonstrate it is entitled to that money” is contrary to Magnolia’s rights as a tenant. “The right to use the leased premises during the term specified in the lease was transferred from the landlord to the tenant. ... During the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted, with the landlord’s right being confined to the reversionary interest.” 9 Am Jur 2nd Landlord/Tenant § 889, 52 CJS Landlord and Tenant §337. Thus Magnolia is entitled to the rental money from the cell tower lease as a result of its position as the tenant. Further Leinbach has not shown it is entitled to the money from the cell tower lease.

This Court stated: “While Magnolia may have had the opportunity to sublease the wooded area to a tenant, any sublease was subject to Leinbach's approval and did not exist as a matter of right. In fact, the record demonstrates Heirs’ consent to a sublease for the tower construction would have been questionable at best.” This statement is belied by the fact that Leinbach approved the construction of the tower under the unilateral mistaken belief that it was not part of the property leased to Magnolia. Having approved use of the property for cell tower use for its own profit, any suggestion that Leinbach would have denied that use if requested by the Magnolia is clear evidence that a denial by Leinbach of any such request by Magnolia would have been arbitrary and capricious, and contrary to the letter of the lease and a violation of the unwritten covenant of good faith and fair dealing. The issue of whether Magnolia would have received permission is moot; it is already done and Leinbach should be estopped to now argue that approval would not have been given.

In its opinion this Court stated: “Therefore, the record suggests Leinbach's agreement to the tower, in the face of public controversy, was because of the benefit *Leinbach* would receive from the Optima lease and was not given simply as a matter of course.” The fact that Leinbach’s motives to lease the property to cover payments on another adjacent property may have been well intentioned they are not relevant to a determination of Leinbach’s unjust enrichment. What is relevant is that Leinbach now collects double rent from a single piece of property, Magnolia’s property, and at Magnolia’s expense. This Court stated “we do not condone the “double leasing” of property” yet this Court permits Leinbach to do just that and to reap the benefits of its unilateral mistake.

Magnolia respectfully submits that this Court should reverse itself on this issue and grant Magnolia judgment on its claim for unjust enrichment.

4. Leinbach has not been damaged.

Introduction. In its complaint Leinbach sued Magnolia for breach of the lease and damages. In its opinion this Court found that Leinbach had breached the lease and further stated that it did not condone “double leasing” but found that Magnolia had only suffered nominal damages. This Court then concluded that the case be remanded to the Master to determine the amount of damages due Leinbach.

Statement of Issue for Reconsideration:

The foregoing fails to take into consideration that Leinbach was not damaged by Magnolia abating the rent. Magnolia seeks reconsideration by this Court in accordance with Rule 221(a), SCACR.

Argument:

In its lease with Magnolia, Leinbach bargained for a set rental from the property for twenty years. Through the date of the trial in October 2011 Leinbach was due from the property and in accordance with its lease with Magnolia, \$193,352.65 (Tr pp 246). Magnolia paid Leinbach from the inception of its lease in June 2003 through October 1, 2011, the date of the trial, the sum of \$153,561.00. Having rented a portion of the property to Optima Towers, Leinbach also received from Optima from the inception of the tower lease until October 1, 2011, \$54,116.65. The total received by Leinbach from Magnolia and Optima was \$207,477.65. (Tr pp259)

Since Leinbach breached the lease and was only contractually entitled to receive in rental payments \$193,352.65 and it received \$207,477.65, it has not been damaged. If anything, it has been overpaid \$14,125.00.

As between Leinbach and Magnolia, who should be entitled to the rent payments from Optima Towers? As a matter of law Magnolia, should be entitled to the rent derived from its leasehold due to its legal status as tenant. Magnolia respectfully submits that this Court should reconsider this issue and issue its opinion that Magnolia is entitled to the rent payments from Optima.

5. Attorney's Fees

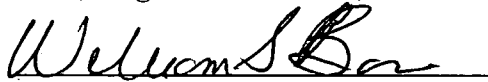
Magnolia respectfully request that the court reconsider awarding it attorney's fees in the event this Court decides to reverse itself as requested.

Conclusion

For the foregoing reasons, Appellant respectfully urges that this Court reconsider its order and opinion on the foregoing issues and issue its order and opinion consistent with this Petition or remanding the case to the Master for further findings or for a new trial.

Respectfully Submitted,

Barr, Unger & McIntosh, LLC

A handwritten signature in black ink, appearing to read "William S. Barr", is written over a horizontal line.

William S. Barr

Barr, Unger & McIntosh, LLC

P. O. Box 1037

Charleston, SC 29402-1037

Telephone: (843) 577-5083

Facsimile: (843) 723-9039

Attorneys for Respondent/Appellant

Charleston, South Carolina
September 23, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SEP 24 2014

Mikell R. Scarborough, Master in Equity

SC Court of Appeals

Case No. 2008-CP-10-3590

56 Leinbach Investors, LLC. Appellant/Respondent,

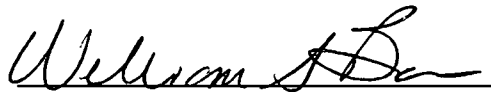
v.

Magnolia Paradigm, Inc. Respondent/Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Respondent/Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc* on 56 Leinbach Investors, LLC, by depositing a copy of same in the United States Mail, postage prepaid, on September 23, 2014, addressed to its attorney of record Donald H. Howe, Esquire, 818 Wappoo Road, Charleston, South Carolina, 29407.

Barr, Unger & McIntosh, LLC



William S. Barr

Barr, Unger & McIntosh, LLC

P. O. Box 1037

Charleston, SC 29402-1037

Telephone: (843) 577-5083

Facsimile: (843) 723-9039

Attorneys for Respondent/Appellant

Charleston, South Carolina
September 23, 2014

**BARR, UNGER
& MCINTOSH**
ATTORNEYS AT LAW

September 23, 2014

William S. Barr
Direct Dial: 843-377-1221
Email: wsb@barrungermcintosh.com

Via Federal Express
Tracking No.: 771249210531

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

**RE: 56 Leinbach Investors, LLC, Appellant/Respondent v.
Magnolia Paradigm, Inc., Respondent/Appellant
Appellate Case No.: 2012-213389**

Dear Ms. Kitchings:

Enclosed for filing please find an original and six (6) copies of Respondent/Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc*, along with Proof of Service.

Also enclosed please find a check for \$25.00 for the filing fee.

An additional copy of the Petition and Proof of Service is also enclosed. Would you please date stamp the additional copy and return to me in the enclosed self-addressed stamped envelope?

Thank you for your attention in this matter.

Sincerely yours,


William S. Barr

Enclosures (as stated)
cc: Donald H. Howe, Esquire (w/enclosure)
Magnolia Paradigm, Inc. (w/enclosure)
WSB:seg

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