

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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Case No.: 2008-CP-10-3590

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

vs.

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

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INITIAL RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT

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**SC Court of Appeals**

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PROOF OF SERVICE

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I certify that I have served the Appellant/Respondent with the Initial Respondent's Brief of Respondent/Appellant by depositing a copy of it in the United States Mail, postage prepaid on April 10, 2013, addressed to his attorney of record, Donald H. Howe, Esquire, 47 State Street, Charleston, S.C., 29402



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## STATEMENT OF THE CASE

The Appellant/Respondent (Herein "Leinbach") commenced this action by the filing of a Complaint on June 24, 2008 for breach of contract arising out of a lease entered into by and between the parties dated June 1, 2003, (R.p. ) Leinbach's Complaint alleges that the Respondent/Appellant (herein "Magnolia") abatement of \$800.00 per month from the rental payments constitute breach of the terms of the lease. A second cause of action requests the Court to declare the parties rights under the lease, pursuant to the Uniform and Declaratory Judgment Act S.C. Code Ann. § 15-53-30 (1976). Thereafter, Leinbach filed an amended complaint attaching the lease which had been inadvertently left off of the lease in the original filing (R.p. ) This matter was referred to the Master in Equity for Charleston County by Order of Reference filed on September 1, 2009. (R.p. ), granting the Master full authority to decide all issues with finality, in accordance with Rule 53(e)(1) SCRCF. (R.p. )

On August 3, 2010, Leinbach filed a Motion to amend its Complaint with a proposed unsigned Second Amended Complaint attached and adding causes of action for unjust enrichment and equitable estoppel. (R.p. )

On July 18, 2008, the Magnolia filed its answer and counterclaim asserting the Leinbach had breached its lease with the Magnolia by leasing a portion of the property that had been heretofore leased to it. (R.p. ) On October 18, 2010 Magnolia filed an amended answer and counterclaim to the second amended complaint to assert the additional cause of action of unjust enrichment.(R.p. )

On October 11, 2011 the case was tried by the Honorable Michel R. Scarborough, Master in Equity for Charleston County who issued a final order dated June 11, 2012 and

filed on June 15, 2012. Receipt of notice of entry of the order was received on June 29, 2012. On July 9, 2012 counsel for the Magnolia filed a motion to reconsider alter or amend. (R.p. ) A form order denying Magnolia's motion was issued August 31, 2012 but was not filed until October 8, 2012. (R.p. ). Receipt of the notice of the courts order was received on October 15, 2012.

The import of the Courts order was that both parties had breached the terms of the lease, that there had been a mutual mistake that allowed the court to reform the lease , that Magnolia was entitled to abate the rent to Leinbach in a set amount and denied the recovery of attorney's fees.

Leinbach served its notice of appeal on or about November 8, 2012 . (R.p. ) and Magnolia served its notice of appeal on November 12, 2012 (R.p. ).

#### **STATEMENT OF FACTS**

The lease, (R.p. ) which is the subject matter of this action, was entered into between the parties on June 1, 2003. The lease was prepared by counsel for Leinbach and reviewed and commented on by counsel for Magnolia. An examination of the lease will reveal that it describes the Demised Premises as Parcel H2 of TMS 349-01-00-045 containing 1.21 acres and located on Leinbach Drive in the City of Charleston. A plat entitled "Harrison Executive Park Plat of Parcel H2 owned by Charles W. Patrick, Jr. and Stephen Ziff about to be conveyed to Charles W. Patrick, Jr. (TMS 349-01-00-045) showing the demised premises was introduced into evidence as Plaintiff's Ex. 10, (R.p. ). Leinbach's, manager, Clyde Hiers, testified that the parcel H-2 is the parcel leased to Magnolia.(R.p. )

The initial term of the lease was for five years with three options to renew for additional five year periods. The initial rent was \$21,600.00 per year for three years and thereafter three percent increase per year. In all it is a twenty year lease. Magnolia is in first renewal and has exercised its option for the third renewal that commences in June 2013. Exhibit 8 (R.p. ) is a rental summary as of the date of the trial showing rent paid through October 1, 2011. Total rent paid was \$153,561.00, total rent due under the lease was \$193,352.65. The difference is the amount that Magnolia deducted from its rent payment as a result of the Tower lease described below. Additionally Magnolia was responsible for and paid the taxes on the subject property.

On or about February 23, 2006, after leasing the demised premises to Magnolia, Leinbach entered into a lease with Optima Towers, LLC. ( R.p. ) Attached to that lease is a site sketch of the proposed lease area with Optima Towers which was executed by Clyde Hiers, the managing member of the Leinbach. It should be noted in comparing Exhibit "10" ( R.p. ) with the site sketch that TMS Parcel 349-01-80-105 is, in fact, Parcel H2 heretofore leased to the Magnolia. Mr. Hiers in his testimony admitted that the sketch is a portion of parcel H-2. ( R.p. ). See also Plaintiff's Exhibit 4 (R.p. ) which shows the Cell Tower parcel more clearly. Mr. Hiers testified that he made a mistake at the time this lease was entered . He did not realize that the area being leased to Optima was a part of the Demised premises already leased to Magnolia. (Tr p. 61 ln 16-180 (Rp. )

It is undisputed that the Lease to Optima Towers is a portion of the property already leased to Magnolia.

The Optima lease was for an initial term of five years with four five year options after that. The initial rental was for \$9,600 per month with increase after the first year of

3.5 % per anum. Exhibit 9 is a rent summary of rents paid by Optima from the inception of the tower lease through September 21, 2011 just before the trial. Total Rent paid was \$54,116.65. (R.p. )

Based on the forgoing two exhibits, from the inception of the tower lease to the date of the trial Leinbach received total rent of \$207,477.65 from Optima and Magnolia combined. Exhibit 15 shows these receipts. (R.p. ). Leinbach was only due from rents from the property \$193, 352.65 over the same period. Therefore, from Exhibit 15, Leinbach was overpaid \$14,125.00 through the date of the trial and continues to be overpaid to date. (R.p. )

Magnolia learned that Leinbach had leased a portion of the premises during negotiations for the purchase of the subject property in late 2007. In accordance with the terms of the lease, on December 18, 2007, Magnolia notified Leinbach's counsel of the terms of the lease that had been breached by Leinbach's lease to Optima Towers and to cure Leinbach's breach within 30 days of the letter or Magnolia would commence abating the rent until Leinbach cured its breach (R.p. ). On January 31 the rent for February was sent to Leinbach's lawyer, Donald H. Howe, abating \$800.00 from the rent. (R.p. )

As a result of the forgoing abatement of the rent Leinbach commenced the underlying action leading to this appeal

The Court in its order, following the trial, after multiple findings of fact and conclusions, determined that there had been a mutual mistake of fact and since neither party sought rescission, that reformation was the appropriate remedy. Neither party had pled or submitted evidence of mutual mistake or sought reformation of the lease. The

only evidence of mistake was the unilateral mistake of Leinbach (Transcript, P61, Line 16-18)(R.p. ). The reformation of the lease consisted of reducing the size of the demised premises to the area that the tenant (Magnolia) was occupying. Based on the foregoing reformation of the lease the Court then fashioned a remedy that recalculated the lease payment due to its reducing the size of the demised premises and allowed Magnolia to abate the rent since the inception of the tower lease.

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.

#### STANDARD OF REVIEW

This action was brought by both parties contending that each had breached the terms of the lease. Lease provisions are construed under rules of contract interpretation. See *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct.App.1992) (applying the rules of contract construction to interpret the lease of a shopping center). One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App.1990). To determine the intention of the parties, the court “must first look at the language of the contract.” *C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm’n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618 (Ct.App.2008); see also *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).

Although the action was brought as a case at law the Trial Courts remedy was equitable, that is, it reformed the lease based upon the mutual mistake of the parties and granted Leinbach judgment on its cause of action for unjust enrichment.

In an appeal of an equitable action tried before a master authorized to enter final judgment, this Court must review the entire record and make its own findings of fact according to its view of the preponderance of the evidence.” *Thomas v. Mitchell*, 287 S.C. 35, 37, 336 S.E.2d 154, 155 (Ct.App.1985). “This requirement does not, however, command us to ignore the findings of the trial judge who heard the witnesses.” *Id.* at 38, 336 S.E.2d at 155

## ARGUMENT I

### **THE MASTER-IN-EQUITY CORRECTLY FOUND THAT 56 LEINBACH HAD BREACHED THE LEASE BY ALLOWING THE OPTIMA COMMUNICATIONS TOWER TO BE BUILT ON THE AREA WHICH WAS ON THE DEMISED PREMISES.**

Leinbach's Argument I states, "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." (Emphasis mine)

The lease provides, "Section 1.01. Demised Premises. Subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, Landlord hereby demises and leases to Tenant, and Tenant hereby takes and leases from Landlord, certain premises (herein called the Demised Premises) consisting of the real estate and any improvements located or to be located thereon described 1.21 acres of real estate located at Leinbach Dr. City of Charleston, State of South Carolina and as more particularly described as parcel H-2 of TMS# 349-01-00-045 to have and to hold during the Demised Term (as defined in Section 2.03). "

The Master found by reference to the testimony of Leinbach's agent, Carnevale, and Magnolia's agent, Cochran, (R.p. ) that the demised premises is the entire 1.21 acre parcel. (Order, Page 4, Paragraph 12) (R.p. ). The Master further found at paragraph 13 page 5 of its order "It is apparent that Plaintiff's (Leinbach's) action in leasing the area to Optima Towers now prevents the Defendant (Magnolia) from using that portion of the demised premises. (emphasis mine) And further at paragraph 22 page 7 "It does however

effectively eject Defendant from future use of this part of the original demised premises". (emphasis mine) (R.p. )Leinbach has not appealed this finding.

Leinbach argues that the Demised Premises is limited to the parking area or parking lot within the Demised Premises. There is no parking area or parking lot within the demised premises. Section 1.01 of the lease repeated above states, "consisting of the real estate and any improvements located or to be located thereon described 1.21 acres of real estate". This language contemplated the construction of a parking lot on the Demised Premises and clearly indicates that the Demised Premises consists of the entire 1.21 acre parcel and any improvements then existing or to be constructed.

The thrust of Leinbach's argument is the boiler plate language of the lease, Section 1.01, "Subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, Landlord hereby demises and leases to Tenant," allows the landlord, Leinbach, to utilize an area of the Demised Premises that the tenant, Magnolia was not using. (R.p. ) (Appellant brief page 9) To support this contention Leinbach refers to section 1.02 of the lease which states, "Parking. Throughout the Demised Term, Tenant and its employees shall have the exclusive right to use any parking areas within the Demised Premises." This is the only place that the term "parking area" exists in the lease. This section just speaks to the exclusive use of any parking areas as opposed to non-exclusive use of any parking areas. At the inception of the lease the property was an open field. A parking lot was ultimately constructed on the site after the lease was entered into as contemplated by section 1.02 and Article VII of the lease. There is no designated parking area or lot within the four corners of the lease.

In his Order, the Master found that Leinbach had breached Article 12 of the lease. (R.p.) Article 12 of the lease is the quiet enjoyment paragraph. In pertinent part it provides that “the demised premises shall hereinafter be subject to no leases... which in any manner would prevent or interfere with tenant.” Notably it does not say the parking lot or parking area or parking. It says the demised premises. In that same paragraph the lease goes on to state, “and if Tenant shall discharge the obligations herein set forth to be performed, ( terms, covenants and conditions) by Tenant, Tenant shall, during the Demised Term, have lawful, quiet and peaceful possession and occupation of the Demised Premises and shall enjoy all the rights herein granted without any let, hindrance, ejection, molestation or interference by any person.”

The erection of the cell tower on the demised premises as a matter of common sense clearly in some manner prevents or interferes with tenant use of the area of the tower and therefore violates Article 12 of the lease as found by the Master.

Leinbach misconstrues the effect of the language in the lease that it is “subject to the terms, covenants, conditions and provisions of this lease”. Leinbach’s construction is that that language allows the landlord (Leinbach) to reduce the size of the demised premises to what tenant is occupying. Leinbach takes this argument to the extreme when it states “since the wooded area” has no parking on it, it is not subject to use by Magnolia.” This argument defies logic. In essence, Leinbach is stating, since Magnolia is not using the area for parking, then Leinbach can use it for any other purposes and since Magnolia did not use it initially for parking they now cannot use it at all.

Clearly a covenant of this lease is that it be used for parking during the demised term. Section 1.02 Parking, Section 1.02 (Use of Space) and Section 6.01( Use) makes

this abundantly clear. All of these sections refer to the Demised Premises. Only the first section, 1.02 Parking, refers to the term “any parking areas” within the demised premises. At the time of the execution of the lease, there were no parking areas. There was only a parking plan submitted in accordance with Leinbach’s rights to approve the plans in accordance with Section 5.01 of the subject lease.

Leinbach further refers to Article 12 of the lease, which is the quiet title paragraph. The statement at Page 8 of its Brief “it only forbids future leases that interfere with the use of the parking area” is again clearly erroneous. As previously stated and as stated in Magnolia’s Appellants Brief, there is no parking area within the demised premises. Parking is merely a use. Article 12 forbids any leases on the Demised Premises that interfere.

Leinbach further asserts that the Optima Tower did not interfere with Magnolia’s use. Article 12 states that “the demised premises shall hereafter be subject to no leases,... which in any manner would prevent or interfere with tenant. There is no language in Article 12 that could be reasonably construed to follow Leinbach’s argument as contained in its Appellants Brief. What Leinbach argues is that the Tower does not interfere with the improved parking area constructed by Magnolia. This argument is misplaced. The question is, does the Tower interfere with Magnolia’s use of the area that the Tower is constructed? Clearly it does. As found by the Master, at paragraph 13 page 5 of its order “It is apparent that Plaintiff’s (Leinbach’s) action in leasing the area to Optima Towers now prevents the Defendant (Magnolia) from using that portion of the demised premises. (emphasis mine) And further at paragraph 22 page 7 “It does however

effectively eject Defendant from future use of this part of the original demised premises". (emphasis mine).

Leinbach further asserts that Page 8 of its Brief that 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". Again there is no parking in any designated area. Leinbach's attempted interpretation of the lease in this fashion goes far beyond reasonableness and common sense.

Leinbach's final statement that "a close and fair reading of the lease allows Leinbach to use a portion of the property as long as it does not interfere with Magnolia's use" is clearly erroneous. The lease prohibits any leases "which in any manner prevent or interfere with tenant." (R.p. ) Leinbach has allowed the construction of a cell tower on a portion of the premise which clearly interferes with the tenant's use and quiet enjoyment of the subject property and in violation of Article XII of the lease.

Based on the foregoing, this Court should reach no other conclusion that the Master correctly found that Leinbach breached Article 12 of the lease when it leased a portion of the property to Optima Towers which "prevented or interfered" with the tenant.

**ARGUMENT II APPELLANTS, LEINBACH'S ARGUMENT II FAILS TO TAKE INTO CONSIDERATION MAGNOLIA'S CLAIM FOR UNJUST ENRICHMENT AND ABATEMENT AS PROVIDED BY THE LEASE AND LEINBACHS CHANGE OF USE OF THE TOWER PARCEL**

In its Argument II Leinbach asserts that Magnolia has not been damaged, or if Magnolia was damaged it was only nominal. This argument fails to consider the relief that Magnolia sought and the way that the Master fashioned his remedy.

Magnolia asserted a claim for unjust enrichment against Leinbach. Its claim was based on the fact that Leinbach had leased the property to Magnolia for 20 years and all the rights and benefits of the property for that period belonged to the Tenant, Magnolia.

“The right to use the leased premises during the term specified in the lease is transferred from the landlord to the tenant. Thus, a 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 a 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 rights being confined to the reversionary interest. 9 Am. Jur. 2d Landlord and Tenant § 889, 52 C.J.S. Landlord & Tenant § 337

Magnolia sought restitution from Leinbach to prevent it from collecting a windfall.

”Restitution is a remedy designed to prevent unjust enrichment.” *13 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). In the case of *Harper v McCoy* 276 S.C. 170, 172 276 S.E.2d 782,783-784 1981, the Court stated

“A cause of action for restitution is a type of the broader cause of action for money had and received, and generally the object to be attained in proceedings for restitution is the prevention of unjust enrichment of the defendant and the securing for plaintiff of that to which he is justly and in good conscience entitled. A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and if one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled.... at *id* 784

The lease also provides a remedy akin to restitution for unjust enrichment that is, abatement. Section 6.02 provides: “Landlord shall use its best efforts to not interfere with Tenant’s operations. If Landlord creates a condition that substantially interferes with the normal use of the Demised Premises or appurtenant parking or service areas as allowed herein, the Rent and other charges due hereunder shall be abated during the time

such interference persists...”. This section allows the total abatement of the rent during the period that the interference persists. Total rent at the time was \$1,909.58 per month. Magnolia commenced abating \$800.00 per month which was the initial amount of the Optima Tower lease payment.

Leinbach changed the character of the use of the area now occupied by Optima Towers from parking to cell tower. This is irrevocable. As a result the rental value of that area is greater than the rental value area for parking. Having changed the character of the use any loss to Magnolia should be based on the existing use as a cell tower instead of the original use contemplated by Magnolia. This would, therefore, be that amount that Optima Towers is now paying.

Leinbach did substantially interfere with Magnolia’s use of the Demised Premises, The Master found, at paragraph 13 page 5 of its order “It is apparent that Plaintiff’s (Leinbach’s) action in leasing the area to Optima Towers now prevents the Defendant (Magnolia) from using that portion of the demised premises.” (emphasis mine)(Rp.) and further at paragraph 22 page 7 “It does however effectively eject Defendant from future use of this part of the original demised premises”. (emphasis mine) (Rp.)These findings are consistent with proposition that there was a substantial interference to that portion of the Demised Premises that the Tower was occupying.

In its Appellant’s brief at page 11 & 12 Leinbach asserts that the Master ruled and Magnolia conceded that it had received the full benefit of what it bargained for. The court did not rule specifically as alleged by Leinbach and further Magnolia did not concede it received the full benefit of its bargain. In fact in Mr. Baker’s testimony on redirect he testified that he bargained for the full 1.21 acres and was deprived a portion of that by

Leinbach's lease of the a portion of the property to Optima Towers. (R.p.)

The Master correctly found that Leinbach had breached the lease and fashioned a remedy that recognized Magnolia's right to abate the rent but not in the full amount of the Optima Tower lease as Magnolia sought. The amount of the abatement was appealed by Magnolia and is fully addressed in Magnolia's Appellants brief.

**ARGUMENT III. LEINBACH'S ARGUMENT III FAILS TO TAKE INTO CONSIDERATION THAT MAGNOLIA WAS DEPRIVED OF A PORTION OF THE DEMISED PREMISE AND THEREFORE DID NOT RECEIVE 100% BENEFIT OF THE ORIGINAL LEASE**

In its brief Leinbach argues that the Master fashioned an equitable remedy based on Section 6.03 of the lease. This is erroneous. The master fashioned an equitable remedy by finding that there was a mutual mistake that allowed reformation of the lease. In Magnolia's Appellant's brief it asserted that this was in error and fully briefed.

Leinbach argues that Magnolia enjoyed 100% of the benefit of the original bargain. This is clearly erroneous. The original bargain was for 1.21 acres. (Testimony Baker, Carnavale and Cochran) (R.p. )The lease to Optima Tower took away 5,000 square feet of that area. The Master found that the entire 1.21 acres was the demised Premises. Therefore Magnolia did not receive 100% of the original bargain.

Leinbach asserts that Magnolia "had no right to use the parcel where the tower was located." I am not sure what support Leinbach gives for that proposition, but if the Master found that the Demised Premises was the entire 1.21 acre parcel and that finding was not appealed then Magnolia had the right to use the entire 1.21 acre parcel which includes the area of the Optima Tower.

Leinbach argues that these further issues should discount the amount of the abatement from \$300.00 to maybe \$150.00. What the court should consider, as argued in

Magnolia's Appellant's brief, is that the parcel that the tower sits on belongs to Magnolia for the term of the lease and that Leinbach is receiving 100% of what it bargained for at the time that it leased the property to Magnolia. It is receiving that agreed upon amount collectively from Magnolia and from Optima Towers. Ex 15 (R.p. ) shows the rent received from Magnolia and the rent received from Optima through the date of the trial. Leinbach has received \$14, 125.00 more than it would have received had it not allowed the erection of the Tower. In other words Leinbach will receive the full benefit of its bargain with Magnolia by allowing a full abatement of the rent received from Optima. Leinbach has not been damaged by Magnolia's abatement of the rent.

Leinbach comments, but has not appealed, that this matter could have been avoided by the filing of a memorandum of the lease. The Master correctly ruled on this issue at page 8 paragraph 26 of his order. (R.p.) and concluded as a matter of law that "A memorandum of lease is for the benefit of third parties and not the parties themselves."

### **CONCLUSION**

Magnolia has fully briefed its position in its Appellant's brief which touches on the issues raised in Leinbach's appeal and urges the court to grant it the relief requested in its appeal.

Leinbach's appeal fails to recognize that it made a unilateral mistake that led to the leasing of the property to two tenants. Leinbach's owner testified that he was not aware that the area was already leased to Magnolia at the time it leased the property to Optima Towers. (R. p. ) After the fact, Leinbach reviewed the lease and tried to find provisions in the lease that would excuse its unilateral mistake and breach.

Using the boiler plate language of the lease that states "Subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, Landlord hereby demises and leases to Tenant," Leinbach tries to pull in provisions of the lease that were not intended to accomplish what it seeks, that is justification for leasing the same property to two different people.

The lease unambiguously describes the demised premises as the entire 1.21 acre parcel and the Master so found. There is was no parking area or parking lot on the demised premises at the time the lease was executed. The demised premise is the entire 1.21 acres.

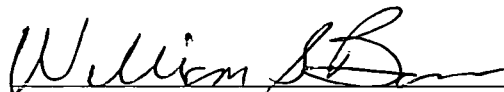
Leinbach was entitled to the lease payments from the entire 1.21 acre parcel for the term of Magnolia's lease, not the full amount of the lease payments for the entire 1.21 acres from Magnolia and the lease payment from Optima Towers for 5,000 square feet of the same 1.21 acres. That is double dipping. As shown on ex 15 (R p. ) Leinbach received a windfall of \$14,125.00 through the date of the trial at Magnolia's expense.

Only the full abatement of the Optima Tower lease will prevent Leinbach from achieving a windfall at Magnolia's expense.

The court should reverse the decision of the Master and enter judgment for Magnolia allowing it full abatement of the rent received by Leinbach from Optima Towers since the inception of the tower lease as well as the rent in the future well as reasonable attorney's fees.

Respectfully submitted,

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