THE STATE OF SOUTH CAROLINA
SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

Hon. Mikell Scarborough, Master-In-Equity

APPELLATE CASE NO. 2012-213389

56 LEINBACH INVESTORS, LLC......................................Appellant/Respondent

v.

MAGNOLIA PARADIGM, INC..Respondent/Appellant

APPELLANT'S INITIAL BRIEF OF APPELLANT/RESPONDENT

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TABLE OF CONTENTS

Table of Contents..1

Table of Authorities...2

Questions Presented..3

Statement of the Case..4

Statement of Facts..5

Argument

I. The Master-In-Equity erred in finding that 56 Leinbach breached the lease by allowing the Optima communications tower to be built on the area which was not part of the parking lot leased by Paradigm..7

II. Assuming Leinbach breached the lease, Magnolia suffered no damages and therefore the Master-In-Equity erred in awarding more than nominal damages..9

III. Even assuming an award of more than nominal damages was appropriate, the award of a one sixth reduction in the total rent was excessive considering Magnolia enjoyed 100% of the benefit of its original bargain...12

Conclusion..13

TABLE OF AUTHORITIES

CASES PAGE

King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (S.C. App. 1984) 12

McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571.. 9

McPherson v. J.E Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501............................ 9

Save Charleston Foundation v. Murray, 333.S.E.2d 60, 65 (S.C. Ct. App. 1985)....11

Stevens v. Allen, 342 S.C. 47, 530 S.E.2d 633 (S. Ct. 2000)...............................11

STATEMENT OF ISSUES ON APPEAL

I. Did the Master-In-Equity err in finding that Appellant/Respondent 56 Leinbach Investors, LLC breached the lease by allowing an Optima communications tower to be built on the area that was not part of the parking lot leased by Respondent/Appellant Magnolia Paradigm?

II. Assuming 56 Leinbach Investors, LLC breached the lease, did the Master-In-Equity err in awarding more than nominal damages when Magnolia was not able to prove any cognizable damages?

III. Assuming an award of more than nominal damages was appropriate, did the Master-In-Equity err in allowing a Three Hundred and 00/100 ($300.00) Dollar per month reduction in rent to Magnolia Paradigm even though Magnolia Paradigm continued to receive 100% of the benefit of its original lease?

STATEMENT OF THE CASE

This matter was commenced by the filing of a Summons and Complaint on June 24, 2008, in the Court of Common Pleas for Charleston County. Appellant/Respondent 56 Leinbach Investors, LLC (hereinafter "Leinbach") alleged breach of contract by Respondent/Appellant Magnolia Paradigm, Inc. (hereinafter "Magnolia"). Leinbach thereafter filed an Amended Complaint to attach the actual lease to the Complaint as alleged therein which had inadvertently been omitted as an attachment. Magnolia filed an Answer and Counterclaim on July 18, 2008. The case was referred to the Honorable Mikell Scarborough, Master-In-Equity for Charleston County, by Order of Reference dated September 1, 2009.

On August 3, 2010, Leinbach filed a Motion to Amend its Complaint with a proposed Second Amended Complaint asserting unjust enrichment and equitable estoppel attached thereto. No hearing on the Motion was held, however, the Defendant, Magnolia, filed an Answer and Counterclaim to the Second Amended Complaint asserting an additional cause of action for unjust enrichment on October 18, 2010.

The case was tried before the Honorable Mikell Scarborough, Master-In-Equity for Charleston County, on October 11, 2011. The issues, without objection by either party, were based on Plaintiff's Second Amended Complaint and Defendant's Answer to Second Amended Complaint and Counterclaim. At trial, all parties moved to amend their respective pleadings to conform to the proof offered and both Motions were granted without objection.

The Master-In-Equity issued an Order dated June 11, 2012. Magnolia filed a Motion to Reconsider on July 9, 2012. Judge Scarborough denied the Motion to Reconsider and both sides filed a Notice of Intent to Appeal: Leinbach on November 8, 2012 and Magnolia on November

12, 2012. The appeals were consolidated by the South Carolina Court of Appeals without objection.

STATEMENT OF FACTS

The facts of this case are relatively undisputed. 56 Leinbach Investors, LLC owns a piece of property in Charleston County at the end of a cul de sac on Leinbach Drive. Leinbach leased the property to Magnolia in a lease dated May 30, 2003. Magnolia Paradigm, Inc. is owned by Tommy Baker who also owns Baker Motors on Savannah Highway not far from the Leinbach property. Baker needed additional parking for the employees of Baker Motors and so leased the property from Leinbach for that purpose.

Leinbach is owned by Clyde Hiers. Hiers also owned the piece of property immediately adjacent to the property which is the focus of this appeal. Negotiations between Leinbach and Magnolia appear to have begun in earnest in September of 2002. (Def. Exhibit 18) An initial sketch of the proposed plan for the parking area was prepared in December of 2000. The plans for the project were approved by the City of Charleston sometime in the Spring of 2003 and the lease signed thereafter on May 30, 2003. (T.T. 112) The lease document appears to have been initially drafted by Leinbach's attorney but was sent for review and approved by Magnolia's attorney who had the draft as early as December of 2002 (nearly seven months before the lease was signed). (T.T. 111-112 and Exhibit 17)

After the signing of the lease in May of 2003, Magnolia built the parking lot which had been approved by the City of Charleston. The parking lot covers the vast majority of the area owned by Leinbach. There was a small area, however, into which the parking area did not extend. This area had trees on it (as well as a shipping container utilized by the school next door) and,

according to Baker and his Operations Manager Bill Cochran, it was not economically feasible to extend the parking area that far. (T.T. 110) It is this small "wooded area" that has become the subject of the dispute before this court.

Sometime in 2005 (after the parking lot was built and being used daily), Optima Tower, LLC approached Clyde Hiers (Leinbach's owner) about erecting a communications tower on the property owned by Hiers. Hiers told Optima if they could get approval from the City, he would certainly consider it. Optima obtained that approval for the "wooded area" that was on the same property that Leinbach had leased to Baker. Optima was told by Hiers that the parking area was leased by Baker. (T.T. 11) Hiers and Optima entered into a lease in February of 2006 and the tower was erected sometime thereafter. The tower is approximately 140 feet tall. It can be seen from Baker's business on Highway 17. It is directly next to the parking area which Baker had for his employees. There is nothing that shields it in any way from any spot in the parking lot. It took thirty to forty-five days to erect and, according to the testimony of Optima employee, Keith Powell, who had to coordinate with people at Baker Motors during the construction phase of the tower. (T.T. 11)

Sometime in late 2006, Baker apparently decided it was in his best interest to go ahead and buy the property rather than just lease it from Leinbach. A contract of sale was signed and in the process of checking out all of the details prior to closing, Baker (through his commercial real estate agent, Jimmy Bailey) discovered that the Tower had been erected on part of the parcel of land which contained the parking lot. (Tr. 126) Baker's attorney, Bill Barr, thereafter wrote Hiers' attorney, Donald Howe, a letter on December 18, 2008 in which he stated:

The erection of the cell tower on a portion of the lease premises substantially interferes with my client's operation of the demised premise. In particular, the area encompassed by the cell tower prevents them from utilizing the area for the intended purposes of the lease, that is, the parking lot.

...9.03 of the lease allows either party to cure any non-performance under the lease

if either party is in default.

That section gives either party thirty days to cure any defaults. Please let this letter act as notice for Mr. Hiers to cure his defaults under the lease. Should he not cure his defaults then we intend to abate the rent until such time as he does.

Please also be advised that your client's acts in allowing the erection of the cell tower constitutes a violation of the provisions of 6.12 in that the use by the cell tower company violates my client's lawful, quiet and peaceful possession and occupation of the demised premises. Also please be advised that the leasing of the subject premises to the cell tower company constitutes a violation of 14.17 which is my client's right of first refusal. (Exhibit 7)

Pursuant to this letter, Baker began deducting from his monthly rent the amount of $886.97. Leinbach alleged a breach of contract for failure to pay the rent due. Defendant admited it has not been paying the rent but asserted an abatement and counterclaims for the $886.97 per month which Optima paid Leinbach. Each party sought damages for breach of contract by the other. Neither sought rescission.

ARGUMENT

1. The Master-In-Equity erred in finding that 56 Leinbach breached the lease by allowing the Optima communications tower to be built on the area which was not part of the parking lot leased by Paradigm.

Although the lease generally addresses the entire 1.21 acre parcel of property, the term "Demised Premises", when defined, states "Subject to...the terms, covenants, conditions, and

provisions of this Lease, Landlord hereby demises and leases...1.21 acres..." etc. The definition of "Demised Premises" therefore put Magnolia on notice that specific conditions attached to the lease.

Those conditions are addressed in Section 1.02 Use of Space: "the demised premises shall be used by the Tenant as parking for employees of Tenant or Baker Motor Company and for no other purpose without the prior written consent of the Landlord." This same language is restated in Section 6.01. Thus, since the "wooded area" has no parking area on it (and was specifically designed by Magnolia not to have parking prior to execution of the lease), it is not subject to use by Magnolia, because parking is the only purpose for which Magnolia has any right of use pursuant to the lease.

Likewise under Title to Premises on page 17 of the lease: "the Demised Premises shall hereafter be subject to no leases...which in any manner interfere with Tenant". Notably, it does not say the Demised Premise is not subject to any future lease. It only forbids future leases that interfere with use of the parking area.

Did the Optima Tower interfere with Magnolia's use? Clearly not. The cars are parked in the same spaces with the same ingress and egress. The only difference to the parking area is the occasional shadow of the tower which is of no consequence. Tommy Baker conceded as much in his testimony before the court. He was not even aware the tower was on part of the 1.21 acre parcel until his real estate agent, Jimmy Bailey, tried to negotiate the sale of the property years after the parking lot was built (T.T. pg. 126).

Magnolia also argues it is entitled to the "quiet enjoyment" of the entire parcel. On page 17 of the lease, however, the enjoyment of quiet title and peaceful possession is limited to "all

rights herein granted" and those rights, as noted above are limited to the use of parking in the designated area.

As stated in McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, "The cardinal rule of contract is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Id. It is a question of law for the court whether the language of a contract is ambiguous." 672 S.E.2d 574 (citations omitted). See also McPherson v. J.E Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501: "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves..." 33 S.E.2d 510.

A close but fair reading of the lease allows Leinbach to use portions of the property as long as that use does not interfere with Magnolia's use. Magnolia conceded there was no interference and the Master-In-Equity found that there was no interference.

Appellant/Respondent Leinbach submits that based on the above there was no breach of contract by Leinbach.

II. Assuming Leinbach breached the lease, Magnolia suffered no damages and therefore the Master-In-Equity erred in awarding more than nominal damages.

Judge Scarborough ruled that the presence of the tower did not interfere with Magnolia's use of the parking lot (Order pg. 5). Tommy Baker confirmed this by his own testimony:

*   *   *

Q. There's an area over in the corner, I believe that you've seen and heard testify, where the tower went up.

A. Right.

Q. Is that an area that, at the time it went up, impacted your parking at the time?

A. No.

(T.T. 120)

*   *   *

Q. And the tower that's there 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, sir.

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

A. Right.

(T.T. 123-124)

*   *   *

Q. You didn't even know it was there until Mr. Bailey told you some year and a half or two years after it was 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 out in connection with doing some work that you all were buying the property.

A. Right.

Q. The tower being there hadn't interfered with anything in your daily life at all up to that point, had it?

A. I don't know that's the point. I think the point-

Q. That's the question Mr. Baker.

A. All right.

Q. The question is: The owner hadn't interfered with anything in your life up until that point? You didn't even know it was there. It wasn't even on your radar was it?

A. No.

(T.T. 126)

The mere fact that a contract has been breached does not entitle someone to an award. Damages must be proven. If there are no damages, but the Court believes a substantial right has been infringed upon, then nominal damages may be awarded. Save Charleston Foundation v. Murray, 333.S.E.2d 60, 65 (S.C. Ct. App. 1985), Stevens v. Allen, 342 S.C. 47, 530 S.E.2d 633 (S. Ct. 2000).

The $300.00 per month figure awarded by Judge Scarborough is not consistent with nominal damages. Judge Scarborough himself ruled (as was conceded by the Defendant) that

Magnolia received the full benefit of what it bargained for. Thus, even assuming a breach, no more than nominal damages should have been awarded.

III. Even assuming an award of more than nominal damages was appropriate, the award of a one sixth reduction in the total rent was excessive considering Magnolia enjoyed 100% of the benefit of its original bargain.

The Master-In-Equity specifically found in his Order "that the Plaintiff's (Leinbach's) action does not interfere with the Defendant's normal use of the area of the demised premises." (Order, pg. 7, emphasis in original Order). The Master thereafter further concluded "that Section 6.03 of the lease provides Defendant's (Magnolia) remedy for Plaintiff's interference with Defendant's use of the demised premises. Section 6.03 only applies, however, "if Landlord creates a condition that substantially interferes with the normal use of the Demised Premises."

Appellant/Respondent would submit that the remedy fashioned by the Master was erroneously based on the proposition that Section 6.03 allowed an equitable remedy under the circumstances. By the wording of the contract and the Master's own finding, Section 6.03 was simply not triggered by any facts in this case. The Master's rationale to begin to fashion an equitable remedy was therefore in error.

The Master relied on King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (S.C. App. 1984) to fashion an equitable remedy. Even assuming an equitable remedy was proper, Landlord submits that the Master's award of $300.00 per month was overly generous. The reason is that the Master simply looked at the amount of area the parcel occupied by the tower in proportion to the entire parcel. He did not factor in that Magnolia: 1) had no right to use the parcel where the tower was located; 2) never attempted to use the parcel where the tower was located;3) was getting the full

benefit of its original bargain under the contract before and after the erection of the Optima tower; 4) failed to file a Memorandum of Lease at the R.M.C. Office which would have prevented the entire problem.

Appellant/Respondent would submit that although the "square footage" approach is arguably one part of fashioning an equitable remedy, that the other factors listed above should also be considered to discount the final award further. Appellant/Respondent would submit that a further reduction of at least an additional 50% ($150.00 per month) would be appropriate.

CONCLUSION

Based on the argument set forth in argument # 1 above, Appellant/Respondent would ask this Honorable Court of Appeals to reverse the Judgment of the Master-In-Equity and enter a judgment in favor of the Appellant/Respondent 56 Leinbach Investors, LLC.

In the alternative, as set out in Argument #2 above, Appellant/Respondent would ask that a judgment of no more than nominal damages be awarded to Respondent/Appellant.

As a further alternative, as set out in Argument #3 above, 56 Leinbach would ask that Respondent/Appellant Magnolia Paradigm be awarded a figure of no greater than $150.00 as an abatement of its monthly rent payment.

Respectfully submitted,

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56 LEINBACH INVESTORS, LLC

Date: March 11, 2013

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