THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Opinion No. 5270 (S.C.Ct.App. Filed September 10, 2014)

56 Leinbach Investors, LLC,..... Respondent,

v.

Magnolia Paradigm, Inc.,.....Petitioner.

PETITIONER'S REPLY TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In its introduction, the Respondent asserts that the Petition for Certiorari should not be granted on the basis of two grounds: 1. equitable abatement was not raised in the lower Court and 2. the theory of equitable abatement is not supported by the controlling facts of the case.

What this introduction fails to consider is that there are other grounds and reasons that the Petition for Certiorari should be granted, most compelling being:

"Under South Carolina law, can a commercial's landlord under a long term lease with tenant number one unilaterally carve out a portion of the leasehold property and lease it to tenant number two and at the same time demand undiminished rent from tenant number one? Can a landlord profit from such double leasing?"

COMMENTS TO RESPONDENTS STATEMENT OF THE CASE

Page 1. The initial contact for the lease of the property came from Respondent, (R PP 157 Ln 20 PP 159 pp ln 6)
P2. There was a single storage age container shown in the initial plan of the Tower. (R PP 228)
P2. The Wooded are referenced was not just technically a part of the 1.21 acre parcel it was a part of the parcel. This area was also landscaped by Magnolia. (R pp 216 Landscape plan of LS3P).
P. 2 Although a memorandum of lease was not recorded the Master found that its purpose was to place third parties on notice and not the Landlord, Leinbach.(R pp 010 para 26, J. Scarborough's Order)

ARGUMENT

I. EQUITABLE ABATEMENT WAS SUFFICIENTLY RAISED IN THE LOWER COURT.

"Respondent misstates the "Novel Question" at page 4;

> "The legal theory that underlies Petitioner's purported "novel question" is the equitable theory of abatement as set out on page 2 of its Petition for Writ of Certiorari"

This is incorrect, Petitioner's "Novel Question" is

> "Under South Carolina Law, can a commercial landlord under a long term lease with Tenant No.1 unilaterally carve out a portion of the leasehold property and lease it to Tenant No.2, and at the same time demand undiminished rents from Tenant No. 1? Can a landlord profit from such "double leasing"? Prior to the decision of the Court of Appeals in this case, no reported South Carolina decision appears to have addressed this novel question.
>
> Petitioner contends that the Court of Appeals reached the wrong conclusion to the question. The Court of Appeals held that, yes, a landlord may effectively eject a tenant from a portion of the leasehold property, and that, unless the tenant can prove actual damages, the tenant may not abate the rent payments,
>
> The Court of Appeals as much as acknowledged the existence of a novel question in this case: "The basic law of damages in our jurisprudence requires proof of damages, and we can find no case law that suggests double-leasing, particularly in a commercial transaction, gives rise to damages, *per se*." (769 SE2d at 249). However, as will be suggested in this petition, the question before the court was not one of damages. Rather, the question is one of remedies. Petitioner seeks the equitable remedy of rent abatement because of Respondent landlord's actual ejectment of Petitioner from a portion of the leased property
>
> The decisions of the Court of Appeals and of the Trial Court squarely conflict with the fundamental proposition that a lease is tantamount to the conveyance of the leasehold property to the tenant for the term of the lease; that the essence of commercial property is the right to derive profits therefrom; and that the tenant's rights of possession, and to the profits derived from possession, are inviolate rights."
> (Petition for Certiorari page 1 & 2)

The issue of the equitable remedy abatement is only one of the available remedies to resolve the "Novel Question". Petitioner has always argued that this case was not about damages but a remedy measured by the income stream from the Tower Company. "The crux of this case is the question, as between, Magnolia, the tenant and Leinbach, the landlord, who is entitled to the rent from the Tower lease." (Magnolia's Appellants brief pp 5)

Petitioners disagree with the foregoing argument. Respondent argues that the legal theory that underlies Petitioners novel question is the equitable theory of abatement. This is not correct; the legal theory that underlies Petitioners novel question is the remedy for ejectment from a portion of the property. Although the specific term " equitable theory of abatement." may not have been used, abatement or adjustment of the rent, legal or equitable in a broader context is used repeatedly throughout the course of this case and in Judge Scarborough's Order. See *Herron v. Century BMW a/k/a Sonic Automotive*, 395 S.C. 461, 719 S.E.2d 640 (2011)

" Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue. *See* State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict). Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733; *see also* S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue). *Id* at S.C pp466, S.E.2d at 643

The law governing the equitable theory of abatement, a remedy, and contractual abatement, the remedy provided in the lease, are the same except for the limitation; in this case by the lease to substantial interference, that is a proportionate reduction. This issue is fully addressed in Petitioner's Argument Number I.

It should be noted that the statement of the issue in the Petition is that Magnolia "has the right to partially abate the rent in accordance with the lease and with equitable principals". The lease allows total abatement but in this case the Petitioner only sought partial abatement which is a remedy not contained in the lease. Since a partial abatement is not covered in the lease, then the thrust of Petitioner's

argument is and has always been for a partial reduction of the rent to prevent the Respondent from being unjustly enriched and to recover its right to the rental income stream as Tenant. Call it what you may, it is equitable abatement or partial reduction of the rent on equitable principals or recovery of rent duly owed it as the Tenant in control of the subject property. The Court of Appeals agreed to hear the equitable argument of unjust enrichment on this issue because it was not covered in the lease,

> 'In the instant case, an express contract exists covering the issue of abatement of rent—the relief sought by Magnolia. However, because of the unusual circumstances of this case, in which the express contract arguably does not address the type of breach at issue, we address Magnolia's unjust enrichment argument. See *Boldt Co. v. Thomason Elec. & Am. Contractors Indem. Co.*, 820 F.Supp.2d 703, 707 (D.S.C.2007) *56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.* 411 S.C. 466, 769 S.E.2d 242,250 (Ct App 2014)

Judge Scarborough recognized that the Petitioner had a right to reduce the rent but under a theory of reformation that was overruled. "Restitution is a remedy designed to prevent unjust enrichment." *1 3* S. C. *Jur. Implied Contracts§ 6,* citing *Moore-Hudson Oldsmobile/GMC, Inc. v. Waterman,* 298 S. C. 107, 110, 378 S. E. 2d 279, 280 (Ct. App. 1989). Petitioner has sought and continues to seek to reduce the rent. In the Petitioner's Respondent's Brief in the Court of Appeals at Page 12, Petitioner argued " the lease also provides a remedy akin to restitution for unjust enrichment, that is abatement.", both equitable arguments.

The issues of substantial interference and contractual abatement are before this Court for reversal, irrespective of the issue of equitable abatement.

Respondent argues that had equitable abatement been raised, then the Master would not have had to resort to a theory of mutual mistake to fashion an equitable remedy. Neither party raised the issue of mutual mistake in the Court below but the

Master *Sua Sponte* raised it. The Master, based on the evidence, was seeking an equitable adjustment of the rent and used that theory just as easily as he could have used equitable abatement. Petitioner submits the Master merely equitably adjusted the rent. Petitioner seeks this Court to do the same.

Respondent argues that Petitioner seeks to change the case to one at law versus equity. This is not correct. The pleadings raise legal and equitable issues which are breach of contract and unjust enrichment. This issue is fully addressed in Petitioner's Argument Number III.

The Court of Appeals also chose to address the equitable issues also,

> "In the instant case, an express contract exists covering the issue of abatement of rent—the relief sought by Magnolia. However, because of the unusual circumstances of this case, in which the express contract arguably does not address the type of breach at issue, we address Magnolia's unjust enrichment argument." *56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.* 411 S.C. 466, 769 S.E.2d 242,250 (Ct App 2014).

II. EQUITABLE ABATEMENT IS SUPPORTED BY THE FACTS

In Respondent's Return at page 6 , it states, "Respondent would draw the Court's attention again to the essence of Petitioner's argument as set out on page two of its Petition for Certiorari.

> "Petitioner seeks the equitable remedy of rent abatement because of Respondent Landlord's actual ejectment of Petitioner from a portion of the leased property. (emphasis added)

Petitioner, again asserts the "essence of its argument is,

> "Under South Carolina Law, can a commercial landlord under a long term lease with Tenant No.1 unilaterally carve out a portion of the leasehold property and lease it to Tenant No.2, and at the same time demand undiminished rents from Tenant No. 1? Can a landlord profit from such "double leasing"?

Respondent misstates the question and takes that statement out of context. The total statement as stated on Page 2 of the Petitioner's Petition, Petitioner is

> "the Court of Appeals as much acknowledged the existence of a novel question in this case:" "The basic law of damages in our jurisprudence requires proof of damages and we can find no case laws suggesting double leasing, particularly in a commercial transaction, gives rise to damages per se." (769 SC 2d at 249) However, as it will be suggested in its position the question before this Court was not one of damages, rather the question is one of remedies. Petitioner seeks an equitable remedy of rent abatement because Respondent/Landlord actually ejectment of the Petitioner from a portion of the property." Petitioners also seeks the contractual remedy of abatement and the equitable remedy of restitution to prevent unjust enrichment.

Thus based on the foregoing, it should be clear that the "remedy" sought was an equitable adjustment of the rent based on the proposition that the landlord ejected the tenant from the subject property. In its Order, the Master-In-Equity found that the tenant had been ejected from a portion of the property.(Rpp 009)

> "The leasing of a portion of the property to another, including fencing off the entire area, prevents Defendant's access to that area.... It does however effectively eject Defendant from future use of this part of the original demised premises"

In this Argument the respondent jumbles several issues, actual damages, use of leasehold to parking, failure of consideration and balancing of the equities.

As to its parking area argument, in this argument Respondent repeats its former argument concerning rights of tenant to park in the "parking area". This is an issue which the Respondent raised in the Court of Appeals and before the Master that was not adopted by either Court. As replied to in the Petitioner's Briefs in the Court of Appeals, there is no "parking area" within the demised premises. The entire parcel is and can be used for parking. This argument and reasoning is completely flawed.

As to its argument concerning nominal damages, the thrust of Petitioners argument is it seeks the equitable remedy of restitution or the legal remedy of the income stream created by the rents from the cell tower located on a portion of the demised premise's that it leased from Respondent, argued before the Court of Appeals but never ruled on.

Respondent continues to argue the issue of lack of damages to Magnolia. What this argument fails to consider is what was the Respondent's damage? Respondent misses the boat. This was fully briefed in the Petitioner's Argument Number IV, Respondent continues to receive the full amount of the rent from the property albeit from two sources, Magnolia and the Tower Company. Petitioners damages are the loss of the property and the profits therefrom. The rents from the cell tower in this case properly belong to Magnolia:

> The law provides that one wrongfully dispossessed of property is entitled to the rents and profits derived from the property during the dispossession. *Segars v Segars* 279 S.C. 564,570, 310 S.E.2nd 156,159 (Ct. App. 1983) citing Martin *and Walter v. Evans,* 20 S.C. Eq. 171, 1 Strobhart's Equity 350 (1847).

> "A right to land essentially implies a right to the profits accruing from it."- "For what," says Lord Coke, "is the land, but the profits thereof."-Co. Litt. 46; *Lyford's* case, 11 Co. 46. *Martin v Evans*, 20S.C. Eq. 350, 355 (1847)

As to the failure of consideration argument, Respondent misses the point on this issue concerning the failure of consideration as addressed by Judge Cardoza in the Fifth Ave Building Company case. In *Fifth Ave. Bldg. Co. vs. Kernochan*, 221 N.Y. 370, 372, 117 N.E. 579 (1917), Justice Cardozo wrote that that an eviction suspends the obligation of payment of rent because it "involves a failure of the consideration for which rent is paid". The failure being the rent received for the

property rented. If the property is removed then there is nothing to support the rent received. Here the area of the cell tower that the Respondent still receives rent from the cell Tower Company.

Petitioner repeats this case has never been a case for damages based on the size of the area in question but for loss of profits derived from the area now occupied by the cell tower. See Re-Statement of Law of Property, Section 11.1.

In its Return at page 10, Respondent's next asks a series of equitable questions in an attempt to show Respondent is the person equitably aggrieved. One has to come back to the basic "equitable question" that being Respondent made a unilateral mistake, he doubled leased the property and seeks forgiveness and compensation. The only equity this Court should consider is, can the landlord collect double rent from the same property from two different tenants?

III. THE COURT OF APPEALS WAS NOT CORRECT IN FINDING MAGNOLIA SUFFERED NO ACTUAL DAMAGES.

As argued before the Court of Appeals and as argued in its Petition for Certiorari, this is not a cookie cutter damages case. In its argument on this issue, the Respondent misses the point as stated in the quotation at 9 *Am Jur. 2d*, Section 384. The issue addressed in 9 *Am Jur* 2d, Section 384 is that the rights in the leasehold property belong to the tenant during the demised term and the landlord is only entitled to the reversionary interest. Respondent tries to turn this into an argument that leaving the concrete block foundation is damage to the reversionary interest and therefore is inappropriate. This issue is moot, Respondent already allowed the Tower to be constructed and accepted the structure and what might happen upon termination

of the cell tower lease. If it was concerned about the foundation being left at the end of the lease it certainly could have required its removal in the lease. Repeating from its Petition, "the landlord has unlawfully ejected the tenant and is putting the leased property a profitable use for the landlord's benefit. Having leased the entire parcel to Magnolia for use as parking, landlord has carved out a section of Magnolia's leasehold and has leased it to a third party for parking of a cell tower". This is substantial interference which should be measured by the rents received by Respondent from the Tower Company.

The damage is the loss of the property and the profits derived therefrom.

IV. THE LANDLORD WAS UNJUSTLY ENRICHED.

Respondent argues that the enrichment must be at the expense of the other party and argues the de minimis interference its quiet possession of the wooded area is all that could be shown. Again respondent misses the point, the point being the rights and profits from the subject property belong to the tenant during the term of the lease, in other words Respondent is receiving a rental payment dues to the Petitioner. It should be noteworthy that Respondent has never addressed this issue.

Petitioner argued that even though the Petitioner had abated its rent that the landlord respondent was not unjustly enriched. The Petitioner further argued that the Respondent was not damaged. The Court of Appeals stated that Petitioner had not shown that it was "entitled to the money." The "money" or rent received from the cell tower is derivative of the income stream from the subject property as much as the right to use the leased premises during the terms specified in the lease was transferred to the tenant from the landlord. Basically the landlord is receiving money that is duly

owed to the Petitioner. As a result that is at the expense of the Petitioner and Magnolia is entitled to the money. Respondent is unjustly enriched if it is allowed to retain it.

As to the allegation by Respondent that Petitioner suggested the Respondent was guilty of some kind of Fraud, Petitioner did not suggest that respondent was guilty of some kind of fraud, the Court of Appeals did without prompting by Petitioner,

> "Hiers testified he was not heavily involved in the placement of the cell tower. "I told [Optima's representative] my plate was full at the time. And if he wanted to pursue this opportunity, he was going to need to contact the city, Mr. Baker, and everyone else, and he was responsible for getting this done if, in fact, that's what he wanted to do." This testimony indicates Hiers believed Baker had some interest in the property or there would be no need to contact him regarding the tower's construction." *56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.* 411 S.C. 466,475; 769 S.E.2d 242.247 (Ct App 2014)

V. THE COURT OF APPEALS ERRED IN FINDING THAT MAGNOLIA, PETITIONER, HAD BREACHED THE LEASE BY FAILING TO PAY THE AGREED UPON RENT.

In this Argument Respondent states,

> "The only reason Magnolia was entitled to use the property was payment of its rent. Magnolia's arguments as to why it failed to pay rent were rejected for the reasons outlined above."

The problem with this statement is that Magnolia did not have the use of the portion of the property occupied by the cell tower. Since it did not have the use of the property occupied by the cell tower there was no obligation to pay rent on that portion. For that portion of the "demised" premises Leinbach was receiving a rent payment form Optima Towers.

Petitioner could not have stated this point better. Respondent all but admits in this statement the failure of consideration. This is the failure of consideration addressed by Judge Cardoza in the Fifth Ave Building Company case. In *Fifth Ave. Bldg. Co. vs. Kernochan*, 221 N.Y. 370, 372, 117 N.E. 579 (1917), Justice Cardozo wrote that an eviction suspends the obligation of payment of rent because it "involves a failure of the consideration for which rent is paid".

Respondent filed this action for breach of the lease claiming that it had been damaged as a result of the Petitioner's failure to pay the rent. This is entirely incorrect as calculated in the Petition for Writ for Certiorari. The landlord, during the full term of the lease and to date, continues to receive the full amount of the rent, albeit from two sources, that being from the tower company and from Magnolia.

It appears that the Respondent agrees with this proposition.

VI. THE COURT OF APPEALS ERRED IN AWARDING THE RENT FROM THE TOWER TO THE LANDLORD

Respondent characterizes the Petitioner's argument in this section as flawed logic. The tenant's, Petitioner's, "use" is not relevant to this issue. The landlord, Respondent could have leased it to a third party for parking and the issue would be the same, who is entitled to the revenue stream from that portion of the property already leased to the Petitioner? The lease does not cover this issue so threrefor the court must resort to the law.

Respondent asserts that it is entitled to receive the rent from the Tower Company and from Petitioner covering the same property? Can that be correct?

The lease contract does not just stand as a piece of paper not governed by certain recognized laws. The laws of landlord and tenant concerning, its construction and the rights between the landlord and tenant not covered in the lease are still all governed by the law. The basic tenant of the argument in this section was that during the period of time of the lease the tenant is entitled to all of the profits from the property. The Master found, "A lease is tantamount to a conveyance of real property for the period of time of the lease. Subject to the terms of the lease, the tenant is entitled to all benefits and **profits** from the leased property." (R pp 011). This finding was not appealed by Respondent.

Petitioner is not asking this court to rewrite the Lease it just asks it to enforce the lease in accordance with basic landlord tenant law.

In its Return the respondent states,

"Under the plain language of the contract, Magnolia had no right, other than quiet possession, to do anything with regard to the wooded area. Magnolia negotiated the generic rights of a tenant away and paid an appropriate rent for what it bargained for. This contract does not give Magnolia all rights of the average tenant and it is very specific in not doing so. Indeed, the first words in the lease are "Subject to ... the conditions ... of the Lease". Magnolia made its bargain. It should be required to stick to that bargain." (Respondents brief pp 15)

It should be noted that Respondent does not point to any particular section of the lease where Magnolia "bargained away its generic rights or the lease did not give Magnolia all rights of and average tenant". There are none. Respondents argument "subject to ... the conditions...of lease was asserted before the court of appeal and not adopted. In fact the court of appeals stated, " the use of the demised premises was not completely limited to parking, any other use was subject to Leinbach's approval" (769 S.E.2d at 249).

Respondent's argument in the preceding section answers its own argument in this section,

"The only reason Magnolia was entitled to use the property was payment of its rent. Magnolia's arguments as to why it failed to pay rent were rejected for the reasons outlined above." (Respondent's Return at page 14)

Stated as applicable here, The only reason Leinbach was entitled rent was for the use the property by Magnolia. When Magnolia ceased to use that portion of the property Leinbach was no longer entitled to the rent from Magnolia. The landlord, Respondent is not entitled to the rent from both tenants covering the same piece of property.

Attorney's Fees

No additional response to this section is necessary inasmuch as the issue of attorney's fees will be decided upon the ultimate decision of this Court.

CONCLUSION

Based on the forging the Petition for Writ of Certiorari should be granted,

Respectfully submitted,

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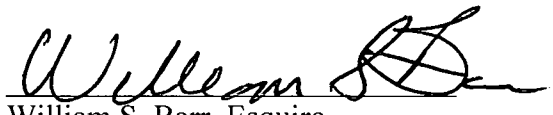
May 21, 2015

Certificate of Counsel

The undersigned certifies that this Reply to Respondents Return to the Petition for Writ of Certiorari complies with Rule 242 SCACR.



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I certify that I have served Petitioner's Proof of Service of the Petitioner's Reply Brief to Petition for a Writ of Certiorari on Donald H. Howe, Esquire, Opposing Counsel, by U. S. Mail, on May 21, 2015, addressed as follows:

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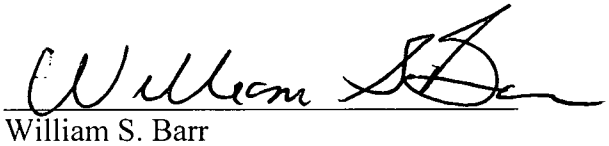

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