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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Bentley Price, Circuit Court Judge

Case No. 2021-CP-08-00513
Appellate Tracking Number 2021-00768

Aracelis Santos, ……. ……Appellant,

vs.

Harris Investment Holdings, L.L.C.
City of Hanahan, City of Hanahan Police Department,
John Doe#1 and John Doe #2, employees of the City of
Hanahan Police Department, ……..……..Defendants,

of which

Harris Investment Holdings, L.L.C. is the……Respondent.

RECORD ON APPEAL

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Aracelis Santos VS Harris Investment Holdings Llc , defendant, et al

Case Number:	2021CP0800513	Court Agency:	Common Pleas	Filed Date:	03/02/2021
Case Type:	Common Pleas	Case Sub Type:	Fraud/Bad Faith 150	File Type:	Mediator - Jury
Status:	Appeal	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:		Disposition Date:		Disposition Judge:	
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documer
Santos, Aracelis	ADR/Alternative Dispute Resolution (Workflow)	Action		09/28/2021-13:04		
Harris Investment Holdings Llc	NEF(09-17-2021 04:21:17 PM) Order/Protection from Court ...	Filing		09/17/2021-16:22		
Harris Investment Holdings Llc	Order/Protection from Court Appearance	Order		09/17/2021-16:21		
Harris Investment Holdings Llc	NEF(09-17-2021 10:58:15 AM) Proposed Order/Protection fr...	Filing		09/17/2021-11:14		
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Santos, Aracelis	NEF(07-30-2021 08:53:18 AM) Order/Protection from Court ...	Filing		07/30/2021-08:53		
Santos, Aracelis	Order/Protection from Court Appearance	Order		07/30/2021-08:53		
Santos, Aracelis	NEF(07-29-2021 11:56:21 AM) Proposed Order/Protection fr...	Filing		07/29/2021-13:55		
Santos, Aracelis	Order/Order Cover Sheet $25.00	Filing		07/29/2021-11:56		
Santos, Aracelis	Appeal/Notice of Appeal to Court of Appeals	Action		07/15/2021-14:52		
Santos, Aracelis	NEF(07-14-2021 02:52:32 PM) Appeal/Notice of Appeal to C...	Filing		07/14/2021-15:16		
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Holdings Llc						
Santos, Aracelis	NEF(06-29-2021 01:53:03 PM) Order/Other	Filing		06/29/2021-13:53		
Santos, Aracelis	Order Denying Plaintiff's Motion to Reconsider	Order		06/29/2021-13:53		
Harris Investment Holdings Llc	NEF(06-28-2021 10:26:45 AM) Order/Order Cover Sheet $25....	Filing		06/28/2021-11:33		
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Santos, Aracelis	NEF(06-15-2021 11:24:08 AM) Motion/Reconsider	Filing		06/15/2021-11:55		
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Harris Investment Holdings Llc	NEF(06-14-2021 03:18:39 PM) Order/Electronic Form 4	Filing		06/14/2021-15:18		
Harris Investment Holdings Llc	Order/Electronic Form 4 (Motion to Dismiss GRANTED)	Order		06/14/2021-15:18		
Santos, Aracelis	NEF(05-27-2021 11:40:33 AM) Memo/Memo in Opposition	Filing		05/27/2021-12:02		
Santos, Aracelis	Memo/Memo in Opposition	Filing		05/27/2021-11:40		
Harris Investment Holdings Llc	NEF(05-25-2021 01:43:44 PM) Memo/Memo in Support	Filing		05/25/2021-14:18		
Harris Investment Holdings Llc	Memo/Memo in Support	Filing		05/25/2021-13:43		
Goldstein, Thomas R.	6/1/2021_MOTHEA_Roster/Notice of Motions Roster Publication	Action		05/19/2021-14:25		
Bracey, Olesya Vaskevich	6/1/2021_MOTHEA_Roster/Notice of Motions Roster Publication	Action		05/19/2021-14:25		
Abney, Merritt Gordon	6/1/2021_MOTHEA_Roster/Notice of Motions Roster Publication	Action		05/19/2021-14:25		
McQuillin, Stafford John III	6/1/2021_MOTHEA_Roster/Notice of Motions Roster Publication	Action		05/19/2021-14:25		
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City Of Hanahan Police Department	Notice/Notice of Appearance	Filing		05/07/2021-14:52		
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Holdings Llc						
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Santos, Aracelis	Summons & Complaint	Filing		03/02/2021-13:04		

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Berkeley
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP0800513

Aracelis Santos
PLAINTIFF(S)

Harris Investment Holdings Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This matter came before the Court as Defendant Harris Investment Holdings, LLC's Motion to Dismiss heard on June 3, 2021.

Defendant Harris Investment Holdings, LLC's Motion to Dismiss is granted.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/14/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Berkeley Common Pleas

Case Caption: Aracelis Santos VS Harris Investment Holdings Llc , defendant, et al

Case Number: 2021CP0800513

Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

ELECTRONICALLY FILED - 2021 Jun 29 1:53 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Aracelis Santos, Plaintiff, vs. Harris Investment Holdings, LLC, City of Hanahan, City of Hanahan Police Department, John Doe #1 and John Doe #2, employees of the City of Hanahan Police Department, Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2021-CP-08-00513 **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

The Plaintiff Aracelis Santos filed a motion asking this Court to reconsider its June 14, 2021 Order. Specifically, Plaintiff asks the Court to reconsider: (1) dismissal with or without prejudice (2) the standard of review (3) the basis for dismissal.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).[1] Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinston v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v.

[1] Rule 59 is substantially the same as the Federal Rule. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

Baker, 554 U.S. 471, n.5 (2008)). In other words, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does "[a] party's mere disagreement with the court's ruling . . . warrant a Rule 59(e) motion." In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Plaintiff's motion, the Court hereby DENIES Plaintiff Aracelis Santos' Motion for Reconsideration.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

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Berkeley Common Pleas

Case Caption: Aracelis Santos VS Harris Investment Holdings Llc , defendant, et al

Case Number: 2021CP0800513

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)
)
)

2016CV0810605290
2017CV0810600019
CIVIL CASE NUMBERS
MAGISTRATE'S COURT

AMENDED BOND TO STAY EXECUTION ON APPEAL

Harris Investment Holdings, Llc

LANDLORD

Vs

Aracelis Santos
5901 Loftis Road Suite#2, 4
Hanahan, SC 29410

TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the Landlord on **December 7, 2017**, by the Magistrate. Tenant(s) has appealed the Judgment to the Circuit Court.

Pursuant to the findings of the Magistrate, the Tenant(s) is obligated to pay rent in the amount of **$2,852.00** per **month**, due on the **1st day** of each **month**.

Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

AMENDED BOND: Having considered the Motion to Alter and Amend filed by the Defendant, the Plaintiff's response thereto, as well as the new communication from counsel, the Court finds it that it is appropriate to amend the bond to $5,500.00. The $5,500.00 BOND shall be paid within five (5) days. Rent shall continue to be due and owing in the amount of $2,852.00, and shall be paid on the 1st day of each month and late after the 5th day.

Dated on May 17, 2018:

by previous signature dated May 7, 2018
Tenant(s)

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on May 17, 2018

JUDGE

Goose Creek Magistrate
303-B North Goose Creek Blvd.
Goose Creek, SC 29445
Phone: (843) 553-7080

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STATE OF SOUTH CAROLINA)	IN THE MAGISTRATE COURT
)	
COUNTY OF BERKELEY)	CASE NUMBERS: 2017-CV-08-10600019
)	2016-CV-08-10605290
)	
HARRIS INVESTMENTS)	
HOLDINGS, LLC,)	
)	
Plaintiff,)	
)	
v.)	ORDER
)	
ARACELIS SANTOS,)	
)	
Defendant.)	
)	

THIS MATTER comes before the Court on October 11, 2017, upon the Plaintiff's Applications for Ejectment filed in the above-captioned actions. The Plaintiff (hereinafter "Harris" or "Landlord") sought to eject the Defendant (hereinafter "Santos" or "Tenant") from two units in the same shopping center located at 5901 Loftis Road, Hanahan, South Carolina.

I. Findings of Fact and Conclusions of Law

A. BACKGROUND

Harris and Santos are parties to a lease dated May 22, 2014, for an 1,807 square foot shopping center unit operated as a convenience store known as "Latino Mix." [Plaintiff's Exhibit 23, Defendant's Exhibit 1], hereinafter "the First Lease." The term of the First Lease was for two (2) years, provided that in the event the "commencement date" of the First Lease was a date other than the first date of a calendar month, the term would extend for the number of days remaining in the calendar month following the commencement date. The commencement date for purposes of the First Lease was August 1, 2014.

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Harris and Santos are parties to a lease dated December 2, 2015, for a 3,780 square foot shopping center unit operated as a restaurant/discotheque/night club known as "El Alamo." [Plaintiff's Exhibit 2, Defendant's Exhibit 2], hereinafter "the Second Lease." The term of the Second Lease was from December 1, 2015, until November 30, 2018.

The First Lease sets forth the "demised premises" as 5901 Loftis Road, Suite #2, 4, Hanahan, South Carolina. The Second Lease provides that the leased premises is 5901 Loftis Road, Hanahan, South Carolina. However, it is clear from the evidence presented, and undisputed by the parties, that the First Lease involves "Latino Mix" and the Second Lease involves "El Alamo." The business license for El Alamo is held in the name of Benjamin Reyna (hereinafter "Reyna").

Harris filed an Application for Ejectment and Rule to Show Cause, Case Number 2016-CV-08-10605290, on November 14, 2016, alleging that Santos had violated the terms or conditions of the Second Lease. A Rule to Vacate or Show Cause was signed by the Honorable D. Mark Stokes and served on Santos on November 17, 2016. Santos filed a Motion for Removal, Answer to Rule to Show Cause, and Counterclaims on November 28, 2016. Harris filed a Reply to Counterclaim on December 15, 2016. Harris submitted a Memorandum in Opposition to Santos's Motion to Remove on or about January 6, 2017[1]. Judge Stokes held a hearing on Santos's Motion for Removal on January 9, 2017, and ultimately issued an order on January 13, 2017, denying the Motion. On March 31, 2017, the Harris filed a Motion for Summary Judgment in Case Number 2016-CV-08-10605290. On June 14, 2017, Harris filed a Supplemental

[1] While Harris's Memorandum in Opposition to Santos's Motion to Remove was submitted to the Court on January 6, 2017, said Memorandum was not actually filed until January 13, 2016.

Memorandum in Support of Motion for Summary Judgment in Case Number 2016-CV-08-10605290.

Harris filed a second Application for Ejectment and Rule to Show Cause, Case Number 2017-CV-08-10600019, on January 5, 2017, alleging that the terms of tenancy or occupancy had ended under the First Lease and further that Santos had violated the terms or conditions of the lease. A Rule to Vacate or Show Cause was signed by the undersigned on January 6, 2017, and a constable attempted service upon Santos two (2) times, posting a copy of the Rule to Vacate or Show Cause on Santos's door. Santos's attorney acknowledged that Santos received a copy of the Rule to Vacate or Show Cause and indicated that he would be filing a response thereto.[2] Santos filed a second Motion for Removal, Answer to Rule to Show Cause, and Counterclaims on February 23, 2017. Harris filed a second Memorandum in Opposition to Santos's Motion to Remove and Reply to Counterclaim on March 3, 2017. On April 3, 2017, the Plaintiff filed a Motion for Summary Judgment in Case Number 2017-CV-08-10600019.

Following Judge Stokes' January 13, 2017, Order denying Santos' Motion for Removal as to Case Number 2016-CV-08-10605290, this Court determined that Judge Stokes' rulings became the "law of the case" for purposes of Case Number 2017-CV-08-10600019, and therefore denied Santos' Motion for Removal in the latter action. After the Court's decision, Santos moved to voluntarily dismiss her counterclaims against Harris over Harris' objection. The Court issued an Order granting Santos' Motion to voluntarily dismiss her counterclaims on July 18, 2017.

[2] On March 9, 2017, the undersigned held a pretrial hearing at which time the Court inquired of Santos's attorney as to whether there were any service issues pertaining to either matter in light of Santos's Answer which asserted an affirmative defense under South Carolina Rules of Civil Procedure (SCRCP) Rule 12(b)(2). The acknowledged to the Court that no service issues existed. As such, the Court finds that Santos voluntarily withdrew her affirmative defense under SCRCP 12(b)(2) and acquiesced to the Court having personal jurisdiction over her for both matters.

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Santos waived her right to a jury trial and the matters were heard by bench trial on October 11, 2017.

B. FINANCIAL DEFAULT

Despite having not pled the issue in either Application for Ejectment, Harris alleges Santos repeatedly defaulted on her obligation under the First and Second Leases to pay rent timely for both El Alamo and Latino Mix.

Rule 15(b) of the South Carolina Rules of Civil Procedure allows for amendments of pleadings to conform to the evidence presented at trial, providing in pertinent part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). The decision whether to allow the amendment of pleadings to conform to the evidence is left to the sound discretion of the trial court. Id. Amendments should be allowed if no prejudice occurs to the opposing party. Id.

Rule 15(b) covers two situations involving amendments to conform to the evidence. Id. First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary. Id. Express consent may be demonstrated by a stipulation but implied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial. Id.

As was the case in Dunbar, no objection was made in this case to the evidence pertaining to financial default. As such, the second part of the rule is inapplicable. In

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addition, there was no express consent. However, the Court finds that the parties tried the issue of financial default by implied consent. It appears from the evidence in the record that counsel for both Harris and Santos questioned witnesses extensively regarding the issues of Santos' alleged financial default. In fact, this issue was the basis for Harris' Motion for Summary Judgment prior to the trial which was granted in part.

Both leases in the instant case require payment of rent on a monthly basis and rent is due on the first day of each month. Failure to pay rent on or before the due date constitutes financial default. If Tenant fails to cure the default via payment of the past due rent and all late fees within 5 days of receiving notice of default, Landlord is authorized to immediately terminate the lease and oust Tenant. [Plaintiff's Exhibit 2, Defendant's Exhibits 1 and 2].

In February of 2017, Santos submitted a check dated February 4, 2017, for the monthly rental payment for El Alamo, but the check was returned due to insufficient funds. [Plaintiff's Exhibit 12]. On March 10, 2017, Harris' counsel notified Santos' counsel of the default orally and in writing. [Plaintiff's Exhibit 13]. No replacement check or any other payment for February 2017 rent was delivered within the 5-day cure period as required. [Plaintiff's Exhibit 17].

On March 20, 2017, the rent check for El Alamo was also returned due to insufficient funds. [Plaintiff's Exhibit 14]. On April 4, 2017, Harris provided notice to Santos that the March rent check was returned due to insufficient funds and stated that although Santos was already in default (due to failure to pay February rent and other breaches described in the Complaint), the failure to pay March rent constituted further financial default under the terms of the Lease. [Plaintiff's Exhibit 15]. Santos failed to

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provide a replacement check or otherwise cure the breach within the 5-day cure period as required. [Plaintiff's Exhibit 17].

On May 3, 2017, counsel for Harris informed counsel for Santos that Harris had terminated the Second Lease due to Santos' failure to timely pay rent and failure to timely cure financial defaults after notice. [Plaintiff's Exhibit 17].

Santos subsequently failed to pay rent timely for August of 2017 for El Alamo. Via letter dated August 15, 2017, counsel for Harris notified Santos of this further financial default. [Plaintiff's Exhibit 18]. Santos failed to cure the defaults within the 5-day cure period as required. Santos again failed to pay rent timely for September of 2017 for El Alamo. Counsel for Harris sent a letter dated September 22, 2017, notifying Santos of this further financial default and Santos did not cure the breach within the 5-day cure period. [Plaintiff's Exhibit 19].

It is clear that Santos repeatedly failed to make timely rental payments under both the First and Second Leases. In fact, the Court previously granted partial summary judgment in that there was no issue of material fact as to whether Santos was in default for "failure to pay rent when due or demanded" and whether she received notice of the default. Mr. DeLuca testified at trial that he had no information about rent and that as far as he was aware, including whether or not there remains an unpaid balance and that Harris had sent the rent payments to held in escrow by new counsel. Nonetheless, Santos had at the time of trial caught up all back owed rent.

Having determined that Santos was in financial default, the Court must next determine whether said breach was material under the analysis set forth in Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994).

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In determining whether Tenant's breach of the Lease was material, the Court must consider (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Kiriakides, supra.

Harris contends that it was deprived of the benefit of its bargain in purchasing the shopping center and assuming the Leases, having based its analysis of what it was willing to pay for the premises in part on the expectation of timely rental payments. Mr. DeLuca testified that Santos' repeated failure to make timely payments frustrated Harris' ability to manage cash flow for the shopping center. However, Mr. DeLuca admitted that he was unaware of the status of Santos' account and testified that the late rent payments remained in Harris' counsel's trust account. The Court finds that while the late rent was an inconvenience to Harris for sure, it did not rise to the level of depriving Harris of the benefit of its bargain and that the only benefit Harris reasonably could have expected was the past due rent which could be adequately compensated by damages. Santos' damages to the extent the Leases would be forfeited include the length of time remaining on the Leases. As to factor (d), the Court finds that Santos has in fact cured her default by paying all amounts past due. Finally, there is no evidence in the record that Santos' breach was willful or in bad faith. Although Santos did provide Harris with

checks that were returned for insufficient funds, nothing presented suggests that she did so purposefully.

As the Court has applied all Kiriakides factors in favor of Santos, the Court finds that forfeiture based on financial default alone in this particular case would be inequitable under the totality of the circumstances surrounding the financial breach.

C. FIRST LEASE

(1) Term of Tenancy or Occupancy Has Ended

In Case Number 2017-CV-08-10600019, Harris argues that the First Lease expired and that Harris delivered notice to Santos to vacate the premises and, as such, the ejectment should be upheld.

It is unequivocal that the term of occupancy for Santos under the First Lease ended August 1, 2016. On December 1, 2016, counsel for Harris notified Santos the term of the First Lease had expired and directed Santos to vacate the premises on or before December 31, 2016. [Plaintiff's Exhibit 24]. Santos refused to vacate and continued to occupy the premises. As indicated previously herein, it is clear from the evidence presented, and undisputed by the parties, that the First Lease involves "Latino Mix" and the Second Lease involves "El Alamo."

During the trial, Santos introduced evidence of a purported new lease agreement for Latino Mix as Defendant's Exhibit 3 (hereinafter "the Third Lease"). Whereas Harris denied ever having agreed to renew or extend the term of the First Lease, Santos argues that all negotiations pertaining to the Third Lease took place with Isabella Martinez acting as agent for Harris and that she believed the Second Lease and the Third Lease were extensions of the First Lease. Santos claims that she signed the Second Lease on December 22, 2015, and the Third Lease on August 1, 2016. The

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Third Lease provided a term beginning on August 1, 2016 (the expiration date of the Second Lease), and ending on August 1, 2018. Santos argues that after she signed the Third Lease, she received text messages from Isabella Martinez explaining that the Landlord would not sign the Third Lease following a meeting with the City of Hanahan.

The Third Lease provides in Section 23 thereof, entitled "Effective Date of Lease," that "This Agreement shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this Agreement is signed by one party and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party and delivery of a fully executed copy of the submitting party." [Defendant's Exhibit 3]. It is undisputed that the Third Lease was never executed by Harris or any agent of Harris. By the express terms of the Third Lease, even if Santos signed the Third Lease and delivered it to Harris, this act merely constituted an offer to lease subject to revocation at any time prior to execution by Harris. As such, the Third Lease did not become a binding agreement as there was never an execution and delivery thereof by both parties.

Moreover, the Third Lease does not satisfy the statute of frauds because it was never signed by Harris or any agent thereof. S.C. Code Section 32-3-10(4) provides that any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (holding a lease agreement for a period greater than one year, or any modification thereof, must satisfy the statute of frauds).

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Finally, the Court finds that Santos failed to exercise her option to renew the First Lease which required delivery via certified mail of written notice of her intention to renew at least one hundred eighty (180) days before the expiration of the First Lease. [Plaintiff's Exhibit 23].

The Court finds that the credible evidence in the record demonstrates that the Third Lease is ineffective and therefore the First Lease expired on August 1, 2016, leaving Santos as a month to month tenant since that date. [Plaintiff's Exhibit 23]. As such, Harris is entitled to ejectment under Case Number 2017-CV-08-10600019.

(2) Failure to Provide Evidence of Insurance Coverage

In Case Number 2017-CV-08-10600019, Harris next argues that Santos defaulted as to Sections 14 and 16 of the First Lease by failing to provide evidence of insurance coverage as demanded by Harris.

Section 14 of the First Lease provides that Santos was to carry at her own expense, public liability insurance coverage on the premises with a company qualified to transact business in South Carolina with liability limits of not less than $1,000,000.00 per occurrence and $2,000,000.00 aggregate. Santos was to have Harris and its managing agent named as additional insureds with a certificate of such coverage from the insurer giving thirty (30) days' notice to Harris and its managing agent prior to cancellation or termination was required to be provided to Harris and its managing agent prior to Santos' possession of the premises.

Section 16 of the First Lease provides that Harris carry all-risk insurance coverage on the premises and other buildings in the shopping center and if during the term of the lease, the premises are used for any purpose or in any manner which

causes an increase in the rates of such insurance, Santos shall pay as additional rent the additional premium caused thereby upon ten (10) days written notice to Santos.

On December 21, 2016, counsel for Harris sent an email to counsel for Santos indicating that it was his understanding the insurance certificates for both Latino Mix and El Alamo were set to expire on December 30, 2016. [Plaintiff's Exhibit 9]. Counsel for Harris further indicated that Harris needed to obtain new certificates as soon as possible but no later than December 30, 2016.

Costa DeLuca, employed by Harris, testified that no insurance certificates were ever provided demonstrating that Santos maintained the public liability insurance coverage up to the limits required by the First Lease subsequent to December 30, 2016. Santos did not testify at trial and produced no evidence that insurance certificates were ever provided subsequent to the purported expiration of the initial insurance certificate on December 30, 2016.

Section 18(b) of the First Lease provides that "Lessee shall be in general default if it shall fail to keep or shall violate any other conditions, stipulations, or agreements contained" in the First Lease "on the part of the Lessee to be kept and performed." Section 18(d) provides that "In the event Lessee is in general default, it shall have a grace period of thirty (30) days to cure such default after Lessor shall have mailed, by U.S. Postal Service, Lessee written notice thereof; provided however, if Lessor shall have mailed to Lessee a notice of such default, even though the same shall have been cured and this Lease not terminated, and within twelve (12) months from the date which said notice of default has been mailed by Lessor to Lessee, Lessee shall again be in general default, the same shall be deemed an event of default without any notice or grace period."

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While Harris provided Santos with a letter titled "Notice of Default and Right to Cure" on October 13, 2016, regarding liability insurance for the Second Lease, Harris did not provide Santos with notice of default pertaining to her failure to maintain insurance on the First Lease.

The purpose of a notice of default is to give the party allegedly in default an opportunity to cure the default and meet his obligation. Hammond v. Tilghman Lakes, Inc., 295 S.C. 152, 367 S.E.2d 446 (Ct. App. 1988). Forfeiture provisions of a lease are strictly construed and when a forfeiture depends upon giving a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to time and content. Litchfield Co. of South Carolina, Inc., v. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986).

Although counsel for Harris requested new certificates of insurance from Santos on December 21, 2016, Santos was not in default at that time as Harris admits the certificates of insurance expired December 30, 2016. The Court finds that Harris may have had grounds to send a Notice of Default to Santos on December 31, 2016, as result of Santos' potential breach of the First Lease for failing to maintain public liability insurance on the premises. However, nothing in the record evinces that Harris ever provided Santos with the opportunity to cure any such potential breach as provided for in Section 18(d) of the Lease. Whether the Court were to conclude that Santos breached the First Lease by failing to maintain public liability insurance is immaterial as the Court finds that Harris failed to comply with the Notice of Default provisions of the First Lease in giving Santos the opportunity to cure the breach.

Therefore, Harris' request to uphold the eviction of Santos based on the alleged violations of the First Lease as to liability insurance is denied.

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D. SECOND LEASE

(1) Failure to Comply with Local Laws and Ordinances

In Case Number 2016CV0810605290, Harris argues first that Santos breached Section 10 of the Second Lease by failing to comply with local laws and ordinances, resulting in revocation of the business license issued by the City of Hanahan in connection with the business operated by Santos and/or Mr. Reyna on the premises. Harris argues that continuing to operate the business without a valid business license also violated the terms and conditions of the Second Lease. Harris further argues that Santos repeatedly violated the International Fire Code regarding the maximum capacity for the building located on the premises, thus violating the terms and conditions of the Second Lease.

The Second Lease prohibits Santos from using the premises for any immoral conduct or illegal activity. [Plaintiff's Exhibit 2, Section 4]. While Santos herself did not testify at trial, her sister, Arelis de Santos Gomez testified that she understood the Second Lease to require her sister to maintain the premises in compliance with local law. Ms. de Santos Gomez acknowledged that violations of local ordinances limiting building occupancy and prohibiting after-hours consumption of alcohol would constitute breaches of the Second Lease. However, she denied that she or her sister had allowed any unlawful activity on the premises.

The Second Lease further requires Santos to keep the premises "in compliance with all laws, ordinances, and requirements of any legally constituted public authority." [Plaintiff's Exhibit 2, Section 10].

At trial, Hanahan Police Chief Dennis Turner testified as to voluminous incident reports prepared by the Hanahan Police Department arising from and connected to the

operation of El Alamo from 2014 to the present day, including alleged violations of local ordinances regarding occupancy, after-hours consumption of alcohol, and selling alcohol without a license.[3] Chief Turner further testified about incident reports related to various physical altercations, including assaulting a police officer, numerous arrests related to alcohol/intoxication, possession of drugs, arrests of an employee of El Alamo for pointing and presenting a firearm on the premises, and noise violations.

While the incident reports do reflect that a substantial amount of criminal activity of third parties has occurred in and around the premises of El Alamo over the last three (3) years to which the City of Hanahan Police Department has responded, most of these incidents involve purported customers of El Alamo rather than the owners, operators, and employees thereof.

Nevertheless, several incident reports detail incidents during which officers cited El Alamo for substantially exceeding its maximum occupancy of ninety-nine (99) persons in violation of the International Fire Code as adopted by the City of Hanahan pursuant to S.C. Code Section 6-9-80. [See Plaintiff's Exhibit 27, pages 44-45, 53, 372, 380]. Officer Cliff Driggers testified that he personally participated in a count of all persons within El Alamo in 2016 in which the occupancy exceeded ninety-nine (99). Driggers further testified that he personally observed patrons of Latino Mix bringing alcohol from Latino Mix to El Alamo and that El Alamo was a "BYOB club" and that nothing was unlawful about customers bringing their own alcohol to El Alamo. It is clear from the evidence presented that Santos' establishment did on at least one occasion permit more persons that allowed by the International Fire Code as adopted by the City

[3] Plaintiff's Exhibit 27, the compilation of incident reports involving El Alamo, was admitted into evidence over Santos' hearsay objection pursuant to Rule 803(8) of the South Carolina Rules of Evidence.

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of Hanahan. Thus, the Court finds that Santos violated the Code of Ordinances for the City of Hanahan constituting default under Section 10 of the Second Lease.

Moreover, several incident reports document incidents of El Alamo violating Hanahan Ordinance 4-2 which prohibits onsite consumption of alcohol after 2:00 a.m. [See Plaintiff's Exhibit 27, pages 372, 380, 402, 415, 424, 437, 444, 445, 449, 451, 473]. In addition, the reports detail at least one incident during which El Alamo sold alcohol without a license to do so. [See Plaintiff's Exhibit 27, page 432]. While Santos argues that the ordinance is being challenged in a separate Common Pleas action, Santos acknowledges that it is unnecessary for this Court to analyze that litigation to decide the issues before the Court. It is clear from the evidence presented that Santos' establishment remained open on at least one occasion during the hours prohibited by the ordinance and that during these hours patrons consumed alcoholic beverages in Santos' establishment. Thus, the Court finds that Santos violated the Code of Ordinances for the City of Hanahan constituting default under Section 10 of the Second Lease.[4]

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[4] Due to the alleged criminal activity in and around El Alamo, the Hanahan City Council unanimously voted on May 26, 2016, to revoke the business license of El Alamo. Said revocation was upheld on appeal to the Court of Common Pleas. The Circuit Court's decision to affirm the revocation is currently on appeal to the South Carolina Court of Appeals. Santos argues that Harris "concedes that both the Hanahan City ordinance and South Carolina state law provide an automatic stay for such an appeal." Although Rule 241 of the South Carolina Appellate Court Rules provides that as a general rule, the service of the notice of appeal in a civil matter acts to automatically stay matters decided in the order and to automatically stay the relief ordered in the appealed order, Rule 241 provides that there are exceptions to the general rule found in statutes, court rules, and case law. Hanahan Municipal Ordinance 10-9(b) states that a timely appeal of a business license revocation **does not effectuate a stay of city council's decision to revoke**. Despite such, El Alamo has continued to operate on the premises which Harris argues violates Hanahan City Ordinance 10-2 prohibiting operating of a business without a valid business license. The HPD incident reports evince repeated instances in which El Alamo has been cited for violations of Ordinance 10-2. [Plaintiff's Exhibit 27, pages 444, 448, 449, 451]. Nothing in the record suggests that Santos sought a temporary injunction in an effort to continue business operations during the pendency of the appeal. See Amrik Singh & SBPS, Inc. v. City of Greenville, 384 S.C. 365, 681 S.E.2d 921 (Ct. App. 2009) (Following revocation of business license, owner unsuccessfully sought a temporary injunction to continue business operations during the pendency of the appeal given the Greenville City Ordinance provided that an appeal does not stay the revocation). Nonetheless, the Court finds that no exceptions to the general rule providing for an automatic stay of the business license revocation apply in this particular case. The Court notes that if the Hanahan Municipal Ordinance's

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Having determined that Santos breached the Second Lease, the Court must determine whether any notice and cure period applies to Santos' breach of the Lease and, if so, whether proper notice was given and whether Santos cured its defaults.

Mr. DeLuca testified at trial that he personally met with Mr. Reyna at El Alamo in the Fall of 2016 and warned him that violations of local ordinances and criminal activity must stop or Harris would have no choice but to take legal action. On October 13, 2016, Harris provided Santos with a Notice of Default regarding the failure to comply with Section 10 of the Second Lease involving exceeding the maximum occupancy. Nonetheless, these violations have continued well past the cure period. As such, the Court finds that Harris complied with the Notice provisions of the Second Lease.

The Court finds that Santos breached the Second Lease and Harris complied with the Notice of Default provisions therein. The Court must next determine whether said breach was material under the analysis set forth in Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994).

In determining whether Tenant's breach of the Lease was material, the Court must consider (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable

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provision regarding the inapplicability of the general rule is upheld, a business would effectively be shut down regardless of whether they prevail on appeal, an application of the law that would effectively eliminate due process. As such, the Court declines to find that Santos breached the lease by continuing to operate El Alamo during the pendency of the appeal of the business license revocation.

assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Kiriakides, supra.

The Court finds that Harris' expectations that Santos will comply with all local and state ordinances are certainly reasonable. The Court concludes that the breaches as proven amounts to those that deprives Harris of the benefit it expected from the Lease itself. The violation of local ordinances, particularly those that relate to fire safety and safety of the general public significantly increases the exposure to Harris as to liability for injuries to persons on the premises and otherwise. Certainly the exposure to liability was an issue contemplated by the Second Lease as the Second Lease requires Santos to keep a minimum of $1,000,000.00/$2,000,000.00 in general liability insurance on the premises with Harris as an additional insured. Harris could not possibly be adequately compensated for Santos' failure to abide by the local ordinances.

The Court finds that that Santos' damages, if the lease is forfeited, include the length of time remaining under the lease alone. However, no testimony was offered at trial as to the potential revenues lost should Santos forfeit the lease. Arelis de Santos Gomez testified as to the amount of work, effort, and her savings that she put into the business and indicated that if put out she would have no money to pay rent as a single mother with a daughter starting college next year. However, Arelis de Santos Gomez is not the tenant of the premises associated with the Second Lease as evinced by her testimony. Aracelis Santos did not testify and presented no evidence as to the extent to which she would suffer forfeiture. The fourth factor examines the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances. Having considered all the circumstances surrounding the Second Lease and Santos' breach, the Court concludes

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that Santos was given ample time within which to cure the default and, over time has failed to attempt to cure its default. This Court has no reasonable assurances that Santos will cease to allow El Alamo to remain open and serve alcoholic beverages after hours in the future.

In light of the foregoing, the Court finds Santos' repeated breaches of the lease relating to Sections 4 and 10 of the Second Lease were material and the eviction is upheld.

(2) Public Nuisance

Harris additionally argues that Santos violated the terms and conditions of the Second Lease by creating a public nuisance on the premises and that the Court should uphold the eviction as a result.

South Carolina defines a nuisance as follows:

> A person who erects, establishes, continues, maintains, uses, owns, occupies, leases, or releases any building or other place used for the purposes of lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace in this State is guilty of a nuisance; and the building, place, or the ground itself in or upon which the lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace is conducted, permitted, carried on, continued, or exists and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining the nuisance also are declared a nuisance and shall be enjoined and abated as provided in this chapter.

S.C. Code Section 15-43-10(A). "Continuous breach of the peace" means a pattern of repeated acts or conduct which either (1) directly disturbs the public peace or (2) disturbs the public peace by inciting or tending to incite violence. S.C. Code Section 15-43-10(B).

S.C. Code Section 15-43-20 provides that the Attorney General, the solicitor in the judicial district in which the alleged nuisance is kept, or any citizen of this State may

bring suit for injunction of the nuisance as to the person conducting or maintaining the nuisance and the owner or agent of the building or ground upon which the nuisance exists. S.C. Code Section 15-43-20.

Santos argues that the procedure set forth in Title 15 is the only means by which a nuisance may be established under South Carolina law and that this Court may not determine whether the actions or inactions of El Alamo constituted a nuisance. The Court disagrees. The Court must determine whether Santos kept the premises "in compliance with laws, ordinances and requirements of **any** legally constituted public authority." [Plaintiff's Exhibit 2, Section 10]. The Court finds that this provision of the lease contemplates not only that a magistrate would have to determine whether Santos violated the ordinances of the City of Hanahan (which the Court finds she has), it also contemplates that a magistrate would have to determine whether Santos violated the laws of the State of South Carolina which certainly include the laws pertaining to public nuisance. While the procedure set forth in Title 15 certainly provides a means by which a Court of equity may grant an injunction as to a nuisance, nothing therein prohibits the magistrate court from determining the existence of said nuisance as a ground for ejectment. To hold otherwise would render the foregoing provision of the Second Lease, a provision common to nearly all commercial and residential leases in South Carolina, meaningless. Santos and Harris entered into a lease that requires Santos to comply with all laws of any legally constituted public authority. Whether Santos has breached said lease is necessarily determined by this Court and this Court alone. This Court cannot and will not enjoin Santos from operating her business as contemplated by the procedures regarding public nuisances as set forth in Title 15. However, if this Court determines that Santos has breached the Second Lease, the Court may uphold

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Harris' application for ejectment, simply preventing Santos from operating her business **on Harris' property**.

It is a sound principle of South Carolina law that "if one maintains a place where the laws are publicly, repeatedly, persistently, and intentionally violated, then such place would become a common or public nuisance." State v. Turner, 198 S.C. 499, 18 S.E.2d 376 (1942); see also State ex rel. Hembree v. Sherald, 2010 WL 10085571 (U.P. Ct. App. 2010). A business may become a nuisance by the manner in which it is conducted, and by the conduct of the persons assembling in and around it. Turner, supra.

The evidence in the record suggests that the number of calls for service to the Hanahan Police Department for El Alamo far exceeds the number of calls for service for the three (3) other establishments in Hanahan that allow for on-premises consumption of alcohol (LG's, Buccas, and Hanahan's). Chief Turner testified that the Hanahan Police Department has been required to devote so much time to El Alamo that it hampers the HPD's ability to address criminal activity elsewhere in the city. Chief Turner further testified that the HPD is forced to address an incident at El Alamo each and every weekend and, because of the danger posed by prior incidents of violence and weapons at El Alamo, the HPD must send multiple officers to El Alamo to address the issues. Two local business owners testified regarding disruption to the surrounding areas caused by disturbances at El Alamo, particularly as to the signage for one business being destroyed by a patron of El Alamo and the disturbances to the other's customers, tenants in a mobile home park adjacent to El Alamo.

As indicated previously herein, a substantial amount of criminal activity of third parties has occurred in and around the premises of El Alamo over the last three (3)

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years to which the City of Hanahan Police Department has responded, most of these incidents involving purported customers of El Alamo rather than the owners, operators, and employees thereof. However, there were many instances during which the owners, operators, and employees of El Alamo violated the municipal ordinances of the City of Hanahan and the International Fire Code.

The Court finds that the credible evidence in the record demonstrates that Santos has maintained El Alamo as a place where the laws are publicly, repeatedly, persistently, and intentionally violated, thus disturbing the public peace. While Santos asserts that the only evidence of nuisance produced by Harris consists of incident reports relating to third parties associated with El Alamo as opposed to Santos herself, it is apparent from the record that Santos has conducted her business in a manner which encourages violations of the various municipal ordinances and which attracts patrons whose conduct violates the various local and state laws. The Court finds that El Alamo became a nuisance by the manner in which it was conducted and by the conduct of the persons assembling in and around it and therefore breached the Second Lease. The Court further finds that in examining the factors as set forth in Kiriakides, said breach was material. As set forth previously herein, Harris' expectations that Santos will comply with all local and state laws are certainly reasonable. The Court concludes that the breaches as proven amount to those that deprive Harris of the benefit it expected from the Lease itself. Violations of state law, just as those involving municipal ordinances, significantly increase the exposure to Harris as to liability for injuries to persons on the premises and otherwise. Likewise, Harris could not possibly be adequately compensated for Santos' failure to abide by the laws pertaining to public nuisance. Having considered all the circumstances surrounding the Second Lease and

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Santos' breach, the Court concludes that Tenant was given ample time within which to cure the default and, over time has failed to attempt to cure its default. This Court has no reasonable assurances that Santos will cease to allow El Alamo to remain open without constituting a public nuisance. As such, the eviction is upheld.

(3) Failure to Provide Evidence of Insurance Coverage

In Case Number 2016CV0810605290, Harris argues Santos breached the Second Lease by failing to provide evidence of insurance.

The Second Lease requires Santos to "keep in full force and effect" public liability insurance on the premises in which both Santos and Harris are named as the insured with a single limit of $1,000,000.00 and an aggregate of $2,000,000.00. [Plaintiff's Exhibit 2, Section 8]. The Second Lease expressly requires Santos to provide a certificate of insurance "not later than the commencement date of this lease and prior to the expiration of such insurance policy during the term of this lease." [Plaintiff's Exhibit 2, Section 8].

Santos obtained insurance for the calendar year 2016 and provided a certificate of insurance to Harris. [Plaintiff's Exhibit 8]. Harris provided Santos with a letter titled "Notice of Default and Right to Cure" on October 13, 2016, regarding liability insurance for the Second Lease. In this letter, Harris' CFO Eric C. Coulter stated to Santos, "At this time we are requesting you increase the liability insurance to Single limit of $3,000,000.00 and an Aggregate of $6,000,000.00. Please provide an updated insurance certificate within 10 business days. Failure to provide increased insurance coverage will cause a default in the lease after October 31, 2016." [Plaintiff's Exhibit 3]. However, nothing in the Second Lease requires Santos to increase the limits of liability upon demand but rather only pay upon demand as additional rent any increase in

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premiums of insurance carried by Harris on the Premises resulting from Santos' occupancy or improvements. [Plaintiff's Exhibit 2, Section 8]. No evidence was presented at trial that Harris obtained additional insurance and/or demanded an increase in rent as a result.

On December 21, 2016, counsel for Harris sent an email to counsel for Santos indicating that it was his understanding the insurance certificates for both Latino Mix and El Alamo were set to expire on December 30, 2016. [Plaintiff's Exhibit 9]. Counsel for Harris further indicated that Harris needed to obtain new certificates as soon as possible but no later than December 30, 2016.

Costa DeLuca, employed by Harris, testified that no insurance certificates were ever provided demonstrating that Santos maintained the public liability insurance coverage up to the limits required by the Second Lease subsequent to December 30, 2016. Santos did not testify at trial and produced no evidence that insurance certificates were ever provided subsequent to the purported expiration of the initial insurance certificate on December 30, 2016.

Nonetheless, while Harris has proven by the preponderance of the evidence that Santos did not provide a certificate of insurance prior to the expiration of the 2016 calendar year insurance policy, the record is devoid of any evidence that constitutes a notice of default (and right to cure) as to her failure to do so. As indicated previously herein, the purpose of a notice of default is to give the party allegedly in default an opportunity to cure the default and meet his obligation. Hammond v. Tilghman Lakes, Inc., 295 S.C. 152, 367 S.E.2d 446 (Ct. App. 1988). Forfeiture provisions of a lease are strictly construed and when a forfeiture depends upon giving a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to

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time and content. Litchfield Co. of South Carolina, Inc., v. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986).

Although counsel for Harris requested new certificates of insurance from Santos on December 21, 2016, the Court finds that this email did not constitute written notice of default. Moreover, nothing in the record evinces that Harris ever provided Santos with the opportunity to cure any such potential breach as provided for in Section 30 of the Second Lease. The fact that Santos breached the Second Lease by failing to maintain public liability insurance is immaterial as the Court finds that Harris failed to comply with the Notice of Default provisions of the Second Lease in giving Santos the opportunity to cure the breach.

Therefore, Harris' request to uphold the eviction of Santos based on the alleged violations of the Second Lease as to liability insurance is denied.

(4) Violation of Prohibition on Third-Party Occupancy

Harris additionally alleges that Santos violated the Second Lease by allowing Reyna to operate a business on the premises. As with issues pertaining to Financial Default, Harris did not plead in its Application for Ejectment this issue. Nonetheless, the Court finds that the parties tried this issue by implied consent.

The Second Lease provides that Santos "shall not, without written consent of [Harris], in each case . . . sublet the Premises or any part thereof or permit the Premises to be occupied by other persons." [Plaintiff's Exhibit 2, Section 12].

Harris alleges that whereas Santos is the tenant under the Second Lease, she never operated a business on the premises. Harris alleges that because the business license for El Alamo was obtained and held by Reyna instead of Santos, Santos was in effect permitting the premises to be occupied by other persons. However, Reyna and

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Santos' sister, Arelis de Santos Gomez, have been living in a long-term monogamous relationship and describe one another as his or her "significant other."

It is worthy to note that it is Reyna, not Santos, that summarized the concept of El Alamo to Harris as early as February 26, 2013. [Plaintiff's Exhibit 20]. Harris additionally served Reyna with its Notice of Default in October of 2016. [Plaintiff's Exhibit 4]. The Court finds that Harris impliedly consented to Reyna operating El Alamo, regardless of whether he was doing so on his own or at the direction or under the supervision of Santos. As such, the Court finds that Santos did not breach the Second Lease as to Section 12, "Assignment or Sublease."

Moreover, even if the Court would have held that Reyna's operation of El Alamo constituted a breach, the record is devoid of any evidence that Harris provided Santos with notice of default as to this section of the Second Lease and an opportunity to cure. Thus, Harris failed to comply with the Notice of Default provisions of the Second Lease in giving Santos the opportunity to cure the breach and as such, the Application for Ejectment as to this particular ground is denied.

III. Conclusion

The Court finds that while Santos breached the First and Second Leases by failing to pay rent when due or demanded, the breach was not so substantial or fundamental to justify forfeiture.

The Court further finds that Harris failed to meet its burden as to Santos' failure to provide proof of sufficient liability insurance under the First Lease. Moreover, even if Santos was in default in that regard, Santos was not given proper notice under the First Lease to cure the default. However, the Court finds that the First Lease expired, Santos became a month to month tenant as to Latino Mix, and notice was properly given

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regarding Harris' intention not to renew said First Lease. As such, Application for Ejectment sought in Case Number 2017CV0810600019 is granted.

The Court finds that Harris met its burden as to Santos' failure to provide proof of sufficient liability insurance under the Second Lease. However, Santos was not given proper notice under the Second Lease to cure the default. The Court finds that Harris failed to meet its burden of proof as to Santos' violation of the Second Lease's prohibition against third-party occupancy and that even if Santos was in default thereof, Santos was not given property notice under the Lease to cure the default. Nonetheless, the Court finds that Santos failed to comply with local ordinances and created a public nuisance on the premises and that said breaches were material. As such, the Application for Ejectment sought in Case Number 2016CV0810605290 is granted.

The Clerk is directed to provide a copy of this Order to counsel for both Landlord and Tenant. All post-trial motions, including those pertaining to the request for attorney fees pursuant to either Lease, shall be filed with the Court within ten (10) days of the receipt of the within Order.

IT IS SO ORDERED.

The Honorable Rad S. Deaton
Berkeley County Magistrate

December 7, 2017
Charleston, South Carolina

Counsel for Harris: Merrit G. Abney, Esquire
Counsel for Santos: Thomas R. Goldstein, Esquire

STATE OF SOUTH CAROLINA)	IN THE MAGISTRATE COURT
)	
COUNTY OF BERKELEY)	CASE NUMBER: 2017-CV-08-10600019
)	2016-CV-08-10605290
)	
HARRIS INVESTMENTS)	
HOLDINGS, LLC,)	
)	
Plaintiff,)	
)	
v.)	ORDER
)	
ARACELIS SANTOS,)	
)	
Defendant.)	
)	

THIS MATTER comes before the Court on February 1, 2018, upon the Plaintiff's Motion for Award of Attorney's Fees filed on December 21, 2017, in the above-captioned actions. The Defendant filed a Reply to Plaintiff's Request for Attorney's Fees on January 25, 2018.

Present at the hearing were counsel for the Plaintiff, Merritt G. Abney, and counsel for the Defendant, Thomas R. Goldstein. The Court engaged in meaningful discussions regarding the applicable law and issues raised in the Plaintiff's Motion and the Defendant's Reply.

The general rule in South Carolina is that attorney's fees are not recoverable unless authorized by contract or statute. Baron Data Systems, Inc. v. Loter, 377 S.E.2d 296, 297 S.C. 382 (1989). In awarding reasonable attorney's fees, there are six factors to be considered by the Court: 1) The Nature, Extent, and Difficulty of the Legal Services Rendered; 2) The Time and Labor Necessarily Devoted to the Case; 3) The Professional Standing of Counsel; 4) The Contingency of Compensation; 5) The fee Customarily Charged in the Locality for Similar Legal Services; and 6) The Beneficial Results Obtained. Id. See also Rule 1.5 of the S.C. Rules of Professional Conduct.

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In the instant case, the May 22, 2014, lease ("the First Lease") provides in pertinent part:

> In the event that any legal matter, dispute, action or proceeding exist [sic] or is commenced by or between Lessor and Lessee under this Lease, the prevailing party shall be reimbursed reasonable attorney fees and court cost [sic] in such matter.

First Lease, Paragraph 46.

The December 1, 2015, lease ("the Second Lease") provides as follows:

> In the event Landlord successfully defends any action by the Tenant, or if it is necessary for Landlord to employ an attorney for the collection of rent or any other sum due hereunder, or to enforce any covenant of this lease, or the termination of this lease, or for the possession of the Premises or any part thereof the Tenant shall pay all costs, including reasonable attorney's fees.

Second Lease, Paragraph 32.

The foregoing paragraphs of the respective leases clearly demonstrate that the contracts between the parties provided for reasonable attorney's fees and costs to "the prevailing party" as related to the First Lease and to the Landlord as related to the Second Lease.

The Defendant first contends that the Plaintiff is not a "prevailing party," arguing that neither the Plaintiff nor the Defendant are the prevailing party in these cases because the Defendant prevailed on many of the issues and the Plaintiff prevailed on many of the issues. A "prevailing party" is the one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention and is the one in whose favor the decision or verdict is rendered and judgment entered. Seckinger v. The Vesselm Excalibur, 483 S.E.2d 775, 326 S.C. 382 (Ct. App. 1997). A party need not be successful as to all issues in order to be found to be a prevailing party. Id. While the Plaintiff did not pr

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on each and every issue or claim presented in its pleadings, the Plaintiff prevailed on the ultimate issue in each action, the ejectment of the Defendant. As such, the Court finds that the Plaintiff is the prevailing party in this matter.

The Defendant next asserts that this Court is without jurisdiction to award an amount of attorney's fees in excess of the Court's general jurisdictional amount, $7,500.00, citing S.C. Code Section 22-3-10. The Defendant argues that the attorney's fee award is a "money judgment" and therefore the Court lacks jurisdiction over the above-referenced dollar amount. The magistrate's court has concurrent jurisdiction with the circuit court in contract actions for the recovery of money only, if the sum claimed does not exceed $7,500. S.C. Code 22-3-10(1); see Mosseri, Mosseri, Castro v. Austin's at the Beach, Inc., 642 S.E.2d 760, 372 S.C. 593 (Ct. App. 2007). This jurisdictional limit does not apply to "matters between landlord and tenant and the possession of land as provided in Chapters 33 through 41 of Title 27...." S.C. Code Section 22-3-10(10), Id. The Magistrate Court will retain jurisdiction in cases involving landlord and tenant and the possession of land even when any counterclaim exceeds $7,500. S.C. Code Section 22-3-10(12), Id. In cases that do not fall under S.C. Code Section 22-3-10(12) when a counterclaim is filed which if successful would exceed the civil jurisdictional amount as provided in Section 22-3-10, then the initial claim and counterclaim must be transferred to the docket of the common pleas court for that judicial circuit. S.C. Code Section 22-3-30, Id. Chapters 33 through 41 of title 27 of the South Carolina Code deal with creation, construction and termination of leasehold estates, ejectment of tenants, rent, undertenants of life tenants, and the Residential Landlord Tenant Act (which is not applicable to non-residential leaseholds). Mosseri, Mosseri, Castro, supra. The common theme of chapters 33 through 41 is possession of

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the property. Id. The instant cases were clearly matters between landlord (the Plaintiff) and tenant (the Defendant). The cases clearly involve the possession of land as both were initiated by the filing of an application for ejectment requesting that the Court evict the Defendant from the leased premises. Whereas the statute sets forth explicitly that the Court retains jurisdiction over counterclaims which exceed the jurisdictional limit in these matters, the statute is silent as to attorney's fees. However, the plain meaning of the statute indicates that this Court has jurisdiction over "all matters" between landlord and tenant and the possession of land. The Court finds that "all matters" includes a request for attorney's fees pursuant to a valid lease.[1]

The Nature, Extent, and Difficulty of the Legal Services Rendered

Although these matters were litigated in the magistrate court and without formal discovery, the parties' attorneys attended several hearings, including those pertaining to the Defendant's Motions for Removal, the Plaintiff's Motions for Summary Judgment, the Defendant's motion to dismiss her counterclaims, the hearing on the merits which lasted a full day with eight (8) witnesses, and the Defendant's Motion for New Trial which was heard in conjunction with the within Motion. These matters were highly contested and, as was the case in Loter, supra, were transformed from simple commercial eviction matters, if such things exist, into complex litigation. As such, the Court finds that the nature, extent, and difficulty of the legal services rendered in these matters was of such a nature that warrants an award of attorney's fees.

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[1] See also 1987 Op. Atty Gen, No. 87-10, p 45, wherein the South Carolina Attorney General opined that in matters brought pursuant to the South Carolina Residential Landlord and Tenant Act, the Magistrate Court has concurrent jurisdiction to include those cases brought pursuant to the Act where damages or attorney's fees may exceed the typical (then) $1,000.00 jurisdictional limit established by S.C. Code Section 22-3-10. The Court finds the reasoning therein to be sound and equally applicable to commercial eviction matters.

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The Time and Labor Necessarily Devoted to the Case

The Court has meticulously reviewed the time sheets provided by the as well as the Affidavit of Plaintiff's counsel in support of this Motion. The Court recognizes that these matters were time-consuming matters given the issues and contentious motions filed, briefed, and argued. The Court finds that the majority of the time and labor spent on the part of counsel for the Plaintiff and his staff was reasonable and not duplicative and thus an award of attorney's fees is warranted.

The Professional Standing of Counsel

The Court finds that based on the aforementioned Affidavit of Plaintiff's counsel, the Motion, timesheets, and conduct throughout these proceedings that counsel for both parties are experienced commercial litigators enjoying strong reputations in the legal community.

The Contingency of Compensation

This factor is inapplicable to the present cases as the fee arrangement between the Plaintiff and its counsel was not based upon a contingency fee.

The Customary Fee for Like Work

The first step in setting a reasonable fee is determining the appropriate hourly rate. See Liberty Mut. Ins. Co. v. Employee Resource Management, Inc., 176 F.Supp. 510 (D.C.S.C. 2001). The reasonableness of the attorney's hourly rate is determined by the prevailing market rates in the relevant community. Id. The court must assess the experience and skill of the prevailing parties' attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. Id.

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The Court finds that the rates charged in these matters were reasonable in the Charleston metropolitan market for Family Court, Circuit Court or Federal Court litigation based upon counsel's extensive experience and the Court's familiarity with attorney's fees customarily charged in the legal community.

However, the Court finds that while counsel for the Plaintiff reduced his hourly rate from his customary $400.00/$450.00 per hour to $380.00 per hour, the hourly rate charged exceeds the hourly rates in the Charleston area for commercial evictions in magistrate court. Moreover, the Court finds that the hourly rate for the paralegal ($205.00) and project assistant ($115.00) exceed those of the prevailing market rates in the community.

As such, for purposes of the attorney's fees award in the present matters, the Court reduces counsel for the Plaintiff's hourly rate to $280.00 per hour, a rate the Court finds commensurate with the prevailing market rates for practitioners in the magistrate courts of the Charleston market. Additionally, the Court finds it appropriate to reduce the paralegal hourly rate to $125.00 per hour and the project assistant to $80.00 per hour.

The Beneficial Results Obtained

The Court finds that the total benefit obtained by the Plaintiff in the matters currently before the Court was the ejectment of the Defendant. While the result was not financially significant in terms of a dollar figure, the Plaintiff prevailed on the ultimate result that it sought, thus accomplishing the aims of the suit.

The Court finds that the majority of the claims upon which the Plaintiff prevailed were related substantially to the claims in which it did not. See Hensley v. Eckerhart, 461 U.S. 424 (1983) (Where the plaintiff has failed to prevail on a claim that is distinct in

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all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised). The Court concludes that the successful and unsuccessful claims in these cases arose from a "common core of facts", and it is impossible to accurately separate out counsel for the Plaintiff's work on each different issue. This is also not a case where the unsuccessful theory so drove the evidentiary hearing and as such must in fairness be apportioned. Moreover, the Court sees no obvious way to reduce the award by a percentage of successful claims versus unsuccessful claims.

The Defendant contends that the charges submitted by the Plaintiff should "shock the conscience" of the Court. While certainly this Court rarely, if ever, sees attorney's fee affidavits which demonstrate over one hundred hours spent litigating a case in magistrate court or one in which the attorney's fee request exceeds fifty thousand dollars ($50,000.00), the Court must consider the relationship of the parties and the nature of their contract in its analysis. The Plaintiff and Defendant are parties to two (2) separate commercial leases presumably entered after arms-length negotiations. While the Plaintiff corporation was likely more sophisticated than the Defendant in terms of business experience, the Defendant was aware of the contractual provision in the leases with respect to attorney's fees and the potential application thereof. In the context of the complex world of commercial real estate, regardless of the level of the court in which the case was tried, this Court cannot find that an attorney's fee request of this magnitude shocks the conscience of the Court.

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Nevertheless, while the majority of the time and labor spent on the part of counsel for the Plaintiff in this matter was reasonable and not duplicative, the Court finds that any award of attorney's fees and costs in these matters should be reduced by some time the Court finds duplicative and the amount of costs other than "court" costs.

As such, and based upon the foregoing factors and relevant law, the Court finds that the Plaintiff is entitled to an award as follows: $34,608.00 in attorney's fees based upon 123.6 hours of time, $862.50 in fees for 6.9 hours of paralegal time, $312.00 in fees for 3.9 hours of project assistant time, and $104.73 in costs, for a total of **$35,887.23.**

IT IS SO ORDERED.

The Honorable Rad S. Deaton
Berkeley County Magistrate

February 9, 2018
Charleston, South Carolina

Counsel for Plaintiff: Merrit G. Abney, Esquire
Counsel for Defendant: Thomas R. Goldstein, Esquire

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ELECTRONICALLY FILED - 2019 Jun 06 11:49 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0801008

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY)	NINTH JUDICIAL CIRCUIT
Aracelis Santos,)	Case No. 2018-CP-08-01008
)	
Appellant/Plaintiff,)	
)	
vs.)	**ORDER OF DISMISSAL WITHOUT PREJUDICE**
)	
Harris Investment Holdings, LLC,)	
)	
Respondent/Defendant.)	
)	

This matter comes before me on motion of the Respondent/Defendant, Harris Investment Holdings, LLC, (hereinafter "HIH") for an order dismissing this case without prejudice. For the reasons set forth below, the motion is granted.

HIH filed eviction actions in the magistrate's court seeking to eject Aracelis Santos from two separate units in the same shopping center located at 5901 Loftis Road, Hanahan, South Carolina, known as "El Alamo" and "Latino Mix," respectively. A consolidated bench trial was held before the magistrate on October 11, 2017.

Following trial, the magistrate's court issued an order dated December 7, 2017, in which it granted HIH's applications for ejectment with respect to both Latino Mix and El Alamo. Santos filed a motion for a new trial, which the court denied via written order dated February 2, 2018. On February 2, 2018, the court issued a writ of ejectment with respect to El Alamo.[1] On February 8, 2018, Santos filed a Notice of Appeal of the magistrate court's orders to this Court in Case No. 2018-CP-08-0026 (the "First Appeal").

[1] Santos vacated the Latino Mix premises voluntarily prior to the magistrate court's ruling on the motion for a new trial.

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In the meantime, following a hearing on February 26, 2018, the magistrate set an appeal bond in the amount of $59,295.23. Santos filed a motion for reconsideration of the bond amount, which the magistrate denied via written order dated March 7, 2018.

Thereafter, Santos moved this Court in the First Appeal to vacate the bond requirement, upon which the Court determined the inclusion of any amount awarded to HIH for attorneys' fees in the bond was improper. Via order issued on April 9, 2018, this Court remanded "the issue of the bond" to the magistrate's court for re-calculation. Meanwhile, the First Appeal remained pending in this Court.

After the magistrate re-calculated the bond, on June 1, 2018, Santos filed a second civil action in this Court (Case No. 2018-CP-08-1008, the "Second Appeal"), in which she again sought to appeal the magistrate's order of ejectment and related orders and, in addition, to assert various tort claims against HIH. HIH moved to dismiss the Second Appeal on several grounds, including that the combination of a civil appeal with new tort claims was procedurally improper.

Following a hearing on HIH's motion to dismiss, the Court issued an order dated October 2, 2018 (the "Order"), to which Santos consented, requiring her to dismiss the Second Appeal. Despite repeated demands from counsel for HIH, Santos has not complied with the Order as evidenced by the fact that this action remains pending. At the hearing on the instant motion, Santos argued that the Order was intended only to require her to amend her pleading in this action to delete the claim for civil appeal, and she insisted she has complied with the Order. But the plain language of the Order, to which Santos consented, expressly requires *dismissal of the action* without prejudice. Santos plainly has not complied with this requirement.[2]

[2] Moreover, the Court notes that, contrary to her counsel's statements at the hearing, Santos did not seek to amend her complaint in this action until March 19, 2019, and she did so then for the purpose of attempting to add additional parties to this action.

Because Santos has failed to comply with the Order to which she consented, HIH is entitled to an order dismissing this action without prejudice. It is hereby ORDERED that this action is dismissed without prejudice.

AND IT IS SO ORDERED.

Kristi F. Curtis
Circuit Court Judge

June ___, 2019

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Berkeley Common Pleas

Case Caption: Aracelis Santos VS Harris Investment Holdings, Llc

Case Number: 2018CP0801008

Type: Order/Dismissal

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Berkeley
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0800266

Aracelis Santos
PLAINTIFF(S)

Harris Investment Holdings, LLC
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☑ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☑ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

The magistrate court judge's award of attorney fees is affirmed. All other issues in this appeal are now moot as the subject property has been demolished.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/06/2019 .

Magistrate Court Goose Creek

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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ELECTRONICALLY FILED - 2019 Jun 06 11:58 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0800266

Berkeley Common Pleas

Case Caption: Aracelis Santos VS Harris Investment Holdings, LLC

Case Number: 2018CP0800266

Type: Order/Electronic Form 4

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

ELECTRONICALLY FILED - 2021 Mar 02 1:04 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BERKELEY)	Case No.: 2021-CP-08-
Aracelis Santos,)	
)	
Plaintiff,)	
)	
vs.)	SUMMONS
)	CONSPIRACY/FRAUD/CONVERSION
Harris Investment Holdings, L.L.C.,)	(Jury Trial Demanded)
City of Hanahan, City of Hanahan Police)	
Department, John Doe #1 and)	
John Doe #2, employees)	
of the City of Hanahan Police Department,)	
)	
Defendants.)	
)	

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you; and to serve a copy of your Answer to the said Complaint upon the subscribers at their offices at 2344 Cosgrove Avenue, Post Office Box 71121, Charleston, South Carolina, 29415-1121 within thirty (30) days after the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN FURTHER NOTICE that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, exclusive of the day of such service, judgment by default will be entered against you for the relief demanded in the Complaint.

February 11, 2021

/s/ Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar # 2186
BELK, COBB, INFINGER, & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, South Carolina 29415-1121
tgoldstein@cobblaw.net
(843) 554-4291
ATTORNEYS FOR PLAINTIFFS

ELECTRONI LY FILED - 2021 Mar 02 1:04 PM - BERKELEY - COMMON PLE, CASE#2021CP0800513

STATE OF SOUTH CAROLINA COUNTY OF BEREKLEY	)	IN THE COURT OF COMMON PLEAS Case No.: 2021-CP-08-
Aracelis Santos, Plaintiff, vs. Harris Investment Holdings, L.L.C., City of Hanahan, City of Hanahan Police Department, John Doe #1 and John Doe #2, employees of the City of Hanahan Police Department, Defendants.	)	COMPLAINT CONSPIRACY/FRAUD/CONVERSION (Jury Trial Demanded)

TO THE DEFENDANTS ABOVE NAMED:

The plaintiff, complaining of the defendants, shows unto the Honorable Court as follows:

1. The plaintiff is a citizen of the County of Berkeley and formerly rented a commercial building from Francon L.L.C., who sold the building to the defendant, Harris Investment Holdings, L.L.C. on or about December 1, 2015 at Deed Book 2071 at Page 749. This property is commonly referred to as 5901 Loftis Road in the City of Hanahan, County of Berkeley.

2. The defendant, Harris Investment Holdings, L.L.C., is a corporation organized and existing pursuant to the laws of the state of Georgia, with its principal place of business in Alpharetta, Georgia, but doing business and maintaining employees in Berkeley County. The defendant, Harris Investment Holdings, L.L.C. currently owns the real estate commonly referred to as 5901 Loftis Road in the City of Hanahan that is the subject of this action.

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3. The defendant, City of Hanahan, is a municipal corporation, organized and existing pursuant to the laws of the State of South Carolina and is located entirely within Berkeley County. The composition of the City is organized under an at-large method of representative that denies to minorities an opportunity for representation, a system of government declared unlawful in 1984 in the Supreme Court case, *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272 (1982) where it declared Burke County Georgia's system of at-large legislative representation unconstitutional.

4. The defendants, John Doe #1 and John Doe #2 are uniformed police officers of the City of Hanahan, who, during the events described in detail below, denied the plaintiff or her representatives access to the building she had rented. At the time of filing, the plaintiff is unaware as to whether the two police officers standing guard over the building and preventing her from access were acting in the course and scope of their employment with the City of Hanahan or whether they were acting as private contractors for the defendant, Harris Investment Holdings, L.L.C. In whatever capacity they were acting, they bore the indicia of authority of the City of Hanahan as City police officers.

5. The Court has jurisdiction over the subject matter of this suit and the parties named, and all of the events described in the complaint occurred in Berkeley County.

FOR A FIRST CAUSE OF ACTION
(Conspiracy)

6. In May, 2014, the plaintiff entered into a lease with Francon, L.L.C. for the premises known as 5901 Loftis Road. In December, 2015, Francon, L.L.C. sold the property to the defendant, Harris Investment Holdings, L.L.C.

7. The plaintiff's operation was owned and operated by a Hispanic family and attracted a large following of Hispanic patrons.

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8. The City of Hanahan objected to the business because it served a minority clientele and in April, 2016, the City passed an ordinance, Ordinance 4-2 "Hours for public consumption of alcoholic beverages," which the City intended to close down the plaintiff's business. Almost immediately after enacting Ordinance 4-2, the City realized that its ordinance did not affect the plaintiff's business because the plaintiff did not sell alcohol, and in response, the City amended the ordinance in July, 2016 to add a section C, which amendment closed the plaintiff's business from 2:00 a.m. until 7:00 a.m.

9. At the same time the City was attempting to close the plaintiff's business, it undertook to revoke the plaintiff's business license.

10. After the City's efforts to close the plaintiff's business failed because the plaintiff appealed the decision, it entered into an unlawful combination with the defendant, Harris Investment Holdings, L.L.C. to eject the plaintiff from the business.

11. Acting in concert with and at the direction of the City, the defendant, Harris Investment Holdings, L.L.C. filed an ejectment action. On December 7, 2017, the Magistrate for Berkeley County entered an Order of Ejectment, which the plaintiff appealed, and on May 17, 2018, the Magistrate issued an Order to stay execution upon appeal, conditioned upon the plaintiff paying into Court an appeal bond of $5,500.00 and remaining current on the rent, which she did.

12. While the ejectment case was on appeal, on or about March 18, 2019, the defendant, Harris Investment Holdings, L.L.C. broke down the plaintiff's door and arranged to have the electrical meters removed. After the plaintiff got the electrical service restored, either the City of Hanahan or Harris Investment Holdings, L.L.C., or both, posted two uniformed Hanahan police officers in a Hanahan Police Department motor vehicle, designated above as John Doe #1 and John Doe #2, to stand guard over the building and prevent the plaintiff from entering her business.

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While the plaintiff filed motions with the Berkeley County Court of Common Pleas to compel the defendant, Harris Investment Holdings, L.L.C., to cease disobeying the Order of the Court and allow the plaintiff access as required by the appeal bond Order, sometime thereafter, on or about March 21, 2019, Harris Investment Holdings, L.L.C. bulldozed the building to the ground, including the plaintiff's valuable commercial restaurant equipment, including, but not limited to commercial walk in freezer, commercial food preparation equipment, tables, chairs, electronic equipment, and inventory. The defendant, Harris Investment Holdings, L.L.C., destroyed the building without asking the Court for relief from the stay Order or without asking the Berkeley County Sheriff's Department to put it in peaceable possession of the premises.

13. The defendants entered into an unlawful combination for the purpose of dispatching or hiring City of Hanahan police officers, John Doe #1 and John Doe #2, in order to physically deprive the plaintiff from the right to enter her own business or to have access to judicial review and to injure the plaintiff by destroying her business and equipment, which caused her special damages as the proximate and direct result of bulldozing her commercial restaurant equipment to the ground and preventing and depriving the plaintiff from having an opportunity to seek judicial review of the Magistrate's decision to eject her and destroying her business.

14. The plaintiff is entitled to a trial by jury and judgement against the defendants, both jointly and severally, for both actual, special, and punitive damages as to Harris Investment Holdings, L.L.C. in an amount calculated by the trier of fact.

FOR A SECOND CAUSE OF ACTION
(fraud)

15. The plaintiff repeats the above allegations as if set forth here *verbatim*.

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16. The defendant, Harris Investment Holdings, L.L.C., applied to the defendant, City of Hanahan, for a demolition permit in 2019 and falsely represented to the City that the demolition permit was necessary to abate asbestos.

17. The defendant's Harris Investment Holdings, L.L.C.'s representations to the City were false, and the defendant knew they were false at the time it made them.

18. The defendant Harris Investment Holdings, L.L.C. knowingly made false representations to the City of Hanahan to induce it to issue a demolition permit, which the City issued without restrictions governing alleged asbestos abatement. The demolition permit covered only the plaintiff's space, leaving intact the remainder of the shopping center even though all the buildings were constructed at the same time. By issuing a demolition permit for alleged asbestos removal with no mitigation requirements for alleged asbestos removal demonstrated that the City of Hanahan was a willing participant in creating a false pretext that the presence of alleged asbestos required demolition of the building.

19. At the time the City issued a demolition permit, it was aware of the extensive litigation then pending between the defendant, Harris Investment Holdings, L.L.C., and the plaintiff because the City had been involved in the litigation both as a party and as a witness.

20. The representation of a need for extensive asbestos remediation was false, and Harris Investment Holdings L.L.C. and the City of Hanahan both knew it was false, and the real reason for the demolition was to drive the plaintiff out of her space because they were both frustrated by the plaintiff seeking judicial review of the decisions to revoke her license (the City) and eject her (Harris Investment Holdings, L.L.C.).

21. As a direct and proximate result of the false representations and the City's turning a blind eye to the reality of plaintiff's then pending legal dispute with the defendant, the defendant,

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Harris Investment Holdings, L.L.C., improperly applied for and the City of Hanahan improperly issued a demolition permit under false pretenses, which the City knew were false and pretext. If the City were issuing a permit for asbestos remediation, it would not allow a landowner to address an alleged asbestos abatement by knocking the building to the ground and releasing the alleged asbestos to the air. Moreover, both defendants, Harris Investment Holdings, L.L.C. and the City of Hanahan were aware that an asbestos report of the building identified only trace amounts of asbestos.

22. Neither Harris Investment Holdings, L.L.C. nor the City of Hanahan provided notice to the plaintiff of the application for demolition permit or Harris Investment Holdings, L.L.C.'s intent to demolish the building.

23. Neither Harris Investment Holdings, L.L.C. or the City of Hanahan, made any effort to request the Berkeley County Sheriff's Department to put Harris Investment Holdings, L.L.C. in peaceable possession of its property, nor did it ask the Court to dissolve the appeal bond Order placing the plaintiff in possession of the property pending resolution of the appeal.

24. The defendants' reliance on the pretext of asbestos abatement to justify issuing a demolition permit and destroying the building and the plaintiff's equipment and the failure to notify the plaintiff of an intent to destroy her equipment constitutes a willful failure to disclose information each defendant was obligated to provide.

25. As a direct and proximate cause of the defendants' fraudulent acts, combining and concurring, the plaintiff has suffered actual damages in an amount to be calculated by the trier of fact, and is entitled to a trial by jury and for judgment for both actual and, as to the defendant, Harris Investment Holdings, L.L.C., punitive damages as may be determined by the trier of fact.

FOR A THIRD CAUSE OF ACTION
(Abuse of process)

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26. The plaintiff repeats the above allegations as if set forth here *verbatim*.

27. One or both of the defendants, Harris Investment Holdings, L.L.C. and/or the City of Hanahan either hired or dispatched at least two police officers to the plaintiff's business to stand guard and to prevent her from entering the premises.

28. Both defendants, Harris Investment Holdings, L.L.C. and the City of Hanahan, were aware that the plaintiff was in the process of seeking judicial review for the Magistrate Court's decision on ejectment and occupied the premises under a court appeal bond order.

29. Both defendants, Harris Investment Holdings, L.L.C. and the City of Hanahan were aware that a municipal police department has no jurisdiction to enforce ejectment Orders issued by the Magistrate Court or the Court of Appeals, and either Harris Investment Holdings, L.L.C. hired John Doe #1 and John Doe #2, who are City of Hanahan Police officers, or the City of Hanahan dispatched them to take possession of the plaintiff's premises and prevent the plaintiff or anyone acting on her behalf from entering the premises or retrieving her property.

30. The use of municipal police officers to prevent the plaintiff from her property in an ejectment case in which the City has no jurisdiction was a willful act in the use of process not proper in the regular conduct of the pending ejectment action, and the defendants, combining and concurring, requested and dispatched City police officers to plaintiff's place of business for an ulterior purpose.

31. As a direct and proximate cause of the defendants' actions, combining and concurring, the plaintiff suffered damages in the loss of her business and the destruction of her valuable commercial restaurant equipment.

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32. The plaintiff is entitled to trial by jury and for damages against the defendants for both actual and punitive damages, as to Harris Investment Holdings, L.L.C., in such amounts as determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Breach of Quiet Enjoyment)

33. The plaintiff repeats the above allegations as if set forth here *verbatim*.

34. Following the Magistrate Court's entry of an Order of Ejectment and the plaintiff's appeal of that Order, including the Court's issuance of a stay Order, the defendant, Harris Investment Holdings, L.L.C. engaged in escalating interference with the plaintiff's right to occupy and operate her business.

35. Rather than obey the Court's stay Order, with which the plaintiff fully complied by posting an appeal bond as required by the Court and by paying rent when due, Harris Investment Company continuously interfered in the plaintiff's quiet enjoyment including, but not limited to:

- refusing to accept tendered rent,
- placing a fence around the plaintiff's business,
- destroying the plaintiff's door so that it cannot be operated,
- terminating utility services,
- employing the police department to order the plaintiff off the premises;
- consistently harassing the plaintiff and her employees and partners,
- converting the plaintiff's personal property,
- asserting a fraudulent claim that the building is infested with asbestos, and
- in March 2019, destroying the building along with the plaintiff's contents.

36. The defendant, Harris Investment Holdings, L.L.C., destroyed the plaintiff's property, threatened the plaintiff's employees and partners with arrest, erected a fence around the

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plaintiff's business, removed the plaintiff's electrical service, and otherwise continuously and intentionally harassed the plaintiff to drive her from the premises even though there was a court order in effect granting plaintiff possession of the premises provided she meets the conditions of the Order.

37. The City of Hanahan lent assistance to the defendant, Harris Investment Holdings, L.L.C., by dispatching or making available at least two uniformed police officers to stand guard over the premises and prevent the plaintiff or her employees and representatives from entering the property.

38. The defendants' actions, combining and concurring, caused the plaintiff actual and special damages including loss of her business, business good will, and valuable commercial restaurant equipment, incurring unnecessary attorney's fees, facing constant threats and intimidation and loss of business, including good will and profits, and severe mental anguish resulting from the defendants' joint unlawful acts.

39. The plaintiff/appellant is entitled to a trial by jury and for judgment against the defendants, Harris Investment Holdings, L.L.C. and the City of Hanahan, for both actual and punitive damages, as to the defendant Harris Investment Holdings, L.L.C., in such amount as calculated by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
Intentional Infliction of Mental Distress

40. The plaintiff repeats the above allegations as if set forth here *verbatim*.

41. The defendants' conduct, combining and concurring, in refusing to obey Court Order imposing a stay and implementing a policy of physical harassment, intimidation under color of law, and damage to the plaintiff is extreme and outrageous conduct intentionally or recklessly undertaken to drive the plaintiff from the premises and cause severe emotional distress.

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42. The defendants' conduct, combining and concurring, is so extreme and outrageous as to exceed all possible bounds of decency and utterly intolerable in a civilized community.

43. The defendants conduct, combining and concurring, has caused the plaintiff to be afraid for her safety and severe emotional distress.

44. The defendants' conduct, combining and concurring, in disobeying Court Orders imposing a stay of execution which were in place at the time the defendants posted city police officers at plaintiff's business and in engaging in a pattern of harassment, intimidation, and physical damage is so severe that no reasonable person can be expected to endure it.

45. The plaintiff is entitled to damages, both actual and punitive, as to the defendant, Harris Investment Holdings, L.L.C., and against the defendants jointly and severally in such amount as may be fixed by the trier of fact.

FOR A SIXTH CAUSE OF ACTION
(Trespass to chattels as to defendant Harris Investment Holdings, L.L.C.)

46. The plaintiff repeats the above allegations as if set forth here *verbatim*.

47. On or about March 21, 2019, the defendant, Harris Investment Holdings, L.L.C. destroyed the plaintiff's building and destroyed the plaintiff's commercial restaurant equipment, including, but not limited to a commercial walk-in freezer, a commercial stove and hood, dishwasher, food prep equipment, buffet bar, tables, chairs, electronic equipment, *etc.*

48. The plaintiff has been deprived of the use of her equipment because of the defendant's, Harris Investment Holdings, L.L.C.'s destruction.

49. The plaintiff is entitled to trial by jury and for an award of both actual and punitive damages for the defendant's, Harris Investment Holdings, L.L.C.'s, intentional destruction of the plaintiff's equipment.

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FOR A SEVENTH CAUSE OF ACTION
(Tortuous Interference with Prospective Business Relations)

50. The plaintiff repeats the above allegations as if set forth here *verbatim.*

51. The City of Hanahan issued a demolition permit to the defendants on December 28 2018, permit No. 2018-1288. The City issued this permit without notice to the plaintiff.

52. The defendant, Harris Investment Holdings, L.L.C., presented false information to the City of Hanahan to induce it to issue the demolition permit under the pretext that the defendant, Harris Investment Holdings, L.L.C., was abating asbestos even though it knew there were only trace amounts of asbestos present and took no steps to demolish the portion of the shopping center not occupied by the plaintiff.

53. Because the City issued the permit based on false information, the permit should never have been issued.

54. As a direct and proximate result of the defendant's, Harris Investment Holdings, L.L.C.'s submission of false information to the City of Hanahan and the City's issuance of the fraudulently obtained permit, the plaintiff has been damaged by the defendant's acts in destroying her business and equipment.

55. The plaintiff is entitled to judgment against the defendant, Harris Investment Holdings, L.L.C., for such amounts as both actual and punitive damages as found to be due by a jury.

FOR AN EIGHTH CAUSE OF ACTION
(Attorney's Fees, § 15-77-300, 310, S. C. Code, Ann.)

56. The plaintiff repeats the above allegations as if set forth here *verbatim.*

57. The defendant's, City of Hanahan's, actions in issuing a demolition permit for grounds it knew were false and dispatching uniformed police officers to stand guard over the

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premises and exclude the plaintiff, her employees and representatives from access to the building constituted unlawful government conduct for which no substantial justification existed, especially since the Berkeley County Sheriff's Department possesses exclusive authority to enforce landlord/tenant ejectment Orders.

58. There are no special circumstances that would make an award of fees unjust.

Wherefore, having fully set forth her complaint, the plaintiff prays for

1. A trial by jury;

2. A judgment against the defendants, jointly and severally, for actual, punitive, as to the defendant, Harris Investment Holdings, L.L.C., and special damages for interference with the plaintiff's business, misuse of process, and destruction of her equipment, including consequential and punitive damages occurring as the result of the unreasonable interference in operating;

3. An award for attorney's fees as allowed by § 15-77-300, *et. seq.*, S. C. Code, ann.;

4. For costs of this action;

5. For such other and further relief as the Court deems just and proper.

BELK, COBB, INFINGER & GOLDSTEIN, P.A.

February 11, 2021

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
Aracelis Santos,	)	Civil Action No. 2021-CP-08-00513
Plaintiff,	)	
vs.	)	**DEFENDANT HARRIS INVESTMENT HOLDINGS, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**
Harris Investment Holdings, LLC, City of Hanahan, City of Hanahan Police Department, John Doe #1 and John Doe #2, employees of the City of Hanahan Police Department,	)	
Defendants.	)	

Defendant Harris Investment Holdings, LLC ("HIH") files this motion to dismiss the claims asserted in Plaintiff Aracelis Santos's ("Santos") Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP").

Santos's Complaint is subject to dismissal pursuant to Rule 12(b)(6), SCRCP, because it fails to state causes of action against HIH. All of Santos's causes of action against HIH in the Complaint relate to HIH's conduct in retaking possession and demolishing the property after expiration of the lease term. HIH, however, had the right under the lease[1] and South Carolina law to retake possession at the conclusion of the lease term after Santos failed to surrender the property as required by the lease, and HIH cannot be held liable or sanctioned for doing so.

In addition, dismissal pursuant to Rule 12(b)(6) is also appropriate because Santos's allegations fail to state facts sufficient to constitute a cause of action against HIH, based on the following grounds, without limitation:

[1] In deciding this motion to dismiss, the Court can consider the lease because Santos references it in the Complaint, (Compl. ¶ 6), and the Court may consider documents attached to or referenced in the complaint. *See Brazell v. Windsor,* 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

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1. Santos's cause of action for civil conspiracy fails to state a claim for relief against HIH because Santos does not plead special damages and additional facts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the Complaint.

2. Santos's cause of action for fraud fails to state a claim for relief against HIH because Santos fails to allege all nine elements of fraud. Santos does not allege that HIH made any false representation to Santos, that HIH intended for Santos to act upon any representation by HIH, that Santos relied on the truth of any representation by HIH, and that Santos had any right to rely on the same.

3. Santos's cause of action for abuse of process fails to state a claim for relief against HIH because Santos fails to allege an ulterior purpose or a lawsuit initiated for an ulterior purpose, and because the only lawsuit HIH initiated against Santos was commenced over three years ago, thus barring any abuse of process claims relating to the same.

4. Santos's cause of action for breach of quiet enjoyment fails to state a claim for relief against HIH because Santos had no right to quiet enjoyment after the lease expired.

5. Santos's cause of action for intentional infliction of mental distress fails to state a claim for relief against HIH because Santos fails to plead facts showing extreme and outrageous conduct and severe emotional distress.

6. Santos's cause of action for tortuous interference with prospective business relations fails to state a claim for relief against HIH because Santos failed to plead interference with a sufficiently definite prospective contract.

7. Santos's cause of action for attorney's fees under S.C. Code Ann. § 15-77-300, -310 fails to state a claim for relief against HIH because this statute does not provide for award of attorney's fees against HIH.

HIH also bases this motion upon the pleadings and documents referenced thereto, the applicable law, and any memoranda HIH may file in connection with any hearing on this motion.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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April 2, 2021

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
Aracelis Santos,	)	Civil Action No. 2021-CP-08-00513
	)	
Plaintiff,	)	
	)	
vs.	)	**MEMORANDUM IN SUPPORT OF DEFENDANT HARRIS INVESTMENT HOLDINGS, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**
	)	
Harris Investment Holdings, LLC, City of Hanahan, City of Hanahan Police Department, John Doe #1 and John Doe #2, employees of the City of Hanahan Police Department,	)	
	)	
Defendants.	)	

Defendant Harris Investment Holdings, LLC ("HIH") moves to dismiss this action pursuant to Rule 12(b)(6), SCRCP. Plaintiff Aracelis Santos ("Santos") alleges Defendant HIH retook possession of commercial property she leased from HIH and demolished the building. But Santos' lease had expired, HIH had instructed her to vacate, and HIH had the right, under the lease and South Carolina law, to retake possession of the property. For this reason, and the reasons stated below, the Complaint fails to state a claim under South Carolina law.

FACTUAL AND PROCEDURAL BACKGROUND

Santos leased commercial property located at 5901 Loftis Road, Hanahan (the "Property") from HIH. Santos and her boyfriend, Benjamin Reyna ("Reyna"), operated a nightclub on the property known as "El Alamo." The lease agreement for the Property dated December 15, 2015 (the "Lease") stated that the term commenced on December 1, 2015 and expired on November 30, 2018. (12/15/2015 Lease, **Exhibit A.**) The Lease contained no right of renewal, and it expressly required Santos to surrender the property to HIH in "broom clean" condition upon expiration of the term. (Lease, Sec. 22.) HIH's remedies for Santos' failure to surrender the premises upon

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expiration of the term included the right to "re-enter and forthwith repossess the entire Premises." (Lease, Sec. 30.)

After receiving reports of dangerous criminal activity at El Alamo, on November 14, 2016, HIH filed an application in the magistrate's court to eject Santos from the Property. Following a bench trial on October 11, 2017, the magistrate granted HIH's application for ejectment and awarded HIH its attorney's fees. (12/7/2017 Order, **Exhibit B.**) The magistrate concluded that "Santos has maintained El Alamo as a place where the laws are publicly, repeatedly, persistently, and intentionally violated, thus disturbing the public peace." (*Id.*)

On February 8, 2018, Santos appealed the magistrate's orders to the circuit court (Case No. 2018-CP-08-00266).[1] After several months of litigation over the amount of the appeal bond, on May 17, 2018, the magistrate issued an Amended Bond to Stay Execution on Appeal (the "5/17/2018 Bond Order," **Exhibit D**). The Bond Order provided that, once Santos posted bond, execution of the ejectment warrant would be stayed pending appeal. Santos subsequently posted the bond and continued to occupy the Property.

On November 30, 2018, while Santos' appeals remained pending in the circuit court, the Lease expired according to its terms. (Lease, p. 1.) On October 16, 2018, HIH sent Santos notice via certified mail directing her to vacate the Property and remove her belongings by midnight on November 30. (10/16/2018 Ltr. from Merritt Abney, **Exhibit E.**) Santos did not vacate the Property and continued to operate El Alamo in violation of the Lease. On February 26, 2019, HIH

[1] Santos subsequently filed a second civil appeal in the circuit court (Case No. 2018-CP-08-1008), in which she not only sought to appeal the magistrate's order of ejectment and related rulings, but also purported to assert various tort claims against HIH. With Santos' consent, the circuit court ordered her to dismiss this second action without prejudice. When she failed to comply, the circuit court dismissed the action on its own. (6/6/2019 Order, **Exhibit C.**)

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again instructed Santos to vacate the Property and notified her that her refusal to do so constituted a breach of the lease and trespass. (2/26/2019 Ltr. from Merritt Abney, **Exhibit F**.)

When Santos failed to vacate the Property as required by the Lease, HIH retook possession of the Property pursuant to the express terms of the Lease. Then, on or about March 22, 2019, when the building was vacant, contractors retained by HIH demolished the building in accordance with a permit obtained from the Town of Hanahan.

On June 6, 2019, the circuit court affirmed the magistrate's orders. (6/6/2019 Order, **Exhibit G**.) Santos subsequently filed a notice of appeal, but she appealed only the circuit court's orders affirming the magistrate's award of attorney's fees to HIH as the prevailing party. She did not appeal the lower courts' conclusion that Santos breached the Lease and her ejectment was proper. These findings are therefore the law of the case. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.").

On March 2, 2021, Santos filed this action alleging that HIH wrongfully repossessed and demolished the building and conspired to do so with the City of Hanahan and its police department.

LEGAL STANDARD

"A defendant may move to dismiss the plaintiff's complaint for 'failure to state facts sufficient to constitute a cause of action' pursuant to Rule 12(b)(6), SCRCP." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014). The court may grant a motion to dismiss when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003). In considering a motion to dismiss, the trial court ordinarily must base its rulings on the allegations set forth in the complaint.

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Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). However, the court may also consider documents attached to or referenced in the complaint. *Brazell v. Windsor,* 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). In addition, the court may take judicial notice of court orders and other filings from related litigation. *Does v. Bishop of Charleston,* 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 (2014) (recognizing that a circuit court may take judicial notice when ruling on a 12(b)(6) motion without converting it into one of summary judgment); *see also* Rule 201(d), SCRE ("A court shall take judicial notice if requested by a party and supplied with the necessary information."); Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding.").[2] Although the court must accept "well pled facts" as true, *United Educ. Distribs., LLC v. Educ. Testing Serv.,* 350 S.C. 7, 13, 564 S.E.2d 324, 328 (Ct. App. 2002), it should not accept "unsupported conclusions" of law. *See Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.,* 348 S.C. 420, 426, 559 S.E.2d 362, 364-65 (Ct. App. 2001).

ARGUMENT

I. Santos fails to state a claim against HIH because HIH had the right under the Lease and South Carolina law to retake possession after expiration of the Lease term.

All of Santos' causes of action relate to HIH's conduct in retaking possession and demolishing the Property after expiration of the Lease term. But HIH had the right under the Lease and South Carolina law to retake possession at the conclusion of the Lease term without an order of any court. The Lease expressly granted HIH the right, upon Santos' failure to surrender the premises, to "re-enter and forthwith repossess the entire Premises." (Lease, Sec. 30.) Moreover, under South Carolina law, where a tenant has no right to continue in possession upon expiration

[2] Thus, in addition to the Complaint, the Court may consider the Lease between HIH and Santos, which Santos also references in the Complaint (Compl. ¶ 6), as well as the rulings and orders of the magistrate's court and the circuit court relating to HIH's eviction of Santos and Santos' related appeals.

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of the lease term, the landlord may expel her from the premises without legal process and may not be held liable for doing so. *Rush v Aiken Mfg. Co.*, 58 S.C. 145, 36 S.E. 497, 499 (1900) (holding that the landlord could retake possession upon expiration of the lease term without process of law); *Barbee v. Winnsboro Granite Corp.*, 190 S.C. 245, 2 S.E.2d 737, 738 (1939) (affirming that "the rule in this state is that, where the tenancy has terminated, the landlord may enter upon and retake possession of the premises, and he commits no trespass upon the real estate in so doing, even if force is used in making such entry, and therefore, in such a case, he is not liable to a civil action for trespass.").[3] Furthermore, nothing in the commercial ejectment statutes indicates the legislature intended to make ejectment remedy exclusive. *See* S.C. Code Ann. § 27-37-10, et. seq.

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[3] South Carolina is not alone in this regard. Despite the widespread existence of ejectment statutes, most jurisdictions permit a commercial landlord to exercise self-help in retaking possession of the leased property upon expiration of the term. *See, e.g.*, *Restatement of the Law of Property* 2d § 14.2, Reporter's Note (1977) ("[A]n apparent majority of jurisdictions still permits the landlord to use some degree of self-help to recover possession of the leased property from a holdover tenant" and "maintain that the existence of the statutory remedy does not prohibit the landlord from using self-help."); *Shorter v. Shelton*, 33 S.E.2d 643, 647 (Va. 1945) (holding landlord has a common law right to retake possession from a holdover tenant and summary ejectment statutes are not the landlord's exclusive remedy); *Laney v. State*, 842 A.2d 773, 785 (Md. 2004) ("The right of peaceable self-help, therefore, is a viable mechanism for a title owner of property to obtain actual possession of real property from a holdover mortgagor."); *In re Estate of Sauder*, 156 P.3d 1204, 1216 (Kan. 2007) ("Generally, courts enforce clauses in commercial leases that reserve a landlord's right to peaceably reenter commercial premises and regain possession if a tenant breaches a material obligation."); *Watson v. Brown*, 686 P.2d 12 (Haw. 1984) (holding that a summary eviction proceeding is not exclusive remedy available to landlord for breach of lease and landlord may resort to self-help to repossess premises); *Rucker v Wynn*, 441 S.E.2d 417, 420 (Ga. App. 1994), *disapproved of on other grounds by George v. Hercules Real Estate Servs., Inc.*, 795 S.E.2d 81 (Ga. App. 2016) (holding that where terms of commercial lease gave a landlord the right to reenter and take possession of premises without recourse to legal proceedings, he may do so); *Martinez v. Ulloa*, 22 N.Y.S.3d 787 (N.Y. App. Term 2015) (holding a landlord may utilize self-help to regain possession of the demised commercial premises where permitted by lease agreement); *In re 1345 Main Partners, Ltd.*, 215 B.R. 536 (Bankr. S.D. Ohio 1997) (holding that, under Ohio law, a commercial lessor may resort to self-help repossession, pursuant to a valid lease provision, as remedy for lessee's breach of lease agreement); *Brown v. State Cent. Bank*, 459 F. Supp. 2d 837 (S.D. Iowa 2006) (holding that, under Iowa law, landlord could resort to self-help where commercial tenant failed to vacate leased premises after expiration of term and there was no dispute about landlord's entitlement to possession).

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Here, the Lease term ended on November 30, 2018. (Lease, p. 1.)[4] The Lease contained no right of renewal, and it expressly required Santos to surrender the property at the conclusion of the term. (Lease, Sec. 22.) Santos does not and cannot allege otherwise. Thus, because Santos failed to surrender the Property upon expiration of the term as required by the Lease, HIH had the right to retake possession of the property and cannot be held liable for doing so. *See Rush*, 58 S.C. 145, 36 S.E. at 499; *Barbee*, 190 S.C. 245, 2 S.E.2d at 738. Thus, HIH is entitled to judgment as a matter of law, and the complaint should be dismissed pursuant to Rule 12(b)(6), SCRCP.

II. Santos' allegations in support of specific counts are legally deficient.

Dismissal is also required because Santos fails to plead the required elements of the specific causes of action.

A. Santos fails to allege the elements of fraud.

The elements of fraud are: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 334, 574 S.E.2d 502, 509 (Ct. App. 2002) (quoting *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993)). "A complaint is fatally defective if it fails to allege all nine elements of fraud. Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim." *Id.* (quotation marks omitted).

[4] In fact, although the Lease term had not yet expired when the magistrate ordered the eviction, the magistrate expressly recognized in the ejectment order that the Lease was set to expire on November 30, 2018. (12/7/2017 Order at 2.)

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Santos pleads no statement, much less a misrepresentation, by HIH to Santos. The only misrepresentation alleged is HIH's purported statement "to the City that the demolition permit was necessary to abate asbestos." (Compl. ¶ 16.) But Santos alleges no false statement *made to her.*[5] Moreover, she did not, and cannot, plead that HIH intended a misrepresentation be acted upon by Santos, that Santos relied on the truth of any alleged representation by HIH, or that she had a right to rely on the same. Because Santos failed to plead at least four elements of fraud, her fraud claim must be dismissed.

B. Santos' cause of action for "tortuous interference with prospective business relations" fails to state a claim.

South Carolina does not recognize a cause of action for "tortuous interference with business relations." Instead, South Carolina recognizes two distinct torts for intentional interference with business relationships, which have specific pleading requirements: intentional interference with existing contract and intentional interference with prospective contract. Santos alleges no interference with an existing contract, only interference with "prospective" business relations. (Compl., Seventh Cause of Action.)

The elements of intentional interference with prospective contract are: (1) the intentional interference with the plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, and (3) causing injury to the plaintiff. *See Brown v. Stewart*, 348 S.C. 33, 55, 557 S.E.2d 676, 688 (Ct. App. 2001); *Love v. Gamble*, 316 S.C. 203, 214, 448 S.E.2d 876, 882 (Ct. App. 1994). Importantly, "[t]he plaintiff must actually demonstrate, at the outset, that he had a truly prospective (or potential) contract with a third party," and that the defendant's actions caused a third party not to agree to a prospective contract, resulting in damage to the plaintiff.

[5] Even if Santos had standing to plead fraud based on the alleged statements by HIH to the City, which she does not, her fraud claim would still fail because she alleges the City was not ignorant of the truth. (Compl. ¶ 20) (alleging the City "knew [the representation by HIH] was false").

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United Educ. Distributors, LLC v. Educ. Testing Serv., 350 S.C. 7, 15, 564 S.E.2d 324, 329 (Ct. App. 2002). In other words, the potential contract must have been a "close certainty" and not speculative, *Santoro v. Schulthess*, 384 S.C. 250, 263, 681 S.E.2d 897, 904 (Ct. App. 2009), and the plaintiff must allege that a defendant "thwarted" the proposed contract, resulting in damage to the plaintiff. *United Educ. Distributors, LLC*, 350 S.C. at 18, 564 S.E.2d at 330.

Santos fails to allege a specific contract that HIH allegedly thwarted. She merely alleges that she was "damaged by the defendant's acts in destroying her business and equipment." (Compl. ¶ 54.) This allegation is plainly inadequate under the case law. Thus, Santos's claim for "tortious interference with prospective business relations" must be dismissed.

C. Santos fails to state a claim for abuse of process because she does not allege HIH initiated a lawsuit for an ulterior purpose.

In South Carolina, the "essential elements" of an abuse of process cause of action are: "(1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014). Ulterior purpose "exists if the process is used to secure an objective that is not legitimate in the use of the process." *Pallares*, 407 at 370–71, 756 S.E.2d at 133 (citation and internal quotation marks omitted). "[N]o action lies where a person has an incidental or concurrent motive of spite or merely seeks to gain a collateral advantage from the process." *Id.* at 371, 756 S.E.2d at 133. Instead, the "collateral objective must be the sole or paramount reason for acting." *Id.* at 371, 756 S.E.2d at 134 (citation and internal quotation marks omitted). "An allegation that a party had a 'bad motive' or an 'ulterior purpose' in bringing an action, standing alone, is insufficient to sustain an abuse of process claim." *Id.* at 371, 756 S.E.2d at 133.

Here, Santos makes only the conclusory allegation that HIH used police officers to assist it in retaking possession of the Property and that HIH did so "for an ulterior purpose." (Compl. ¶

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30.) Santos does not say what the purported ulterior purpose consisted of or allege it was HIH's sole reason for acting. *See also Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (holding that conclusory allegations are not facts sufficient to constitute a cause of action). In addition, "process" means commencing litigation. *See Pallares*, 407 S.C. at 370-71, 756 S.E.2d at 133; *see also Food Lion, Inc. v. United Food & Com. Workers Int'l Union*, 351 S.C. 65, 70, 567 S.E.2d 251, 253 (Ct. App. 2002) ("To sustain a claim for abuse of process, it is axiomatic that the judicial process must in some manner be involved.") (citation and internal quotation marks omitted). But Santos does not allege HIH commenced a lawsuit for an ulterior purpose. (Compl. ¶¶ 27-30.) Allegedly employing police officers to assist in retaking possession of property is not the type of "process" required to support this cause of action. Accordingly, Santos' claim for abuse of process claim must be dismissed.[6]

D. Santos fails to state a claim for breach of the covenant of quiet enjoyment because she had no right to quiet enjoyment of the Property after the Lease expired.

The Lease provided for Santos to have "peaceable possession" of the Property, but only "[s]ubject to the terms, covenants, and conditions of [the] lease." (Lease § 29.) The Lease expired according to its terms on November 30, 2018, before the events that underlie Santos' allegations, and it contained no right of renewal. (Lease, p. 1.) Santos had no right to peaceable possession

[6] To the extent Santos alleges HIH's commencement of the ejectment action in 2016 constitutes abuse of process, the claim is barred by the statute of limitations. Abuse of process has a three-year statute of limitations. *See* S.C. Code Ann. § 15-3-530; *see also Whitfield Const. Co. v. Bank of Tokyo Tr. Co.*, 338 S.C. 207, 222, 525 S.E.2d 888, 896 (Ct. App. 1999). The limitations period begins to run when the plaintiff "knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535. Santos filed this lawsuit on March 2, 2021, which is over four years after Santos was served with pleadings in the ejectment action.

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after the Lease expired and HIH repeatedly instructed her to vacate the Property. Thus, this cause of action must be dismissed.

E. Santos fails to state a claim for intentional infliction of emotional distress because she fails to allege any extreme and outrageous conduct or severe emotional distress.

To recover for intentional infliction of emotional distress, the plaintiff must establish that: (1) the defendant intentionally inflicted severe emotional distress; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency"; (3) the defendant's conduct caused plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007) (citing *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776, 778 (1981)).

The threshold for establishing a claim for intentional infliction of emotional distress under South Carolina law is very high. There is a "heightened burden of proof" where "the plaintiff must show both that the conduct on the part of the defendant was 'extreme and outrageous,' and that the conduct caused distress of an "extreme or severe nature.'" *Hansson*, 374 S.C. at 356, 650 S.E.2d at 71 (quoting *Ford*, 276 S.C. at 162, 276 S.E.2d at 778). "Even callous, offensive, or extremely insensitive behavior" does not necessarily establish the tort. *Doe v. Erskine Coll.*, CIV.A. 8:04-23001RBH, 2006 WL 1473853 at *14, n.18 (D.S.C. May 25, 2006) (citing *Hawkins v. Greene,* 311 S.C. 88, 427 S.E.2d 692, 694 (Ct. App. 1993) (stating that to permit recovery on a claim of intentional infliction of emotional distress, the defendant's conduct must be "so extreme and outrageous as to exceed all possible bounds of decency and atrocious and utterly intolerable in a civilized community"); *Shipman v. Glenn,* 314 S.C. 327, 443 S.E.2d 921, 922 (Ct. App. 1994) (holding evidence of "both callous and offensive" conduct could not provide the basis for an action for intentional infliction of emotional distress). Thus, "the court plays a significant gatekeeping

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role" to "prevent claims for intentional infliction of emotional distress from becoming a panacea for wounded feelings rather than reprehensible conduct." *Hansson*, 374 S.C. at 358, 650 S.E.2d at 72 (citations and internal quotation marks omitted).

The conduct alleged in the Complaint fails to meet this heighted pleading standard. Santos alleges HIH retook possession of its property and demolished its own building. (Compl. ¶¶ 41, 44.) But because Santos failed to surrender the Property upon expiration of the Lease, HIH had the right under the Lease and South Carolina law to take these actions. Regardless, HIH's alleged conduct was not "extreme and outrageous" as a matter of law.

Nor does Santos plead that her alleged emotional distress was sufficiently severe. In *Hansson*, the Supreme Court emphasized that a plaintiff must plead and prove emotional distress so severe that no reasonable person could be expected to endure it. *See* 374 S.C. at 356, 650 S.E.2d at 70 ("Under the heightened standard of proof for emotional distress claims emphasized in *Ford*, a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions. To permit a plaintiff to legitimately state a cause of action by simply alleging, 'I suffered emotional distress' would be irreconcilable with this Court's development of the law in this area."). The plaintiff's claim in *Hansson* that he lost sleep and developed a habit of grinding his teeth was insufficient to survive summary judgment. *Id.* at 356, 650 S.E.2d at 70; *see also AJG Holdings LLC v. Dunn*, 392 S.C. 160, 169, 708 S.E.2d 218, 223 (Ct. App. 2011) (plaintiffs failed to establish severity as a matter of law despite testimony that the defendant's actions caused them to become "emotionally ill", lose twenty pounds, develop high blood pressure and digestive problems and required them to take medication for high blood pressure and nervousness). Santos alleges only that HIH's conduct caused her "to be afraid for her safety and severe emotional distress." (Compl. ¶ 43.) This allegation fails to state a claim under

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Hansson and *Dunn*. Thus, Santos's claim for intentional infliction of emotional distress must be dismissed.

F. Santos fails to state a claim for conspiracy because she does not plead additional facts in furtherance of the conspiracy separate from other wrongful acts alleged in the Complaint.

A "plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cty. Sch. Dist.*, No. 2018-002025, 2021 WL 1992245, at *6 (S.C. May 19, 2021); *see also Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719, 727 (1942).

Santos failed to plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, which requires dismissal. *See Paradis*, 2021 WL 1992245, at *6 ("The plaintiff . . . failed to plead any overt acts in furtherance of the conspiracy. Thus, the Court correctly concluded the civil conspiracy claim failed as a matter of law. In that situation, the Court noted, the plaintiff's repetition of the same acts as the prior claims was insufficient to salvage the claim."); *see also Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) ("Because [the third party plaintiff] . . . merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action."). Santos alleges only that Defendants "entered into an unlawful combination" to deprive her "from the right to enter her own business or to have access to judicial review" and to injure her "by destroying her business and equipment." (Compl. ¶ 13.) She alleges this same conduct in support of her other causes of action. (Compl. ¶¶ 23-25, 29-31, 37-38, 43-45, 47-48, 54, and 57.) Because Santos failed to plead additional conduct in furtherance of the

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conspiracy, separate and independent from other wrongful acts she alleges in the Complaint, Santos' civil conspiracy claim must be dismissed.

G. Santos fails to state a claim against HIH for attorney's fees under S.C. Code Ann. § 15-77-300, -310 because the statute does not provide for award of attorney's fees against a private party such as HIH.

Section 15-77-300 provides only for fee awards against the State. S.C. Code Ann. § 15-77-300 ("[T]he court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs ***against the appropriate agency*** . . .") (emphasis added). HIH is not a state agency and, therefore, the statute provides no authority for award of attorney's fees against HIH.[7] *See also S.C. Pub. Int. Found. v. Courson*, 420 S.C. 120, 124, 801 S.E.2d 185, 187 (Ct. App. 2017) ("[A]gency under the state action statute must be limited to executive branch agencies."). Santos does not and cannot raise any other viable authority allowing recovery of attorney's fees against HIH. Thus, Santos cannot recover attorney's fees from HIH, and this cause of action must be dismissed.

CONCLUSION

Based on the foregoing, the factual allegations in the Complaint fail to state a claim under South Carolina law because they do not support relief under any theory of law alleged by Santos. As a result, Santos's claims against HIH must be dismissed pursuant to Rule 12(b)(6), SCRCP.

[7] Chapter 77 of Title 15 of the Code of Laws of South Carolina is entitled "Suits Involving State, State Agencies and Officials and United States," and, therefore, it does not apply to HIH, which is a private limited liability company.

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May 25, 2021

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EXHIBIT A

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COMMERCIAL LEASE

In consideration of the covenants herein contained, Aracelis Santos, hereinafter called **"Tenant"** and Harris Investment Holdings, LLC, Landlord, or Agent for the Landlord, hereinafter called **"Landlord"**, agree as follows:

For the period of time beginning on December 1, 2015, and ending at midnight on November 30, 2018, Landlord hereby grants to Tenant the sole and exclusive right to lease the real property known as:

Lot _____ Block _____ Section _____ Subdivision _____

Address 5901 Loftis Rd

Tax Map # 265-02-15-068 City Hanahan Zip 29410-2663

County of Berkeley, State of South Carolina.

THE ☐ LANDLORD ☐ TENANT IS LICENSED UNDER THE LAWS OF SOUTH CAROLINA AS A REAL ESTATE LICENSEE.

1. **RENT.** Tenant shall pay to the Landlord, a Monthly Base Rental and Additional Rent as follows:
   (a) MONTHLY BASE RENTAL. Tenant shall pay a Monthly Base Rental to Landlord for each month during the term of this lease or any renewal thereof, in advance on or before the 1st day of each month during the term of this Agreement. The amount of the Monthly Base Rental for the first year of this Agreement shall be Two Thousand, One Hundred Seventy-Six 30/100 Dollars ($ 2,176.30).
   (b) The rental for the first month of this lease shall be paid at the date of execution thereof. The Monthly Base Rental shall be increased as follows: 2% per year, for 2 additional Years.
   (c) ADDITIONAL RENT. In addition to the Monthly Base Rental and any accumulative adjustments, Tenant shall pay Additional Rent as indicated herein below (check all that apply):
      ☒ 1. PROPERTY TAXES (choose one):
         ☐ TAX INCREASE. Tenant shall pay annually a sum equal to any increase in real estate taxes (ad valorem, special assessments and any other government charges to include any solid waste disposal user fees) over those assessed for the year of 2015, on a pro rata basis. Presentation of copies of tax bills shall constitute sufficient evidence of additional rent due and shall be payable within fifteen (15) days after receipt thereof. Tenant shall be charged additional rent only for the portion of the calendar year during which this lease was in effect.

         ☒ NET LEASE. Tenant shall pay annually the real estate taxes (ad valorem, special assessments and any other government charges) upon presentation by the Landlord of tax bills on the property. These charges shall be payable by the Tenant within fifteen (15) days after receipt thereof. So long as Tenant shall not be in default, Tenant shall be responsible for the portion of the calendar year during which this lease was in effect.

      ☐ 2. PERCENTAGE OF GROSS SALES. Tenant shall pay annually a sum equal to _____ % of gross sales, as herein defined, in excess of _____ Dollars, ($ _____), in any lease year. Gross sales as used herein shall be the amount of the gross sales as indicated on the Tenant's South Carolina Tax Report (Form ST-3). Tenant shall deliver to Landlord a certified copy of each

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The Boulevard Company, LLC, 35 Broad Street Charleston, SC 29401 Phone: (843)619-7316 Fax: Alamo Cafe\Santos
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monthly report within ten (10) days after report is due to the South Carolina Tax Commission. Lease year as used herein shall be the period of one year's duration commencing on the effective day of the lease and each successive period of one full year commencing on the anniversary of said effective date. Tenant shall deliver to Landlord within days following the end of each lease year written statement signed and certified by Tenant to be a true and correct statement of the amount of gross sales during the proceeding lease year. Tenant shall at the same time pay the amount of Additional Rent due (if any) as a percentage of the excess over the amount herein stated.

☒ 3. COMMON AREA MAINTENANCE. Tenant shall pay on the first day of each month, in advance, a fee equal to the Tenant's pro rata share of the cost of maintaining common areas. Tenant's common area maintenance fee for the remaining portion of the calendar year in which this lease became effective shall be 0 52/100 _____ Dollars ($ 0.52 _____) per month. Said fee shall be adjusted at the end of each calendar year to reflect any increase in cost during said year. Common areas include all areas used in common with the other Tenants of the property of which the Premises is a part, for the convenience or welfare of all tenants' customers collectively. Common area maintenance shall mean and include all amounts paid or incurred by Landlord for operating, managing and maintaining the Property, including the buildings, improvements and common area facilities of the Property in a manner deemed by Landlord reasonable and appropriate and for the best interest of the Property, including, without limitation, all costs and expenses of 1) operating, repairing, lighting, cleaning, painting and securing the Property and the common areas of the Property, and water and sewer charges; 2) paying all personnel employed on a part time basis or full time basis in the operation, maintenance, or repair of the Property, including the common areas; 3) removing rubbish and debris from the Property; 4) repair and maintenance of walkway, landscaping, and lighting facilities, other than such costs and expenses of a capital nature; 5) management fees paid to the property management firm to manage the Property; 6) planting, replanting and replacing flowers, shrubbery, and planters and the supplies required therefore; 7) all utilities used in connection with the operation of the common area facilities; 8) seasonal decorations, including installation and removal thereof and electricity therefore; 9) leasing or renting equipment used in connection with the operation and maintenance of the common areas; 10) fountain maintenance and repairs, when applicable; 11) security, fire and crime prevention services; 12) utility charges for the common area including without limitation, storm water, sewer and pollution control fees.

☒ 4. INSURANCE. Landlord shall keep the Premises adequately insured at a reasonable rate as indicated below (choose one):

☐ INSURANCE INCREASE. Tenant shall pay annually a sum equal to any increase in insurance premium for the year of _____, on a pro rata basis. Presentation of copies of insurance bills shall constitute sufficient evidence of additional rent due and shall be payable within fifteen (15) days after receipt thereof. Tenant shall be charged additional rent only for the portion of the calendar year during which this lease was in effect.

☒ NET LEASE. Tenant shall pay annually the insurance premium upon presentation by the Landlord of bill on the property. These charges shall be payable by the Tenant within fifteen (15) days after receipt thereof. So long as Tenant shall not be in default, Tenant shall be responsible for the portion of the calendar year during which this lease was in effect.

☒ 5. PRORATION OF CHARGES. If the Premises described herein are less than the entire property, the increases in Monthly Base Rental adjustments, Additional Rent and all other charges required by this lease shall be determined by proration on the same ratio that the rentable floor area of the Premises bears to the rentable floor areas of the entire property. Landlord and Tenant hereby deem that the Premises contains approximately 3780 square feet of rentable area of the entire property which is approximately 7200 square feet, resulting in a percentage ratio factor of Fifty-Two Point Zero percent (52.000 %).

☐ 6. ADDITIONAL CHARGES. Any charges due Landlord by Tenant, including but not limited to, damage to Premises, legal fees, cost of default remedies, and past due charges for utilities, insurance, cleaning, maintenance and repairs, etc. or for work done on the Premises by order of Tenant, shall be considered as Additional Rent due (in addition to all other rent payable) and shall be included in any lien

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for rent. In the event any documentary stamp tax, or tax levied on rental or leasing of the Premises is required, the cost shall be paid by tenant upon demand. The cost of the credit report on the Tenant which may be requested at the Landlord's option shall be paid by the Tenant.

☒ 7. LATE RENT. If rent is not paid within 5 days after due date, the Tenant is subject to a one-time late fee of Ten Point Zero (10.000 %) percent of all rents due at that time.

2. **SECURITY DEPOSIT.** Upon execution of the lease by the Tenant, the Tenant shall pay to Landlord a Security Deposit in the amount of ($ 2,800.00) Two Thousand, Eight Hundred Dollars. Any security deposit required by Landlord and paid by Tenant shall be retained as security (interest free) for the faithful performance by Tenant of all terms, covenants and conditions herein. Landlord may at any time apply said deposit or any part thereof against any default by Tenant of any of the terms, covenants and conditions of this lease. In such event, Tenant shall upon demand deposit with Landlord the amount so applied that Landlord shall have the full amount of the deposit on hand at all times during the terms of this lease. Upon the expiration of this lease the Tenant shall surrender possession of the Premises as required in paragraph 24 herein. Landlord is given permission to deduct from said security deposit the cost of any unusual cleaning or repairs to the property, upon vacating of Tenant. Security deposit is not a part of the rental and subsequently cannot be deducted from the rent of the last month of this tenancy. Security deposit or any remaining portion will be returned within 30 days after the termination of this Agreement or completion of the repairs necessitated by Tenant's misuse of the Premises. In the event the security deposit is not sufficient to pay all charges due, Tenant shall pay said charges within three days after receiving written notice from the Landlord or Agent.

3. **TENANTS UTILITIES.** Tenant shall pay all charges or bills for the utility and services used by the Tenant, EXCEPT: _____

4. **USE OF PREMISES.** Tenant agrees not to abandon or vacate the Premises and to use entire leased Property for Cafe, Restaurant, Discoteque. and for no other purposes without the express written consent of the Landlord. Pets, animals or birds may not be kept on the Premises without the landlord's permission. These Premises may not be used for sleeping quarters or apartments, immoral conduct or any illegal activity.

5. **EXAMINATION OF PREMISES.** Tenant has examined the Premises and is familiar with their present condition. Tenant, relying solely on said examination, agrees to accept Premises in their present "as is" condition, unless otherwise agreed to in writing by Tenant and Landlord.

6. **DELAY OF POSSESSION.** If Landlord is unable to deliver possession of Premises on the effective date of this lease, by reason of the holding over of a prior Tenant or for any other reason, this lease shall not be affected or impaired in any way and landlord shall not be liable to Tenant for any loss or damage resulting therefrom. The effective date of this lease however, shall not begin until the delivery of possession. If Landlord, however, is unable to deliver possession of the Premises to Tenant by _____ , and if Tenant in fact shall not have accepted possession of the Premises, and if Tenant shall not be in default, Tenant shall have the right to cancel this lease upon written notice delivered to Landlord and upon such cancellation Landlord and Tenant shall each be released and discharged from all liability under this lease. In such case any deposit or prepaid rent shall be promptly returned to Tenant.

7. **TENANT'S PARKING.** Parking of vehicles owned or operated by Tenant or Tenant's employees is hereby limited, restricted or prohibited, as follows: Tenant may park any where in parking lot around building.

8. **LIABILITY INSURANCE.** Tenant shall not carry any stock of goods or do anything in or about the Premises which will in any way restrict or invalidate any insurance coverage of the Premises. Tenant agrees to pay upon demand as

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additional rent any increase in premiums of insurance carried by the Landlord on the Premises resulting from the Tenant's occupancy or improvements. Tenant shall keep in full force and effect, at Tenant's expense, insurance for plate glass, personal property, trade fixtures, and property damages, as well as a public liability policy in which both Tenant and Landlord shall be named as the insured with the following minimum coverage:
Single Limit $ 1,000,000.00 Aggregate $ 2,000,000.00 .
A certificate of insurance showing the Landlord and Landlord's Agent as an additional insured shall be provided to the landlord not later than the commencement date of this lease and prior to the expiration of such insurance policy during the term of this lease.

9. **MAINTENANCE AND REPAIRS.** Landlord shall repair and maintain the foundation, roof, outer walls and structural members of the Premises. Tenant shall, at Tenant's sole expense make all other repairs necessary to maintain the Premises, both interior and exterior, ordinary and extraordinary including window glass, plate glass, storefronts, doors, windows, screens, awnings, locks, keys, weather stripping and thresholds, as well as all interior walls, floors, ceilings, and floor coverings. Tenant's responsibility to maintain the Premises shall also include the servicing, repair and maintenance of plumbing, electrical, heating, ventilating and air conditioning systems, including all pipes, wiring, fixtures, filters, equipment, machinery, boilers, furnaces, compressors and appliances, and for the replacement of any of the aforementioned systems if their failure is due to Tenant's neglect. Notwithstanding anything contained in this Lease to the contrary, during the term of this Lease, Landlord shall warrant the major components of the heating, ventilating, and air conditioning (HVAC) equipment servicing the Premises, to include the compressors, condensing units, and air handlers, which warranty shall be contingent upon Tenant maintaining the HVAC equipment and ductwork by entering into a contract with a reputable HVAC services company approved in writing by Landlord. Said contract shall include a minimum of monthly filter changes, routine testing for Freon leakage, cleaning, and other customary periodic maintenance. In the event a major component shall need replacement and Tenant is unable to provide written documentation to the Landlord of the required maintenance as set for in this paragraph, Tenant shall be responsible for the replacement of said component at Tenant's sole cost and expense. Tenant shall also repair and be responsible for any caused by stoppage, breakage, leakage, overflow, discharge or freezing of plumbing pipes, soil lines, or fixtures. If any part of the Premises is damaged by the Tenant, or Tenant's employees, agents or invitees, Tenant shall provide Landlord with immediate written notification of all damages to the property. After notification and approval of the Landlord, repairs shall be made promptly at Tenant's expense so as to restore said Premises to its previous condition. If Tenant refuses or neglects to commence necessary repairs within ten (10) days after written demand, or does not complete such repairs within a reasonable time thereafter, Landlord may make said repairs without liability to Tenant for any loss or damage that may accrue to Tenant's stock, business or fixtures by reason thereof and if Landlord makes such repairs, Tenant shall pay to Landlord, on demand, as Additional Rent, the cost thereof. Tenant's failure to pay shall constitute a default of this lease. Repairs that are the Landlord's responsibility shall be made within a reasonable time after written notice from the Tenant. Tenant's failure to give or unreasonable delay in giving notice of needed repairs or defects shall make Tenant liable for any loss or damage resulting from delay of needed repairs.

10. **REGULATIONS AND SANITATION.** Tenant shall keep the Premises clean, safe, sanitary, and in compliance with laws, ordinances and requirements of any legally constituted public authority. Tenant shall keep broom clean all areas in and around Premises that are not included in Common Area Maintenance, such as front sidewalks and area behind building. Cleaning includes removing of any trash or refuse deposited on the lease Premises or adjacent public area by Tenant, Tenant's customers', invitees, or agents. In the event of non-compliance by Tenant, Landlord shall have the right to have said areas cleaned, trash and refuse removed and charge the expense to Tenant as Additional Rent which shall be due and payable upon demand. Nonpayment of which shall constitute default of this Agreement. Tenant shall not allow loitering on Premises. Tenant shall employ if Landlord determines it is necessary, a reputable pest extermination company at regular intervals.

11. **ALTERATIONS.** Tenant shall make no alterations, additions, improvements, or rewiring in or to the Premises without the written consent of Landlord. All additions, or improvements to the Premises including carpeting, tile, other floor covering, wall covering, ceiling tile, etc., made with or without Landlord's written consent shall become part of the Premises, and the property of Landlord upon installation. Trade fixtures and office furniture shall be installed so as to be readily removable without injury to the Premises and any injury caused by said removal shall be repaired forthwith at Tenant's expense. Said trade fixtures shall be removed from the Premises before the end of this lease or shall become part of the Premises and the property of Landlord. Tenant shall not install or maintain any equipment, partitions, furniture, etc. which the weight or operation thereof would tend to injure, or be detrimental to the Premises or would unreasonably annoy or disturb other Tenants.

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12. **ASSIGNMENT OR SUBLEASE.** Tenant shall not, without written consent of Landlord, in each case, assign, transfer, mortgage, pledge or otherwise encumber or dispose of this lease, or sublet the Premises or any part thereof or permit the Premises to be occupied by other persons. Such consent shall not be unreasonably withheld, conditioned, or delayed. If this lease be assigned, or if the Premises or any part thereof be sublet or occupied by any other person, firm, office or corporation with or without written permission of Landlord, it will not relieve Tenant of any obligations under the terms of this lease, and if sublet, assigned or occupied without the Landlord's permission, this lease may, at the option of the Landlord, be terminated by a seven day written notice. In the event Tenant shall sublease the Premises in accordance herewith for rentals in excess of those rentals payable hereunder, Tenant shall pay to Landlord monthly in advance as Additional Rent hereunder, one-half of all such excess rent. Any proposed assignee or sublessee that proposes to assume Tenant's obligations hereunder shall execute a satisfactory assumption or sublease agreement before consent shall be given. Other provisions of this Paragraph to the contrary notwithstanding, Landlord shall have the right in its absolute and sole discretion to withhold consent to any sublease or assignment if Tenant shall be in default or breach of this Agreement or if the proposed assignee or sublessee or its business will cause Landlord to incur any costs of whatever kind or nature.

13. **SIGNS OR AWNINGS.** Tenant shall place no signs, notices, pictures, or advertising matter upon the exterior of the lease Premises except with the written consent of the Landlord. Any and all signs placed on the Premises by Tenant shall be maintained in compliance with rules and regulations governing such signs. The Tenant shall be responsible to Landlord for any damages by installation, use, maintenance or removal of said signs. Any electrical service needed for signs shall be installed at the Tenant's expense. Tenant shall, at Tenant's expense, remove signs at the expiration of the Agreement.

14. **WAIVER OF RIGHTS.** No failure of Landlord to exercise any power given Landlord hereunder, or to insist upon Tenant's strict compliance with Tenant's obligation hereunder and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of Landlord's right to demand exact compliance with the terms of this Agreement at a future time. The rights and remedies created by this Agreement are cumulative and the use of one remedy shall not be taken to exclude the right to the use of another.

15. **RULES AND REGULATIONS.** Landlord reserves the right at any time to make further rules and regulations as in Landlord's judgment that may be necessary for the safety, care, appearance, and cleanliness of the Premises and the entire property, and the preservation of good order herein, and such other rules and regulations shall be binding upon the parties hereto with the same force and effect as if they had been contained herein at the time of execution hereof.

16. **RIGHT OF ENTRY.** Landlord, without being liable for trespass or damages, shall have the right to enter Premises during reasonable hours, with reasonable prior notice, to examine same or to make repairs, additions, or alterations as Landlord may deem necessary for the safety, comfort, appearance, or preservation thereof or to exhibit said Premises. Entry shall also be allowed to post "FOR RENT" notice, during the 90 days before the expiration of this lease. Said right of entry shall likewise exist for the purpose of removing placards, signs, fixtures, alterations or additions which do not conform to this Agreement. In accordance with this right, Tenant shall give Landlord a key to any and all locks, security systems and burglar alarms. Tenant shall not change or install new locks or security systems without the written consent of Landlord.

17. **LIENS.** Tenant shall not create or allow to be created any liens for labor or materials against Landlord's interest in the Premises. All persons contracting with the Tenant for the erection, installation, alteration, repair or demolition of any building or other improvements on the Premises, and all material suppliers, contractors, mechanics, and laborers are hereby charged with notice that they must look to the Tenant and to the Tenant's interests only in the Premises to secure the payment of any bill for work done or material furnished during the rental period created by this Agreement. In the event that liens are placed on record against the Premises by contractors, mechanics, laborers, material suppliers, etc.. of Tenant it will constitute a default of this Agreement. The Tenant shall indemnify, hold harmless, and defend the Landlord from any liens and encumbrances arising out of any work performed or materials furnished by or at the direction of the Tenant. Such indemnity shall include, without limitation, all attorney's fees and costs incurred by the Landlord due to the filing of such mechanic's lien or notice thereof. In the event that the Tenant, within twenty (20) days following the imposition of any such lien, shall not cause such lien to be released of record by payment or posting of a proper bond, in addition to all other remedies provided herein and by law, the Landlord shall have the right (but not the obligation) to cause the same to be released by such means as it shall deem proper, including bonding or payment of the claim giving rise to such lien. All such sums paid by the Landlord and all expenses incurred by it in connection therewith, including attorney's fees and costs shall be payable to the Landlord by the Tenant on demand with interest at the rate of eighteen (18%) percent per annum.

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18. **DAMAGE OR DESTRUCTION OF PREMISES.** If Premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If Premises are damaged but not wholly destroyed by fire or other casualty, rental shall abate in such proportion as use of Premises has been lost to the Tenant. Landlord shall restore Premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence. Insurance proceeds, if paid to Tenant, shall be assigned to Landlord to restore Premises and replace any covered contents owned by Landlord.

19. **DAMAGE TO PERSONAL PROPERTY.** All personal property, merchandise, fixtures and equipment placed or moved into the Premises shall be at the risk of Tenant or the owners thereof and Landlord shall not be liable for any damages, loss or theft of said personal property, merchandise, fixtures, or equipment, from any cause whatsoever.

20. **CONDEMNATION.** If the whole of the Premises, or such portion thereof as will make said Premises unusable for the purpose herein leased, be condemned by any legally constituted authority, this lease shall terminate on the date when possession thereof is taken by public authorities, and rental shall be accounted for as between Landlord and Tenant as of that date. Such termination, however, shall be without prejudice to the rights of either Landlord or Tenant to recover from the public authority compensation for damage caused by condemnation. Neither the Tenant nor Landlord shall have any rights in any award made to the other by any condemnation authority. In the event only such portion of the Premises is acquired by condemnation as will leave the remaining Premises, after alteration and repairs, in condition suitable for use by Tenant, the monthly rental payments from the day of such acquisition to the end of the original or any extended term of this lease shall be reduced in proportion to the resulting loss of use of Premises by Tenant. In the event of such partial acquisition and reduction in rent, Landlord shall make promptly at Landlord's expense, all necessary alterations and repairs that shall be required, to restore the Premises to a safe and usable condition.

21. **INDEMNITY AND LIABILITY.** Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorney's fees, arising from the management of the business conducted by Tenant on the Premises. Landlord shall not be liable, and Tenant waives all claims for damage to person or property sustained by Tenant, its employees or agents, resulting from the condition of the Premises, or any equipment, or, such as may result from any accident in or about the Premises or which may result directly or indirectly from any act of neglect of any other Tenant of the property of which the Premises is a part.

22. **HOLDOVER.** Tenant shall surrender to Landlord, at the end of the term of this lease or upon cancellation of this lease, said Premises broom clean and in as good condition as the Premises were at the beginning of the term of this lease, ordinary wear and tear and damage by fire and windstorm or other acts of God excepted, or Tenant will pay to Landlord all damages that Landlord may suffer because of Tenant's failure to do so. Tenant will indemnify and save Landlord harmless from and against all claims made by any succeeding Tenant of said Premises against Landlord because of delay in delivering possession of Premises, so far as such delay is occasioned by failure of Tenant to so surrender Premises. If Tenant remains in possession of the Premises or any part thereof after the expiration of the Agreement, such holdover places the Tenant in default and the Monthly Base Rental shall be increased to one hundred fifty percent (150%) of the last month's Monthly Base Rental unless given a month to month tenancy in writing from the Landlord.

23. **EFFECTIVE DATE OF LEASE.** This Agreement shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this Agreement is signed by one party and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party and delivery of a fully executed copy of the submitting party.

24. **NOTICES.** Tenant hereby appoints as Tenant's agent to receive service of all notices required under this Agreement as well as all dispossessory distraint notices, the person in charge of Premises or occupying said Premises, at the time notice is delivered. A copy of all notices under this Agreement shall also be sent via certified mail, return receipt requested, or via recognized overnight delivery company, to Tenant's and Landlord's last known address as follows (or to such other address as either party may specify by written notice):

Tenant Address: 28 Lighthouse Dr.
Goose Creek, SC 29445

Landlord Address: 2650 Holcomb Bridge, Suite 630
Alpharetta, GA 30022

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25. **BANKRUPTCY.** If Tenant shall be adjudicated bankrupt or as insolvent or take the benefit of any Federal reorganization or make a general assignment or take the benefit of any insolvent law, or if a Trustee in bankruptcy or a receiver be appointed or elected for Tenant, under Federal or State law, this Agreement at the option of the Landlord shall expire and end seven (7) days after Landlord gives Tenant written notice, UNLESS, the Tenant's Trustee immediately cures any default of Tenant hereunder and provides (in compliance with Federal and State laws) adequate assurance of future performance of Tenant's obligations hereunder.

26. **BEYOND LANDLORD'S CONTROL.** None of the acts, promises, covenants, or obligations on the part of the Tenant to be kept, performed or not performed as the case may be, nor the obligation of the Tenant to pay Monthly Base Rental. Additional Rent or other charges or payments shall be in anywise waived, excused or affected by reason of the Landlord being unable at any time during the term of this Agreement, to supply, or to delay in supplying heat, light, elevator service or any other service expressed or implied on the part of the Landlord to be supplied; or by reason of the Landlord being unable to make any alteration, repairs, or decorations, or to supply any equipment or fixtures, or any other promise, covenant, or obligations on the part of the Landlord to be performed, if the Landlord's inability or delay is caused by circumstances or events beyond the Landlord's control.

27. **KEYS.** Landlord shall provide Tenant with one key per lock, and the Tenant is responsible for accounting for all keys provided or duplicated and shall return all keys of Premises to the Landlord upon termination or cancellation of this Agreement and/or Tenant vacating said Premises. Landlord shall have the right, if in the Landlord's sole judgment it is necessary, to require the Tenant at Tenant's expense to replace locks, and to supply Landlord with one key to the new locks. The Landlord shall retain a master key or pass key to the Premises, including all security locks and systems. Tenant shall not change or install new locks or security systems without written approval from Landlord.

28. **ESTOPPEL.** Tenant shall from time to time, within ten days following written notice from Landlord, execute, acknowledge and deliver to the Landlord a written statement certifying that this Agreement is in full force and effect. This statement should also state whether or not the Landlord is in default in performance of any covenant or condition of this Agreement or other such reasonable terms required by the Landlord, purchaser, or lender for either. The failure of the Tenant to execute, acknowledge and deliver to the Landlord a statement in accordance with this covenant shall constitute an acknowledgment by the Tenant that this lease is unmodified and in full force and effect, and shall constitute a waiver of any defaults by the Landlord which may have existed prior to the date of such notice.

29. **PEACEFUL POSSESSION.** Subject to the terms, covenants and conditions of this lease, the Tenant shall have, hold and enjoy possession of the Premises, subject to the rights of the holders of any mortgage which now covers said Premises or which may hereafter be placed on Premises by Landlord. Tenant's rights are also subject to any underlying lease now or later covering the entire property of which the leased property is a part. Tenant shall execute any necessary lease subordination agreement at the Landlord's request.

30. **DEFAULT.** If Tenant fails to pay Monthly Base Rental including Additional Rent on or before the due dates as herein stated (TIME IS OF THE ESSENCE) this Agreement shall be in default. If Tenant fails to cure such default within five (5) days after written notice from Landlord; or if Tenant shall be in default in performing any of the terms, covenants and conditions of this Agreement, other than the provision requiring the payment of Monthly Base Rental and Additional Rent, and fails to cure such default within thirty (30) days after the receipt of written notice of default from Landlord; or if Premises shall be abandoned or deserted for fifteen (15) days, or if this Agreement is assigned to any other person, firm, office or corporation, without the permission of Landlord as required in Paragraph 15 herein, this lease at the Landlord's option shall expire and terminate seven (7) days after Landlord delivers written notice to Tenant of such condition or default and Tenant shall immediately quit and surrender said Premises to Landlord. In the event of any such default or breach of performance, the Landlord without any further notice or demand of any kind to the Tenant, may terminate this lease and re-enter and forthwith repossess the entire Premises and without being liable for trespass or damage shall re-let, lease or demise the Premises to another Tenant without any hindrance or prejudice to Landlord's right to distrain for any past due rent, Additional Rent, and rent from the time of such default or termination until the Premises were leased or rented to another Tenant.

31. **ASSIGNMENT OF CHATTELS.** Tenant hereby pledges and assigns to Landlord all the furniture, fixtures, goods, equipment and chattels of Tenant which shall or may be brought or put on said Premises as security for the payment of said rent, and tenant agrees that said lien may be enforced by distraint or foreclosure, at the election of Landlord. It is understood and agreed that any merchandise, fixtures, furniture, or equipment left in the Premises when Tenant vacates

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shall be deemed to have been abandoned by Tenant and by such abandonment, Tenant relinquishes any right or interest therein and Landlord is authorized to sell, dispose of or destroy same.

32. **ATTORNEY'S FEE.** In the event Landlord successfully defends any action by the Tenant, or if it is necessary for Landlord to employ an attorney for the collection of rent or any other sum due hereunder, or to enforce any covenant of this lease, or the termination of this lease, or for the possession of the Premises or any part thereof the Tenant shall pay all costs, including reasonable attorney's fees.

33. **AGENT.** Tenant acknowledges that I Martinez/Boulevard Company is the leasing/managing agent for the Landlord of the Premises. Tenant shall pay all rent payable under this lease to said agent. The right to collect said rentals shall be governed by the written agreement between Landlord and agent for the management of the Premises and shall terminate with the expiration of said management agreement or any renewal thereof.

34. ***BROKER LIABILITY LIMITATION.*** *Parties agree Brokers provided Parties with benefits, services, assistance, and value in bringing about this Contract. In consideration and recognition of the risks, rewards, compensation and benefits arising from this transaction to Brokers, Parties each agree that they shall pay Brokers' attorneys fees and that Brokers, shall not be liable to either Party or both, either jointly, severally or individually, in an amount exceeding that Broker's Compensation by reason of any act or omission, including negligence, misrepresentation, errors and omissions, or breach of undertaking, except for intentional or willful acts. This limitation shall apply regardless of the cause of action or legal theory asserted against either Broker, unless the claim is for an intentional or willful act. This limitation of liability shall apply to all claims, losses, costs, damages or claimed expenses of any nature from any cause(s), except intentional or willful acts, so that the total liability of either Broker shall not exceed the amount set forth herein. Parties will indemnify and hold harmless and pay attorneys fees for Brokers from beach of contract, any negligent or intentional acts or omissions by any Parties, Inspectors, Professionals, Service Providers, Contractors, etc. including any introduced or recommended by Brokers. Parties each agree that there is valid and sufficient consideration for this limitation of liability and that Brokers are the intended third-party beneficiaries of this provision.*

35. **SUBORDINATION, ATTORNMENT, AND NON-DISTURBANCE.** Tenant agrees that this Agreement shall be subject and subordinate to any mortgages, deeds of trust or any ground lease now or hereafter placed upon the Premises and to all modifications thereto, and to all present and future advances made with respect to any such mortgage or deed of trust; provided however, that such mortgagee or ground lessor agrees not to disturb Tenant in its possession of the Premises so long as Tenant shall not be in breach or default under any of the terms and conditions of this Agreement. Tenant agrees to attorn to the mortgagee, trustee, or beneficiary under any such mortgage or deed of trust, and to the purchaser at a sale pursuant to the foreclosing thereof, and to the lessor in the event of a termination of any such ground lease.

36. **DEFINITIONS.** "Landlord" as used in this Agreement shall include the owner or owners of the property and/or the aforementioned managing agent as well as the Landlord's heirs, representatives, assigns and successors in title to Premises. "Tenant" shall include Tenant, Tenant's heirs and representatives, and if this lease shall be assigned or sublet, shall include also Tenant assignees or subleases, as to Premises covered by such assignment or sublease. "Agent" shall include agent, agent's successors, assigns, heirs and representatives. "Landlord," "Tenant," and "Agent," including male and female, singular and plural, corporation, partnership or individual, as may fit the particular parties. "Property" is defined as the land, lots, building improvements, and common areas as may be further defined herein, in which the Premises is included.

37. **ENVIRONMENTAL MATTERS.** Tenant represents, warrants and covenants to Landlord throughout the Term of this Agreement as follows that Tenant is and agrees to remain in compliance with all applicable federal, state and local laws relating to protection of the public health, welfare, and the environment ("Environmental Law") with respect to Tenant's use and occupancy of the Premises. Tenant agrees to cause all of its employees, agents, contractors, sublessees, assignees, and any other persons occupying or present on the Premises ("Occupants") to comply with all Environmental Laws applicable to their activities in and around the Premises.

38. **AMERICANS WITH DISABILITIES ACT.** Any other provision of this Agreement notwithstanding, the parties hereby agree that the Premises may be subject to the terms and conditions of the Americans with Disabilities Act of 1990 (hereinafter the "ADA"). The parties further agree and acknowledge that it shall be the sole responsibility of Tenant to comply with any and all provisions of the ADA, as such compliance may be required to operate the Premises. Tenant further agrees to indemnify, depend and hold Landlord harmless against any claims, which may arise out of Tenant's

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failure to comply with the ADA. Such indemnification shall include, but not necessarily be limited to reasonable attorney's fees, court costs and judgments as a result of said claims. Within ten (10) days after receipt, Tenant shall advise the Landlord in writing and provide with copies of (as applicable), any notices alleging violation of the Americans with Disabilities Act of 1990 ("ADA") relating to any portion of the Property of the Premises, any claims made or threatened in writing regarding noncompliance with the ADA and relating to any portion of the Property or of the Premises, or any governmental or regulatory actions or investigations instituted or threatened regarding noncompliance with the ADA and relating to any portion of the Property or of the Premises.

39. **SPECIAL STIPULATIONS.** Insofar as the following stipulations conflict with any of the provisions herein, the following stipulations shall control (use addendum if necessary): NNN or additional expenses will be: Taxes: $1.20 psf $378.00, Insurance: $.26 psf or $81.90, CAM $0.52 psf or $163.80

40. **SOUTH CAROLINA LAW TO GOVERN.** Tenant and Landlord agree that South Carolina law will govern the interpretation and enforcement of this Agreement.

41. **ENTIRE AGREEMENT.** This lease contains the entire agreement between the parties hereto and all previous negotiations leading thereto, and it may be modified only by a dated written agreement signed by both Landlord and Tenant. No surrender of the Premises or of the remainder of the term of this lease shall be valid unless accepted by Landlord in writing. TIME IS OF THE ESSENCE WITH REGARD TO ALL TERMS AND CONDITIONS IN THIS AGREEMENT.

42. **FACSIMILE.** The parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax and the signatures, initials, and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

43. **MEGAN'S LAW.** The Tenant and Landlord agree that the Property Manager or Real Estate Broker representing Tenant or Landlord and all affiliated agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry. The Tenant and Landlord agree that no course of action may be brought against the Property Manager or Real Estate Broker representing Tenant or Landlord and all affiliated agents for failure to obtain or disclose any information contained in the South Carolina Sex Offender Registry. The Tenant agrees that the Tenant has the sole responsibility to obtain any such information. The Tenant understands that Sex Offender Registry information may be obtained from the local sheriff's department or other appropriate law enforcement officials.

44. **NON-RELIANCE CLAUSE.** Both Tenant and Landlord hereby acknowledge that they have not received or relied nor could have relied upon any statements or representations or promises or agreements or inducements by either Broker or their agents which are not expressly stipulated herein. If not contained herein, such statements, representations, promises, or agreements shall be of no force or effect. This general non-reliance clause shall not prevent recovery in tort for fraud or negligent misrepresentation or intentional misrepresentation unless specific non-reliance language is included in this agreement. This is a non-reliance clause and is neither a merger clause nor an extension of a merger clause. The parties execute this agreement freely and voluntarily without reliance upon any statements or representations by parties or agents except as set forth herein. Parties have fully read and understand this Agreement and the meaning of its provisions. Parties are legally competent to enter into this agreement and to fully accept responsibility. Parties have been advised to consult with counsel before entering into this agreement and have had the opportunity to do so.

THE UNDERSIGNED HEREBY WARRANT THAT THEY OWN THE PROPERTY AND/OR HAVE THE AUTHORITY TO EXECUTE THIS AGREEMENT. THIS IS A LEGALLY BINDING AGREEMENT. OWNER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. OWNER ACKNOWLEDGES RECEIPT OF A COPY OF THIS AGREEMENT. OWNER AGREES TO RECEIVE COMMUNICATIONS FROM BROKER AT THE EMAIL ADDRESS, PHONE AND FAX NUMBER LISTED BELOW.

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IN WITNESS WHEREOF, this agreement has been duly executed by the parties.

12-22-15

Tenant Aracelis Santos Date Witness to Tenant

Tenant's Email Address: 28 Lighthouse DR Goose Creek SC 29445

Phone: 843-460-5934 Fax:

Aracelis Santos 12-22-15 Ophelia Mathis

Tenant Date Witness to Tenant

Tenant's Email Address:

Phone: Fax:

12-22-15 12-22-15

Landlord Date Witness to Landlord

Landlord's Email Address: C. Coulter @ cmj cpa. com

Phone: 813 514-1729 Fax:

LANDLORD'S AGENT AND COMPANY

TENANT'S AGENT AND COMPANY

GUARANTEE

As an inducement and, thus, a further consideration for the Landlord entering into this Agreement with the Tenant, the undersigned (jointly and severally, if more than one) hereby guarantees full performance by the Tenant and its heirs, successors, or assigns of all of the terms and conditions of the Agreement. The Landlord is not required to provide the Guarantor(s) with any notice provided for in the Agreement. In addition, this Guarantee is not waived by any delay that the Landlord has permitted the Tenant in satisfying its obligations under the Agreement. This Guarantee runs to the Guarantor's heirs, successors, and assigns and ensures to the benefit of the Landlord and its successors, and assigns. The Landlord and Tenant may agree to a modification of the Agreement without the approval of the Guarantor(s), provided that the obligation of the Guarantor(s) is not increased beyond the financial conditions contained in the Lease. This is a guarantee of payment and performance and not merely of collection of any term or condition of the Agreement that requires the Tenant to pay the Landlord any sum of money.

Aracelis Santos 12-22-15 Ophelia Mathis

GUARANTOR Date Witness to GUARANTOR

GUARANTOR Date Witness to GUARANTOR

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Alamo Cafe/Santos

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EXHIBIT B

(Part 1 of 2)

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STATE OF SOUTH CAROLINA)) COUNTY OF BERKELEY))) HARRIS INVESTMENTS) HOLDINGS, LLC,)) Plaintiff,)) v.)) ARACELIS SANTOS,)) Defendant.)	IN THE MAGISTRATE COURT CASE NUMBERS: 2017-CV-08-10600019 2016-CV-08-10605290 **ORDER**

THIS MATTER comes before the Court on October 11, 2017, upon the Plaintiff's Applications for Ejectment filed in the above-captioned actions. The Plaintiff (hereinafter "Harris" or "Landlord") sought to eject the Defendant (hereinafter "Santos" or "Tenant") from two units in the same shopping center located at 5901 Loftis Road, Hanahan, South Carolina.

I. Findings of Fact and Conclusions of Law

A. BACKGROUND

Harris and Santos are parties to a lease dated May 22, 2014, for an 1,807 square foot shopping center unit operated as a convenience store known as "Latino Mix." [Plaintiff's Exhibit 23, Defendant's Exhibit 1], hereinafter "the First Lease." The term of the First Lease was for two (2) years, provided that in the event the "commencement date" of the First Lease was a date other than the first date of a calendar month, the term would extend for the number of days remaining in the calendar month following the commencement date. The commencement date for purposes of the First Lease was August 1, 2014.

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Harris and Santos are parties to a lease dated December 2, 2015, for a 3,780 square foot shopping center unit operated as a restaurant/discotheque/night club known as "El Alamo." [Plaintiff's Exhibit 2, Defendant's Exhibit 2], hereinafter "the Second Lease." The term of the Second Lease was from December 1, 2015, until November 30, 2018.

The First Lease sets forth the "demised premises" as 5901 Loftis Road, Suite #2, 4, Hanahan, South Carolina. The Second Lease provides that the leased premises is 5901 Loftis Road, Hanahan, South Carolina. However, it is clear from the evidence presented, and undisputed by the parties, that the First Lease involves "Latino Mix" and the Second Lease involves "El Alamo." The business license for El Alamo is held in the name of Benjamin Reyna (hereinafter "Reyna").

Harris filed an Application for Ejectment and Rule to Show Cause, Case Number 2016-CV-08-10605290, on November 14, 2016, alleging that Santos had violated the terms or conditions of the Second Lease. A Rule to Vacate or Show Cause was signed by the Honorable D. Mark Stokes and served on Santos on November 17, 2016. Santos filed a Motion for Removal, Answer to Rule to Show Cause, and Counterclaims on November 28, 2016. Harris filed a Reply to Counterclaim on December 15, 2016. Harris submitted a Memorandum in Opposition to Santos's Motion to Remove on or about January 6, 2017[1]. Judge Stokes held a hearing on Santos's Motion for Removal on January 9, 2017, and ultimately issued an order on January 13, 2017, denying the Motion. On March 31, 2017, the Harris filed a Motion for Summary Judgment in Case Number 2016-CV-08-10605290. On June 14, 2017, Harris filed a Supplemental

[1] While Harris's Memorandum in Opposition to Santos's Motion to Remove was submitted to the Court on January 6, 2017, said Memorandum was not actually filed until January 13, 2016.

Memorandum in Support of Motion for Summary Judgment in Case Number 2016-CV-08-10605290.

Harris filed a second Application for Ejectment and Rule to Show Cause, Case Number 2017-CV-08-10600019, on January 5, 2017, alleging that the terms of tenancy or occupancy had ended under the First Lease and further that Santos had violated the terms or conditions of the lease. A Rule to Vacate or Show Cause was signed by the undersigned on January 6, 2017, and a constable attempted service upon Santos two (2) times, posting a copy of the Rule to Vacate or Show Cause on Santos's door. Santos's attorney acknowledged that Santos received a copy of the Rule to Vacate or Show Cause and indicated that he would be filing a response thereto.[2] Santos filed a second Motion for Removal, Answer to Rule to Show Cause, and Counterclaims on February 23, 2017. Harris filed a second Memorandum in Opposition to Santos's Motion to Remove and Reply to Counterclaim on March 3, 2017. On April 3, 2017, the Plaintiff filed a Motion for Summary Judgment in Case Number 2017-CV-08-10600019.

Following Judge Stokes' January 13, 2017, Order denying Santos' Motion for Removal as to Case Number 2016-CV-08-10605290, this Court determined that Judge Stokes' rulings became the "law of the case" for purposes of Case Number 2017-CV-08-10600019, and therefore denied Santos' Motion for Removal in the latter action. After the Court's decision, Santos moved to voluntarily dismiss her counterclaims against Harris over Harris' objection. The Court issued an Order granting Santos' Motion to voluntarily dismiss her counterclaims on July 18, 2017.

[2] On March 9, 2017, the undersigned held a pretrial hearing at which time the Court inquired of Santos's attorney as to whether there were any service issues pertaining to either matter in light of Santos's Answer which asserted an affirmative defense under South Carolina Rules of Civil Procedure (SCRCP) Rule 12(b)(2). The acknowledged to the Court that no service issues existed. As such, the Court finds that Santos voluntarily withdrew her affirmative defense under SCRCP 12(b)(2) and acquiesced to the Court having personal jurisdiction over her for both matters.

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Santos waived her right to a jury trial and the matters were heard by bench trial on October 11, 2017.

B. FINANCIAL DEFAULT

Despite having not pled the issue in either Application for Ejectment, Harris alleges Santos repeatedly defaulted on her obligation under the First and Second Leases to pay rent timely for both El Alamo and Latino Mix.

Rule 15(b) of the South Carolina Rules of Civil Procedure allows for amendments of pleadings to conform to the evidence presented at trial, providing in pertinent part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). The decision whether to allow the amendment of pleadings to conform to the evidence is left to the sound discretion of the trial court. Id. Amendments should be allowed if no prejudice occurs to the opposing party. Id.

Rule 15(b) covers two situations involving amendments to conform to the evidence. Id. First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary. Id. Express consent may be demonstrated by a stipulation but implied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial. Id.

As was the case in Dunbar, no objection was made in this case to the evidence pertaining to financial default. As such, the second part of the rule is inapplicable. In

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addition, there was no express consent. However, the Court finds that the parties tried the issue of financial default by implied consent. It appears from the evidence in the record that counsel for both Harris and Santos questioned witnesses extensively regarding the issues of Santos' alleged financial default. In fact, this issue was the basis for Harris' Motion for Summary Judgment prior to the trial which was granted in part.

Both leases in the instant case require payment of rent on a monthly basis and rent is due on the first day of each month. Failure to pay rent on or before the due date constitutes financial default. If Tenant fails to cure the default via payment of the past due rent and all late fees within 5 days of receiving notice of default, Landlord is authorized to immediately terminate the lease and oust Tenant. [Plaintiff's Exhibit 2, Defendant's Exhibits 1 and 2].

In February of 2017, Santos submitted a check dated February 4, 2017, for the monthly rental payment for El Alamo, but the check was returned due to insufficient funds. [Plaintiff's Exhibit 12]. On March 10, 2017, Harris' counsel notified Santos' counsel of the default orally and in writing. [Plaintiff's Exhibit 13]. No replacement check or any other payment for February 2017 rent was delivered within the 5-day cure period as required. [Plaintiff's Exhibit 17].

On March 20, 2017, the rent check for El Alamo was also returned due to insufficient funds. [Plaintiff's Exhibit 14]. On April 4, 2017, Harris provided notice to Santos that the March rent check was returned due to insufficient funds and stated that although Santos was already in default (due to failure to pay February rent and other breaches described in the Complaint), the failure to pay March rent constituted further financial default under the terms of the Lease. [Plaintiff's Exhibit 15]. Santos failed to

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provide a replacement check or otherwise cure the breach within the 5-day cure period as required. [Plaintiff's Exhibit 17].

On May 3, 2017, counsel for Harris informed counsel for Santos that Harris had terminated the Second Lease due to Santos' failure to timely pay rent and failure to timely cure financial defaults after notice. [Plaintiff's Exhibit 17].

Santos subsequently failed to pay rent timely for August of 2017 for El Alamo. Via letter dated August 15, 2017, counsel for Harris notified Santos of this further financial default. [Plaintiff's Exhibit 18]. Santos failed to cure the defaults within the 5-day cure period as required. Santos again failed to pay rent timely for September of 2017 for El Alamo. Counsel for Harris sent a letter dated September 22, 2017, notifying Santos of this further financial default and Santos did not cure the breach within the 5-day cure period. [Plaintiff's Exhibit 19].

It is clear that Santos repeatedly failed to make timely rental payments under both the First and Second Leases. In fact, the Court previously granted partial summary judgment in that there was no issue of material fact as to whether Santos was in default for "failure to pay rent when due or demanded" and whether she received notice of the default. Mr. DeLuca testified at trial that he had no information about rent and that as far as he was aware, including whether or not there remains an unpaid balance and that Harris had sent the rent payments to held in escrow by new counsel. Nonetheless, Santos had at the time of trial caught up all back owed rent.

Having determined that Santos was in financial default, the Court must next determine whether said breach was material under the analysis set forth in Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994).

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In determining whether Tenant's breach of the Lease was material, the Court must consider (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Kiriakides, supra.

Harris contends that it was deprived of the benefit of its bargain in purchasing the shopping center and assuming the Leases, having based its analysis of what it was willing to pay for the premises in part on the expectation of timely rental payments. Mr. DeLuca testified that Santos' repeated failure to make timely payments frustrated Harris' ability to manage cash flow for the shopping center. However, Mr. DeLuca admitted that he was unaware of the status of Santos' account and testified that the late rent payments remained in Harris' counsel's trust account. The Court finds that while the late rent was an inconvenience to Harris for sure, it did not rise to the level of depriving Harris of the benefit of its bargain and that the only benefit Harris reasonably could have expected was the past due rent which could be adequately compensated by damages. Santos' damages to the extent the Leases would be forfeited include the length of time remaining on the Leases. As to factor (d), the Court finds that Santos has in fact cured her default by paying all amounts past due. Finally, there is no evidence in the record that Santos' breach was willful or in bad faith. Although Santos did provide Harris with

checks that were returned for insufficient funds, nothing presented suggests that she did so purposefully.

As the Court has applied all Kiriakides factors in favor of Santos, the Court finds that forfeiture based on financial default alone in this particular case would be inequitable under the totality of the circumstances surrounding the financial breach.

C. FIRST LEASE

(1) Term of Tenancy or Occupancy Has Ended

In Case Number 2017-CV-08-10600019, Harris argues that the First Lease expired and that Harris delivered notice to Santos to vacate the premises and, as such, the ejectment should be upheld.

It is unequivocal that the term of occupancy for Santos under the First Lease ended August 1, 2016. On December 1, 2016, counsel for Harris notified Santos the term of the First Lease had expired and directed Santos to vacate the premises on or before December 31, 2016. [Plaintiff's Exhibit 24]. Santos refused to vacate and continued to occupy the premises. As indicated previously herein, it is clear from the evidence presented, and undisputed by the parties, that the First Lease involves "Latino Mix" and the Second Lease involves "El Alamo."

During the trial, Santos introduced evidence of a purported new lease agreement for Latino Mix as Defendant's Exhibit 3 (hereinafter "the Third Lease"). Whereas Harris denied ever having agreed to renew or extend the term of the First Lease, Santos argues that all negotiations pertaining to the Third Lease took place with Isabella Martinez acting as agent for Harris and that she believed the Second Lease and the Third Lease were extensions of the First Lease. Santos claims that she signed the Second Lease on December 22, 2015, and the Third Lease on August 1, 2016. The

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Third Lease provided a term beginning on August 1, 2016 (the expiration date of the Second Lease), and ending on August 1, 2018. Santos argues that after she signed the Third Lease, she received text messages from Isabella Martinez explaining that the Landlord would not sign the Third Lease following a meeting with the City of Hanahan.

The Third Lease provides in Section 23 thereof, entitled "Effective Date of Lease," that "This Agreement shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this Agreement is signed by one party and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party and delivery of a fully executed copy of the submitting party." [Defendant's Exhibit 3]. It is undisputed that the Third Lease was never executed by Harris or any agent of Harris. By the express terms of the Third Lease, even if Santos signed the Third Lease and delivered it to Harris, this act merely constituted an offer to lease subject to revocation at any time prior to execution by Harris. As such, the Third Lease did not become a binding agreement as there was never an execution and delivery thereof by both parties.

Moreover, the Third Lease does not satisfy the statute of frauds because it was never signed by Harris or any agent thereof. S.C. Code Section 32-3-10(4) provides that any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (holding a lease agreement for a period greater than one year, or any modification thereof, must satisfy the statute of frauds).

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Finally, the Court finds that Santos failed to exercise her option to renew the First Lease which required delivery via certified mail of written notice of her intention to renew at least one hundred eighty (180) days before the expiration of the First Lease. [Plaintiff's Exhibit 23].

The Court finds that the credible evidence in the record demonstrates that the Third Lease is ineffective and therefore the First Lease expired on August 1, 2016, leaving Santos as a month to month tenant since that date. [Plaintiff's Exhibit 23]. As such, Harris is entitled to ejectment under Case Number 2017-CV-08-10600019.

(2) Failure to Provide Evidence of Insurance Coverage

In Case Number 2017-CV-08-10600019, Harris next argues that Santos defaulted as to Sections 14 and 16 of the First Lease by failing to provide evidence of insurance coverage as demanded by Harris.

Section 14 of the First Lease provides that Santos was to carry at her own expense, public liability insurance coverage on the premises with a company qualified to transact business in South Carolina with liability limits of not less than $1,000,000.00 per occurrence and $2,000,000.00 aggregate. Santos was to have Harris and its managing agent named as additional insureds with a certificate of such coverage from the insurer giving thirty (30) days' notice to Harris and its managing agent prior to cancellation or termination was required to be provided to Harris and its managing agent prior to Santos' possession of the premises.

Section 16 of the First Lease provides that Harris carry all-risk insurance coverage on the premises and other buildings in the shopping center and if during the term of the lease, the premises are used for any purpose or in any manner which

causes an increase in the rates of such insurance, Santos shall pay as additional rent the additional premium caused thereby upon ten (10) days written notice to Santos.

On December 21, 2016, counsel for Harris sent an email to counsel for Santos indicating that it was his understanding the insurance certificates for both Latino Mix and El Alamo were set to expire on December 30, 2016. [Plaintiff's Exhibit 9]. Counsel for Harris further indicated that Harris needed to obtain new certificates as soon as possible but no later than December 30, 2016.

Costa DeLuca, employed by Harris, testified that no insurance certificates were ever provided demonstrating that Santos maintained the public liability insurance coverage up to the limits required by the First Lease subsequent to December 30, 2016. Santos did not testify at trial and produced no evidence that insurance certificates were ever provided subsequent to the purported expiration of the initial insurance certificate on December 30, 2016.

Section 18(b) of the First Lease provides that "Lessee shall be in general default if it shall fail to keep or shall violate any other conditions, stipulations, or agreements contained" in the First Lease "on the part of the Lessee to be kept and performed." Section 18(d) provides that "In the event Lessee is in general default, it shall have a grace period of thirty (30) days to cure such default after Lessor shall have mailed, by U.S. Postal Service, Lessee written notice thereof; provided however, if Lessor shall have mailed to Lessee a notice of such default, even though the same shall have been cured and this Lease not terminated, and within twelve (12) months from the date which said notice of default has been mailed by Lessor to Lessee, Lessee shall again be in general default, the same shall be deemed an event of default without any notice or grace period."

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While Harris provided Santos with a letter titled "Notice of Default and Right to Cure" on October 13, 2016, regarding liability insurance for the Second Lease, Harris did not provide Santos with notice of default pertaining to her failure to maintain insurance on the First Lease.

The purpose of a notice of default is to give the party allegedly in default an opportunity to cure the default and meet his obligation. Hammond v. Tilghman Lakes, Inc., 295 S.C. 152, 367 S.E.2d 446 (Ct. App. 1988). Forfeiture provisions of a lease are strictly construed and when a forfeiture depends upon giving a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to time and content. Litchfield Co. of South Carolina, Inc., v. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986).

Although counsel for Harris requested new certificates of insurance from Santos on December 21, 2016, Santos was not in default at that time as Harris admits the certificates of insurance expired December 30, 2016. The Court finds that Harris may have had grounds to send a Notice of Default to Santos on December 31, 2016, as result of Santos' potential breach of the First Lease for failing to maintain public liability insurance on the premises. However, nothing in the record evinces that Harris ever provided Santos with the opportunity to cure any such potential breach as provided for in Section 18(d) of the Lease. Whether the Court were to conclude that Santos breached the First Lease by failing to maintain public liability insurance is immaterial as the Court finds that Harris failed to comply with the Notice of Default provisions of the First Lease in giving Santos the opportunity to cure the breach.

Therefore, Harris' request to uphold the eviction of Santos based on the alleged violations of the First Lease as to liability insurance is denied.

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D. SECOND LEASE

(1) Failure to Comply with Local Laws and Ordinances

In Case Number 2016CV0810605290, Harris argues first that Santos breached Section 10 of the Second Lease by failing to comply with local laws and ordinances, resulting in revocation of the business license issued by the City of Hanahan in connection with the business operated by Santos and/or Mr. Reyna on the premises. Harris argues that continuing to operate the business without a valid business license also violated the terms and conditions of the Second Lease. Harris further argues that Santos repeatedly violated the International Fire Code regarding the maximum capacity for the building located on the premises, thus violating the terms and conditions of the Second Lease.

The Second Lease prohibits Santos from using the premises for any immoral conduct or illegal activity. [Plaintiff's Exhibit 2, Section 4]. While Santos herself did not testify at trial, her sister, Arelis de Santos Gomez testified that she understood the Second Lease to require her sister to maintain the premises in compliance with local law. Ms. de Santos Gomez acknowledged that violations of local ordinances limiting building occupancy and prohibiting after-hours consumption of alcohol would constitute breaches of the Second Lease. However, she denied that she or her sister had allowed any unlawful activity on the premises.

The Second Lease further requires Santos to keep the premises "in compliance with all laws, ordinances, and requirements of any legally constituted public authority." [Plaintiff's Exhibit 2, Section 10].

At trial, Hanahan Police Chief Dennis Turner testified as to voluminous incident reports prepared by the Hanahan Police Department arising from and connected to the

EXHIBIT B

(Part 2 of 2)

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operation of El Alamo from 2014 to the present day, including alleged violations of local ordinances regarding occupancy, after-hours consumption of alcohol, and selling alcohol without a license.[3] Chief Turner further testified about incident reports related to various physical altercations, including assaulting a police officer, numerous arrests related to alcohol/intoxication, possession of drugs, arrests of an employee of El Alamo for pointing and presenting a firearm on the premises, and noise violations.

While the incident reports do reflect that a substantial amount of criminal activity of third parties has occurred in and around the premises of El Alamo over the last three (3) years to which the City of Hanahan Police Department has responded, most of these incidents involve purported customers of El Alamo rather than the owners, operators, and employees thereof.

Nevertheless, several incident reports detail incidents during which officers cited El Alamo for substantially exceeding its maximum occupancy of ninety-nine (99) persons in violation of the International Fire Code as adopted by the City of Hanahan pursuant to S.C. Code Section 6-9-80. [See Plaintiff's Exhibit 27, pages 44-45, 53, 372, 380]. Officer Cliff Driggers testified that he personally participated in a count of all persons within El Alamo in 2016 in which the occupancy exceeded ninety-nine (99). Driggers further testified that he personally observed patrons of Latino Mix bringing alcohol from Latino Mix to El Alamo and that El Alamo was a "BYOB club" and that nothing was unlawful about customers bringing their own alcohol to El Alamo. It is clear from the evidence presented that Santos' establishment did on at least one occasion permit more persons that allowed by the International Fire Code as adopted by the City

[3] Plaintiff's Exhibit 27, the compilation of incident reports involving El Alamo, was admitted into evidence over Santos' hearsay objection pursuant to Rule 803(8) of the South Carolina Rules of Evidence.

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of Hanahan. Thus, the Court finds that Santos violated the Code of Ordinances for the City of Hanahan constituting default under Section 10 of the Second Lease.

Moreover, several incident reports document incidents of El Alamo violating Hanahan Ordinance 4-2 which prohibits onsite consumption of alcohol after 2:00 a.m. [See Plaintiff's Exhibit 27, pages 372, 380, 402, 415, 424, 437, 444, 445, 449, 451, 473]. In addition, the reports detail at least one incident during which El Alamo sold alcohol without a license to do so. [See Plaintiff's Exhibit 27, page 432]. While Santos argues that the ordinance is being challenged in a separate Common Pleas action, Santos acknowledges that it is unnecessary for this Court to analyze that litigation to decide the issues before the Court. It is clear from the evidence presented that Santos' establishment remained open on at least one occasion during the hours prohibited by the ordinance and that during these hours patrons consumed alcoholic beverages in Santos' establishment. Thus, the Court finds that Santos violated the Code of Ordinances for the City of Hanahan constituting default under Section 10 of the Second Lease.[4]

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[4] Due to the alleged criminal activity in and around El Alamo, the Hanahan City Council unanimously voted on May 26, 2016, to revoke the business license of El Alamo. Said revocation was upheld on appeal to the Court of Common Pleas. The Circuit Court's decision to affirm the revocation is currently on appeal to the South Carolina Court of Appeals. Santos argues that Harris "concedes that both the Hanahan City ordinance and South Carolina state law provide an automatic stay for such an appeal." Although Rule 241 of the South Carolina Appellate Court Rules provides that as a general rule, the service of the notice of appeal in a civil matter acts to automatically stay matters decided in the order and to automatically stay the relief ordered in the appealed order, Rule 241 provides that there are exceptions to the general rule found in statutes, court rules, and case law. Hanahan Municipal Ordinance 10-9(b) states that a timely appeal of a business license revocation **does not effectuate a stay of city council's decision to revoke**. Despite such, El Alamo has continued to operate on the premises which Harris argues violates Hanahan City Ordinance 10-2 prohibiting operating of a business without a valid business license. The HPD incident reports evince repeated instances in which El Alamo has been cited for violations of Ordinance 10-2. [Plaintiff's Exhibit 27, pages 444, 448, 449, 451]. Nothing in the record suggests that Santos sought a temporary injunction in an effort to continue business operations during the pendency of the appeal. See Amrik Singh & SBPS, Inc. v. City of Greenville, 384 S.C. 365, 681 S.E.2d 921 (Ct. App. 2009) (Following revocation of business license, owner unsuccessfully sought a temporary injunction to continue business operations during the pendency of the appeal given the Greenville City Ordinance provided that an appeal does not stay the revocation). Nonetheless, the Court finds that no exceptions to the general rule providing for an automatic stay of the business license revocation apply in this particular case. The Court notes that if the Hanahan Municipal Ordinance's

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Having determined that Santos breached the Second Lease, the Court must determine whether any notice and cure period applies to Santos' breach of the Lease and, if so, whether proper notice was given and whether Santos cured its defaults.

Mr. DeLuca testified at trial that he personally met with Mr. Reyna at El Alamo in the Fall of 2016 and warned him that violations of local ordinances and criminal activity must stop or Harris would have no choice but to take legal action. On October 13, 2016, Harris provided Santos with a Notice of Default regarding the failure to comply with Section 10 of the Second Lease involving exceeding the maximum occupancy. Nonetheless, these violations have continued well past the cure period. As such, the Court finds that Harris complied with the Notice provisions of the Second Lease.

The Court finds that Santos breached the Second Lease and Harris complied with the Notice of Default provisions therein. The Court must next determine whether said breach was material under the analysis set forth in Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994).

In determining whether Tenant's breach of the Lease was material, the Court must consider (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable

provision regarding the inapplicability of the general rule is upheld, a business would effectively be shut down regardless of whether they prevail on appeal, an application of the law that would effectively eliminate due process. As such, the Court declines to find that Santos breached the lease by continuing to operate El Alamo during the pendency of the appeal of the business license revocation.

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assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Kiriakides, supra.

The Court finds that Harris' expectations that Santos will comply with all local and state ordinances are certainly reasonable. The Court concludes that the breaches as proven amounts to those that deprives Harris of the benefit it expected from the Lease itself. The violation of local ordinances, particularly those that relate to fire safety and safety of the general public significantly increases the exposure to Harris as to liability for injuries to persons on the premises and otherwise. Certainly the exposure to liability was an issue contemplated by the Second Lease as the Second Lease requires Santos to keep a minimum of $1,000,000.00/$2,000,000.00 in general liability insurance on the premises with Harris as an additional insured. Harris could not possibly be adequately compensated for Santos' failure to abide by the local ordinances.

The Court finds that that Santos' damages, if the lease is forfeited, include the length of time remaining under the lease alone. However, no testimony was offered at trial as to the potential revenues lost should Santos forfeit the lease. Arelis de Santos Gomez testified as to the amount of work, effort, and her savings that she put into the business and indicated that if put out she would have no money to pay rent as a single mother with a daughter starting college next year. However, Arelis de Santos Gomez is not the tenant of the premises associated with the Second Lease as evinced by her testimony. Aracelis Santos did not testify and presented no evidence as to the extent to which she would suffer forfeiture. The fourth factor examines the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances. Having considered all the circumstances surrounding the Second Lease and Santos' breach, the Court concludes

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that Santos was given ample time within which to cure the default and, over time has failed to attempt to cure its default. This Court has no reasonable assurances that Santos will cease to allow El Alamo to remain open and serve alcoholic beverages after hours in the future.

In light of the foregoing, the Court finds Santos' repeated breaches of the lease relating to Sections 4 and 10 of the Second Lease were material and the eviction is upheld.

(2) Public Nuisance

Harris additionally argues that Santos violated the terms and conditions of the Second Lease by creating a public nuisance on the premises and that the Court should uphold the eviction as a result.

South Carolina defines a nuisance as follows:

> A person who erects, establishes, continues, maintains, uses, owns, occupies, leases, or releases any building or other place used for the purposes of lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace in this State is guilty of a nuisance; and the building, place, or the ground itself in or upon which the lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace is conducted, permitted, carried on, continued, or exists and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining the nuisance also are declared a nuisance and shall be enjoined and abated as provided in this chapter.

S.C. Code Section 15-43-10(A). "Continuous breach of the peace" means a pattern of repeated acts or conduct which either (1) directly disturbs the public peace or (2) disturbs the public peace by inciting or tending to incite violence. S.C. Code Section 15-43-10(B).

S.C. Code Section 15-43-20 provides that the Attorney General, the solicitor in the judicial district in which the alleged nuisance is kept, or any citizen of this State may

bring suit for injunction of the nuisance as to the person conducting or maintaining the nuisance and the owner or agent of the building or ground upon which the nuisance exists. S.C. Code Section 15-43-20.

Santos argues that the procedure set forth in Title 15 is the only means by which a nuisance may be established under South Carolina law and that this Court may not determine whether the actions or inactions of El Alamo constituted a nuisance. The Court disagrees. The Court must determine whether Santos kept the premises "in compliance with laws, ordinances and requirements of **any** legally constituted public authority." [Plaintiff's Exhibit 2, Section 10]. The Court finds that this provision of the lease contemplates not only that a magistrate would have to determine whether Santos violated the ordinances of the City of Hanahan (which the Court finds she has), it also contemplates that a magistrate would have to determine whether Santos violated the laws of the State of South Carolina which certainly include the laws pertaining to public nuisance. While the procedure set forth in Title 15 certainly provides a means by which a Court of equity may grant an injunction as to a nuisance, nothing therein prohibits the magistrate court from determining the existence of said nuisance as a ground for ejectment. To hold otherwise would render the foregoing provision of the Second Lease, a provision common to nearly all commercial and residential leases in South Carolina, meaningless. Santos and Harris entered into a lease that requires Santos to comply with all laws of any legally constituted public authority. Whether Santos has breached said lease is necessarily determined by this Court and this Court alone. This Court cannot and will not enjoin Santos from operating her business as contemplated by the procedures regarding public nuisances as set forth in Title 15. However, if this Court determines that Santos has breached the Second Lease, the Court may uphold

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Harris' application for ejectment, simply preventing Santos from operating her business **on Harris' property**.

It is a sound principle of South Carolina law that "if one maintains a place where the laws are publicly, repeatedly, persistently, and intentionally violated, then such place would become a common or public nuisance." State v. Turner, 198 S.C. 499, 18 S.E.2d 376 (1942); see also State ex rel. Hembree v. Sherald, 2010 WL 10085571 (U.P. Ct. App. 2010). A business may become a nuisance by the manner in which it is conducted, and by the conduct of the persons assembling in and around it. Turner, supra.

The evidence in the record suggests that the number of calls for service to the Hanahan Police Department for El Alamo far exceeds the number of calls for service for the three (3) other establishments in Hanahan that allow for on-premises consumption of alcohol (LG's, Buccas, and Hanahan's). Chief Turner testified that the Hanahan Police Department has been required to devote so much time to El Alamo that it hampers the HPD's ability to address criminal activity elsewhere in the city. Chief Turner further testified that the HPD is forced to address an incident at El Alamo each and every weekend and, because of the danger posed by prior incidents of violence and weapons at El Alamo, the HPD must send multiple officers to El Alamo to address the issues. Two local business owners testified regarding disruption to the surrounding areas caused by disturbances at El Alamo, particularly as to the signage for one business being destroyed by a patron of El Alamo and the disturbances to the other's customers, tenants in a mobile home park adjacent to El Alamo.

As indicated previously herein, a substantial amount of criminal activity of third parties has occurred in and around the premises of El Alamo over the last three (3)

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years to which the City of Hanahan Police Department has responded, most of these incidents involving purported customers of El Alamo rather than the owners, operators, and employees thereof. However, there were many instances during which the owners, operators, and employees of El Alamo violated the municipal ordinances of the City of Hanahan and the International Fire Code.

The Court finds that the credible evidence in the record demonstrates that Santos has maintained El Alamo as a place where the laws are publicly, repeatedly, persistently, and intentionally violated, thus disturbing the public peace. While Santos asserts that the only evidence of nuisance produced by Harris consists of incident reports relating to third parties associated with El Alamo as opposed to Santos herself, it is apparent from the record that Santos has conducted her business in a manner which encourages violations of the various municipal ordinances and which attracts patrons whose conduct violates the various local and state laws. The Court finds that El Alamo became a nuisance by the manner in which it was conducted and by the conduct of the persons assembling in and around it and therefore breached the Second Lease. The Court further finds that in examining the factors as set forth in Kiriakides, said breach was material. As set forth previously herein, Harris' expectations that Santos will comply with all local and state laws are certainly reasonable. The Court concludes that the breaches as proven amount to those that deprive Harris of the benefit it expected from the Lease itself. Violations of state law, just as those involving municipal ordinances, significantly increase the exposure to Harris as to liability for injuries to persons on the premises and otherwise. Likewise, Harris could not possibly be adequately compensated for Santos' failure to abide by the laws pertaining to public nuisance. Having considered all the circumstances surrounding the Second Lease and

Santos' breach, the Court concludes that Tenant was given ample time within which to cure the default and, over time has failed to attempt to cure its default. This Court has no reasonable assurances that Santos will cease to allow El Alamo to remain open without constituting a public nuisance. As such, the eviction is upheld.

(3) Failure to Provide Evidence of Insurance Coverage

In Case Number 2016CV0810605290, Harris argues Santos breached the Second Lease by failing to provide evidence of insurance.

The Second Lease requires Santos to "keep in full force and effect" public liability insurance on the premises in which both Santos and Harris are named as the insured with a single limit of $1,000,000.00 and an aggregate of $2,000,000.00. [Plaintiff's Exhibit 2, Section 8]. The Second Lease expressly requires Santos to provide a certificate of insurance "not later than the commencement date of this lease and prior to the expiration of such insurance policy during the term of this lease." [Plaintiff's Exhibit 2, Section 8].

Santos obtained insurance for the calendar year 2016 and provided a certificate of insurance to Harris. [Plaintiff's Exhibit 8]. Harris provided Santos with a letter titled "Notice of Default and Right to Cure" on October 13, 2016, regarding liability insurance for the Second Lease. In this letter, Harris' CFO Eric C. Coulter stated to Santos, "At this time we are requesting you increase the liability insurance to Single limit of $3,000,000.00 and an Aggregate of $6,000,000.00. Please provide an updated insurance certificate within 10 business days. Failure to provide increased insurance coverage will cause a default in the lease after October 31, 2016." [Plaintiff's Exhibit 3]. However, nothing in the Second Lease requires Santos to increase the limits of liability upon demand but rather only pay upon demand as additional rent any increase in

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premiums of insurance carried by Harris on the Premises resulting from Santos' occupancy or improvements. [Plaintiff's Exhibit 2, Section 8]. No evidence was presented at trial that Harris obtained additional insurance and/or demanded an increase in rent as a result.

On December 21, 2016, counsel for Harris sent an email to counsel for Santos indicating that it was his understanding the insurance certificates for both Latino Mix and El Alamo were set to expire on December 30, 2016. [Plaintiff's Exhibit 9]. Counsel for Harris further indicated that Harris needed to obtain new certificates as soon as possible but no later than December 30, 2016.

Costa DeLuca, employed by Harris, testified that no insurance certificates were ever provided demonstrating that Santos maintained the public liability insurance coverage up to the limits required by the Second Lease subsequent to December 30, 2016. Santos did not testify at trial and produced no evidence that insurance certificates were ever provided subsequent to the purported expiration of the initial insurance certificate on December 30, 2016.

Nonetheless, while Harris has proven by the preponderance of the evidence that Santos did not provide a certificate of insurance prior to the expiration of the 2016 calendar year insurance policy, the record is devoid of any evidence that constitutes a notice of default (and right to cure) as to her failure to do so. As indicated previously herein, the purpose of a notice of default is to give the party allegedly in default an opportunity to cure the default and meet his obligation. Hammond v. Tilghman Lakes, Inc., 295 S.C. 152, 367 S.E.2d 446 (Ct. App. 1988). Forfeiture provisions of a lease are strictly construed and when a forfeiture depends upon giving a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to

time and content. Litchfield Co. of South Carolina, Inc., v. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986).

Although counsel for Harris requested new certificates of insurance from Santos on December 21, 2016, the Court finds that this email did not constitute written notice of default. Moreover, nothing in the record evinces that Harris ever provided Santos with the opportunity to cure any such potential breach as provided for in Section 30 of the Second Lease. The fact that Santos breached the Second Lease by failing to maintain public liability insurance is immaterial as the Court finds that Harris failed to comply with the Notice of Default provisions of the Second Lease in giving Santos the opportunity to cure the breach.

Therefore, Harris' request to uphold the eviction of Santos based on the alleged violations of the Second Lease as to liability insurance is denied.

(4) Violation of Prohibition on Third-Party Occupancy

Harris additionally alleges that Santos violated the Second Lease by allowing Reyna to operate a business on the premises. As with issues pertaining to Financial Default, Harris did not plead in its Application for Ejectment this issue. Nonetheless, the Court finds that the parties tried this issue by implied consent.

The Second Lease provides that Santos "shall not, without written consent of [Harris], in each case . . . sublet the Premises or any part thereof or permit the Premises to be occupied by other persons." [Plaintiff's Exhibit 2, Section 12].

Harris alleges that whereas Santos is the tenant under the Second Lease, she never operated a business on the premises. Harris alleges that because the business license for El Alamo was obtained and held by Reyna instead of Santos, Santos was in effect permitting the premises to be occupied by other persons. However, Reyna and

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Santos' sister, Arelis de Santos Gomez, have been living in a long-term monogamous relationship and describe one another as his or her "significant other."

It is worthy to note that it is Reyna, not Santos, that summarized the concept of El Alamo to Harris as early as February 26, 2013. [Plaintiff's Exhibit 20]. Harris additionally served Reyna with its Notice of Default in October of 2016. [Plaintiff's Exhibit 4]. The Court finds that Harris impliedly consented to Reyna operating El Alamo, regardless of whether he was doing so on his own or at the direction or under the supervision of Santos. As such, the Court finds that Santos did not breach the Second Lease as to Section 12, "Assignment or Sublease."

Moreover, even if the Court would have held that Reyna's operation of El Alamo constituted a breach, the record is devoid of any evidence that Harris provided Santos with notice of default as to this section of the Second Lease and an opportunity to cure. Thus, Harris failed to comply with the Notice of Default provisions of the Second Lease in giving Santos the opportunity to cure the breach and as such, the Application for Ejectment as to this particular ground is denied.

III. Conclusion

The Court finds that while Santos breached the First and Second Leases by failing to pay rent when due or demanded, the breach was not so substantial or fundamental to justify forfeiture.

The Court further finds that Harris failed to meet its burden as to Santos' failure to provide proof of sufficient liability insurance under the First Lease. Moreover, even if Santos was in default in that regard, Santos was not given proper notice under the First Lease to cure the default. However, the Court finds that the First Lease expired, Santos became a month to month tenant as to Latino Mix, and notice was properly given

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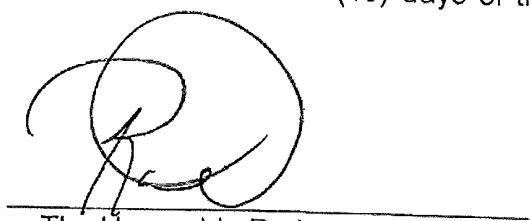
regarding Harris' intention not to renew said First Lease. As such, Application for Ejectment sought in Case Number 2017CV0810600019 is granted.

The Court finds that Harris met its burden as to Santos' failure to provide proof of sufficient liability insurance under the Second Lease. However, Santos was not given proper notice under the Second Lease to cure the default. The Court finds that Harris failed to meet its burden of proof as to Santos' violation of the Second Lease's prohibition against third-party occupancy and that even if Santos was in default thereof, Santos was not given property notice under the Lease to cure the default. Nonetheless, the Court finds that Santos failed to comply with local ordinances and created a public nuisance on the premises and that said breaches were material. As such, the Application for Ejectment sought in Case Number 2016CV0810605290 is granted.

The Clerk is directed to provide a copy of this Order to counsel for both Landlord and Tenant. All post-trial motions, including those pertaining to the request for attorney fees pursuant to either Lease, shall be filed with the Court within ten (10) days of the receipt of the within Order.

IT IS SO ORDERED.



The Honorable Rad S. Deaton
Berkeley County Magistrate

December 17, 2017
Charleston, South Carolina

Counsel for Harris: Merrit G. Abney, Esquire
Counsel for Santos: Thomas R. Goldstein, Esquire

EXHIBIT C

ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

ELECTRONICALLY FILED - 2019 Jun 06 11:49 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0801008
ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
Aracelis Santos,	)	Case No. 2018-CP-08-01008
Appellant/Plaintiff,	)	
vs.	)	**ORDER OF DISMISSAL WITHOUT PREJUDICE**
Harris Investment Holdings, LLC,	)	
Respondent/Defendant.	)	

This matter comes before me on motion of the Respondent/Defendant, Harris Investment Holdings, LLC, (hereinafter "HIH") for an order dismissing this case without prejudice. For the reasons set forth below, the motion is granted.

HIH filed eviction actions in the magistrate's court seeking to eject Aracelis Santos from two separate units in the same shopping center located at 5901 Loftis Road, Hanahan, South Carolina, known as "El Alamo" and "Latino Mix," respectively. A consolidated bench trial was held before the magistrate on October 11, 2017.

Following trial, the magistrate's court issued an order dated December 7, 2017, in which it granted HIH's applications for ejectment with respect to both Latino Mix and El Alamo. Santos filed a motion for a new trial, which the court denied via written order dated February 2, 2018. On February 2, 2018, the court issued a writ of ejectment with respect to El Alamo.[1] On February 8, 2018, Santos filed a Notice of Appeal of the magistrate court's orders to this Court in Case No. 2018-CP-08-0026 (the "First Appeal").

[1] Santos vacated the Latino Mix premises voluntarily prior to the magistrate court's ruling on the motion for a new trial.

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In the meantime, following a hearing on February 26, 2018, the magistrate set an appeal bond in the amount of $59,295.23. Santos filed a motion for reconsideration of the bond amount, which the magistrate denied via written order dated March 7, 2018.

Thereafter, Santos moved this Court in the First Appeal to vacate the bond requirement, upon which the Court determined the inclusion of any amount awarded to HIH for attorneys' fees in the bond was improper. Via order issued on April 9, 2018, this Court remanded "the issue of the bond" to the magistrate's court for re-calculation. Meanwhile, the First Appeal remained pending in this Court.

After the magistrate re-calculated the bond, on June 1, 2018, Santos filed a second civil action in this Court (Case No. 2018-CP-08-1008, the "Second Appeal"), in which she again sought to appeal the magistrate's order of ejectment and related orders and, in addition, to assert various tort claims against HIH. HIH moved to dismiss the Second Appeal on several grounds, including that the combination of a civil appeal with new tort claims was procedurally improper.

Following a hearing on HIH's motion to dismiss, the Court issued an order dated October 2, 2018 (the "Order"), to which Santos consented, requiring her to dismiss the Second Appeal. Despite repeated demands from counsel for HIH, Santos has not complied with the Order as evidenced by the fact that this action remains pending. At the hearing on the instant motion, Santos argued that the Order was intended only to require her to amend her pleading in this action to delete the claim for civil appeal, and she insisted she has complied with the Order. But the plain language of the Order, to which Santos consented, expressly requires *dismissal of the action* without prejudice. Santos plainly has not complied with this requirement.[2]

[2] Moreover, the Court notes that, contrary to her counsel's statements at the hearing, Santos did not seek to amend her complaint in this action until March 19, 2019, and she did so then for the purpose of attempting to add additional parties to this action.

Because Santos has failed to comply with the Order to which she consented, HIH is entitled to an order dismissing this action without prejudice. It is hereby ORDERED that this action is dismissed without prejudice.

AND IT IS SO ORDERED.

Kristi F. Curtis
Circuit Court Judge

June ___, 2019

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Berkeley Common Pleas

Case Caption: Aracelis Santos VS Harris Investment Holdings, Llc

Case Number: 2018CP0801008

Type: Order/Dismissal

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

EXHIBIT D

ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS CASE#2021CP080513

STATE OF SOUTH CAROLINA	)	**2016CV0810605290**
	)	**2017CV0810600019**
		CIVIL CASE NUMBERS
COUNTY OF BERKELEY	)	**MAGISTRATE'S COURT**
	)	
	)	**AMENDED BOND TO STAY EXECUTION**
	)	**ON APPEAL**

Harris Investment Holdings, Llc

LANDLORD

Vs

Aracelis Santos
5901 Loftis Road Suite#2, 4
Hanahan, SC 29410

TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the Landlord on **December 7, 2017**, by the Magistrate. Tenant(s) has appealed the Judgment to the Circuit Court.

Pursuant to the findings of the Magistrate, the Tenant(s) is obligated to pay rent in the amount of **$2,852.00** per **month**, due on the **1st day** of each **month.**

Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

AMENDED BOND: Having considered the Motion to Alter and Amend filed by the Defendant, the Plaintiff's response thereto, as well as the new communication from counsel, the Court finds it that it is appropriate to amend the bond to $5,500.00. The $5,500.00 BOND shall be paid within five (5) days. Rent shall continue to be due and owing in the amount of $2,852.00, and shall be paid on the 1st day of each month and late after the 5th day.

Dated on May 17, 2018:

by previous signature dated May 7, 2018
Tenant(s)

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on May 17, 2018

JUDGE

Goose Creek Magistrate
303-B North Goose Creek Blvd.
Goose Creek, SC 29445
Phone: (843) 553-7080

EXHIBIT E

ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLE, - CASE#2021CP0800513

NELSON MULLINS

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Merritt G. Abney
T 843.534.4110
merritt.abney@nelsonmullins.com

October 16, 2018

Via Certified Mail – Return Receipt Requested
Aracelis Santos
28 Lighthouse Drive
Goose Creek, SC 29445

Certified Article Number
7160 3901 9849 0188 0910
SENDERS RECORD

RE: Harris Investment Holdings, LLC v. Aracelis Santos (El Alamo)
Case No.: 2016cv0810605290
Our File No.: 020766/01507

Dear Ms. Santos:

As you know, I represent the Landlord in connection with the above-titled matter. Please be advised the lease for El Alamo expires according to its terms at midnight on November 30, 2018. You are hereby directed to vacate the premises with all of your belongings before midnight on November 30, 2018, or else we will take further legal action against you and your belongings may be removed from the premises.

Very truly yours,

Merritt G. Abney

MGA:ls
cc: Thomas R. Goldstein, Esq.

EXHIBIT F

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February 26, 2019

Thomas R. Goldstein, Esq.
Belk, Cobb, Infinger & Goldstein, PA
2344 Cosgrove Avenue
Charleston, SC 29405

RE: Harris Investment Holdings, LLC v. Aracelis Santos (El Alamo)
Case No.: 2016cv0810605290
Our File No.: 020766/01507

Tommy:

As you are aware, the Lease for El Alamo expired according to its terms on November 30, 2018, and I have previously directed your client to vacate the premises by that date. Your client has refused to vacate in violation of the terms of the Lease and is trespassing on my client's property by remaining beyond the Lease term.

The purpose of this letter to notify you that engineers recently identified asbestos in the premises, and the Department of Health & Environmental Control (DHEC) is requiring that the building be cleared in connection with the mandatory remediation process. Remediation of the premises will begin on or about March 1, 2019. Your client is hereby directed to vacate and remove all of her personal property from the premises by that date. Once the remediation process begins, no access will be permitted to the premises for any reason.

Very truly yours,

Merritt G. Abney

MGA:ls

EXHIBIT G

ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Berkeley
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0800266

Aracelis Santos
PLAINTIFF(S)

Harris Investment Holdings, LLC
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☑ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☑ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

The magistrate court judge's award of attorney fees is affirmed. All other issues in this appeal are now moot as the subject property has been demolished.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/06/2019 .

Magistrate Court Goose Creek

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONI LY FILED - 2019 Jun 06 11:58 AM - BERKELEY - COMMON PL - CASE#2018CP0800266
ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

ELECTRONICALLY FILED - 2019 Jun 06 11:58 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0800266
ELECTRONICALLY FILED - 2021 May 25 1:43 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

Berkeley Common Pleas

Case Caption: Aracelis Santos VS Harris Investment Holdings, LLC

Case Number: 2018CP0800266

Type: Order/Electronic Form 4

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

ELECTRONICALLY FILED - 2021 May 07 2:52 PM - BERKELEY - COMMON PLEAS - CASE#2021CP0800513

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
Aracelis Santos,	)	Civil Action No. 2021-CP-08-00513
	)	
Plaintiff,	)	
	)	
vs.	)	**HANAHAN DEFENDANT'S MOTION TO DISMISS**
	)	
Harris Investment Holdings, LLC, City of Hanahan, City of Hanahan Police Department, John Doe #1 and John Doe #2, employees of the City of Hanahan Police Department,	)	
	)	
Defendants.	)	

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the City of Hanahan, the City of Hanahan Police Department, and John Doe #1 and John Doe #2, the unidentified employees of the City of Hanahan Police Department (together "Hanahan" or "City"), herein move for an order dismissing Plaintiff's Complaint. The basis of this motion is that Plaintiff's allegations fail to state facts sufficient to constitute a cause of action against the City and fail as a matter of law. Accordingly, dismissal is appropriate. This Motion is made on the following grounds, without limitation:

1. Plaintiff's civil conspiracy cause of action seeks the same damages alleged in Plaintiff's other causes of actions and does not specify any special damages beyond those alleged in her other claims. Thus, Plaintiff's claim for civil conspiracy must be dismissed.

2. Plaintiff failed to plead additional facts in furtherance of the conspiracy separate and independent from the other wrongful acts she alleges in the Complaint. Thus, Plaintiff's claim for civil conspiracy must be dismissed.

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3. Plaintiff's civil conspiracy claim is also barred as a matter of law, because the claim was previously alleged on behalf of the business, El Alamo Restaurant, in Case. No. 2017-CP-08-00177, which was dismissed and settled by a "Full and Final Release of Claims." In the prior action, the City was sued by Plaintiff's business for civil conspiracy, among other things, and alleged that the City combined with "the plaintiffs' landlord" for the purpose of injuring the plaintiffs."

4. Even if Plaintiff adequately alleged a civil conspiracy cause of action against the City and even if the claim was not disposed of in the "Full and Final Release of Claims," the City is immune from liability pursuant to S.C. Code Ann. § 15–78–60.

5. Plaintiff's fraud cause of action should also be dismissed because Plaintiff has not alleged the nine essential elements of fraud against the City. While Plaintiff alleged that Defendant Harris Investment Holdings, LLC ("Harris") made false representations to the City, Plaintiff fails to assert that the City made any false misrepresentations of its own. (Compl. ¶ 16.) Indeed, Plaintiff's fraud cause of action does not allege: (1) that any of the Defendants made false representations to Plaintiff; (2) that the City intended for Plaintiff to act on any representations made by the City (no City representations are alleged); (3) that Plaintiff relied on the truth of any representations by the City (no City representations are alleged); or (4) that Plaintiff had any right to rely on the same.

6. Even if Plaintiff adequately alleged a fraud cause of action against the City, the City is immune from liability pursuant to S.C. Code Ann. § 15–78–60.

7. Plaintiff's abuse of process cause of action should be dismissed because Plaintiff makes no allegation that the City utilized any legal process. Instead, the only allegation made by Plaintiff is that Defendant Harris utilized judicial process through an ejectment

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action, which was instituted on November 14, 2016, more than three years ago, and is, thus, time barred. Plaintiff also fails to allege an ulterior purpose or a lawsuit initiated by the City for an ulterior purpose.

8. Plaintiff's abuse of process claim is also barred as a matter of law, because the claim was previously alleged on behalf of the business, El Alamo Restaurant, in Case. No. 2017-CP-08-00177, which was dismissed and settled by a "Full and Final Release of Claims." In the prior action, the City was sued by Plaintiff's business for abuse of process, among other things, and alleged that the City used judicial process for an ulterior purpose.

9. Even if Plaintiff adequately alleged an abuse of process cause of action against the City and even if the claims were not disposed of in the "Full and Final Release of Claims," the City is immune from liability pursuant to S.C. Code Ann. § 15–78–60.

10. Plaintiff's cause of action for breach of quiet enjoyment should be dismissed because under South Carolina law the City had no duty to ensure Plaintiff's quiet enjoyment of the property, as this duty is placed on the grantor, Defendant Harris, at the time of the conveyance. Further, as Defendant Harris points out in its Motion to Dismiss, Plaintiff had no right to quiet enjoyment because the applicable lease had expired at the time of the acts complained of.

11. Even if Plaintiff adequately alleged a breach of quiet enjoyment cause of action against the City, the City is immune from liability pursuant to S.C. Code Ann. § 15–78–60.

12. Plaintiff's cause of action for intentional infliction of mental distress fails to state a claim for relief against the City because Plaintiff fails to plead facts showing that the City

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engaged in extreme and outrageous conduct and that Plaintiff had severe emotional distress as a result of the City's conduct.

13. Even if Plaintiff adequately alleged an intentional infliction of mental distress cause of action against the City, the City is immune from liability pursuant to S.C. Code Ann. § 15–78–60.

14. Plaintiff's cause of action for tortuous interference with prospective business relations fails to state a claim against the City because Plaintiff failed to plead interference with a sufficiently definite prospective contract. Plaintiff's Complaint is completely devoid of any allegation of any potential contract that was a close certainty, and Plaintiff fails to allege that the City's actions caused any third party not to agree to such a potential contract.

15. Plaintiff's cause of action for tortuous interference with prospective business relations is barred as a matter of law, because this claim was previously alleged on behalf of the business, El Alamo Restaurant, in Case. No. 2017-CP-08-00177, which was dismissed and settled by a "Full and Final Release of Claims." In the prior action, the City was sued for by Plaintiff's business for tortuous interference with prospective business relations, among other things, and alleged that the City made efforts "to damage the plaintiffs' with their landlord."

16. Even if Plaintiff adequately alleged a cause of action for tortuous interference with prospective business relations against the City and even if the claim is not barred by the Full and Final Release of Claims, the City is immune from liability pursuant to S.C. Code Ann. § 15–78–60.

17. Plaintiff's cause of action for attorney's fees under the state action statute, S.C. Code Ann. § 15-77-300, should also be dismissed because S.C. Code Ann. § 15–78–60

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provides immunity to the City from the allegations alleged by plaintiff. *S.C. Pub. Int. Found. v. Courson*, 420 S.C. 120, 125, 801 S.E.2d 185, 188 (Ct. App. 2017) (finding that immunity precluded application of the state action statute). Specifically, Plaintiff alleges that the City issued a demolition permit based on Defendant Harris' "false representations to the City of Hanahan to induce it to issue a demolition permit" (Compl. ¶¶ 18 and 57.); and (2) by dispatching police officer to the premises. (Compl. ¶ 57.) Under S.C. Code Ann. § 15–78–60, the City "is not liable for a loss resulting from . . . "(6) [] the failure to provide [or] the method of providing police or fire protection;" (9) entry upon any property where the entry is expressly or impliedly authorized by law;" "(12) licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit . . ." and "(13) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." Further to the extent Plaintiff's prior causes of action are dismissed, Plaintiff is not the "prevailing party" and is, thus, not entitled to fees. Section 15-77-300 specifically provides that "the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency . . . ." Here Plaintiff has also sought claims against individual officers of the City, which is not permitted because they are not an "agency." Indeed, "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duties is not liable therefor" unless the employee's actions constituted "actual fraud, actual malice, intent to

harm, or of a crime of moral turpitude," none of which are alleged against the City's employees. S.C. Code Ann. 15-78-70.

The City also bases this Motion upon the pleadings and documents referenced herein, applicable South Carolina law, and a memorandum of law to be submitted in advance of a hearing on this motion.

HAYNSWORTH SINKLER BOYD, P.A.

By: *s/ Stafford J. McQuillin III*

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Attorneys for the City

May 7, 2021

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	Case No.: 2021-CP-08-00513
	)	
Aracelis Santos,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	MEMORANDUM OF LAW ON
Harris Investment Holdings, L.L.C.,	)	DEFENDANTS' MOTIONS TO DISMISS[1]
City of Hanahan, City of Hanahan Police	)	
Department, John Doe #1 and	)	
John Doe #2, employees	)	
of the City of Hanahan Police Department,	)	
	)	
Defendants.	)	
	)	

In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiffs complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*
Plyer v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007)

In order to promote judicial economy and the speedy and inexpensive disposition of the case, the plaintiff is prepared to file an amended complaint if the Court identifies any deficiencies in the plaintiff's pleadings. Plaintiff asserts there are none, but if the Court finds a technical

[1] In an effort to promote judicial economy and conserve limited resources, the plaintiff submits this Memo in dual capacity because the analysis of the City of Hanahan's Motion to Dismiss would be nothing more than a duplication of the analysis here. The City of Hanahan's grounds for dismissal are as spurious as Harris Investment Holdings' are, including, but not limited to an assertion that a release given to the City of Hanahan in August 2018 would indemnify it for **future** torts.

misstep, then the plaintiff stands ready to file an amended complaint to cure any deficiencies the Court identifies as authorized by *Spence v. Spence* 368 S.C. 106, 628 S.E. 869 (2006):

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); *Small v. Mungo*, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); *Dockside Assn., Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); *accord Arkansas Dept. of Environ. Quality v. Brighton*, 352 Ark. 396, 102 S.W.3d 458, 468 (2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); *Giuliani v. Chuck*, 1 Haw. App. 739, 620 P.2d 733, 737 (1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan, *South Carolina Civil Procedure* 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect).

The plaintiff's prior experience litigating with these defendants teaches her, as the musical philosopher, Kid Rock, analogously expresses it: "I touched the stove, and it was hot!"[2] The plaintiff knows she cannot match up with the largest law firm in South Carolina representing a client who is unburdened by the ordinary moral imperatives of truth. (Harris Investment Holdings

[2] Part of the problem in this case is generational. In days passed, opposing counsel would telephone plaintiff's counsel and identify alleged deficiencies, and the lawyers would consult. As a result, the plaintiff's lawyer would either agree to amend in part or whole to address deficiencies or thank counsel for the call and elect to stand on the pleadings as filed. Counsel will object, accurately, that Rule 11(a) does not require consultation on motions to dismiss, to which the undersigned will reply that the *Rules of Civil Procedure* do not constrain lawyers to adhere only to the minimum requirement of the rules—lawyers are free to do more to promote "the just, speedy, and inexpensive determination of every action." Rule 1, *S. C. Rules of Civil Procedure*

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is the first landlord in the annals of American jurisprudence to allege that it can bulldoze a tenant's property into the dust because the lease allegedly expired.) The plaintiff's limited resources compel her to be judicious and dictate her decision to decline to pursue the defendant into each rabbit hole[3] the ingenuity of its lawyers can identify, but at his juncture in the case, it is a fact that the parties have widely divergent views of what is true and what is not, and if there is some technical defect in the plaintiff's pleading, the Court can identify it, dismiss the complaint, and grant the plaintiff leave to amend.

Since the plaintiff cannot match up with the defendants' firepower, and it would strain the resources of the Court to what in essence would result in trying the entire case in dueling memos, let us examine in detail two representative examples of the defendants' assertions and let them stand for the whole, a technique known as synecdoche in Rhetoric or inference in Logic:

On page 3 of Harris' May 25th Memorandum of Law, Harris asserts: ". . . on or about March 22, 2019, **when the building was vacant**, contractors retained by [Harris Investment Holdings] demolished the building in accordance with a permit obtained from the Town of Hanahan." We cannot know at this juncture how Defendant, Harris Investment Holdings, is using the word "vacant," but *Webster's Seventh New Collegiate Dictionary* defines "vacant" as: "being without content or occupant." It is true that Harris Investment Holdings did not murder anyone in demolishing the building, but the statement that the building was "vacant" is as far from the truth as a statement can be, and is in conflict with Harris Investment Holdings' judicial notice reliance on Orders establishing the "law of the case," since these Orders establish: (1) the plaintiff

[3] While the list of alleged of deficiencies contains assertions validating the ingenuity of counsel, some of the arguments are so far fetched as to be safely passed over in silence, such as: a release for a past tort releases future torts, or the law of South Carolina allows a landlord to destroy a tenant's property, or that the Magistrate authorized such destruction, or that Harris Investments took down a building because it was rife with asbestos but took no steps to mitigate the asbestos, or that the City of Hanahan could dispatch City police officers to effect an ejectment, *etc.*

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occupied the building under an Appeal Bond Order (Exhibit D to Defendant's May 25th Memo), (2) Harris Investment Holdings made no effort to ask the Court to dissolve it, (3) did not ask the Berkeley County Sheriff's Department to put it in peaceable possession, (4) did not remove the plaintiff's restaurant equipment prior to bulldozing the building as required by law, and (5) rushed the demolition because the plaintiff filed a motion for temporary restraining Order on March 19, 2008 at Case No.: 2018 CP 08 1008. See also the companion Motion for Contempt filed December 17, 2018 at Case No.: 2018 CP 08 0266. See § 27-37-160, S. C. Code, Ann. for the procedure to eject a tenant. (While it will await development in discovery, the plaintiff thinks the "independent" contractor, Tri Bay Construction, is a subsidiary or otherwise affiliated with the defendant, Harris Investment Holdings, Co. All the plaintiff knows at the present is that the two companies share a registered agent, a principal of Harris Investment Holdings.) The defendants concede that it is true that plaintiff's walk-in cooler, commercial food preparation equipment, bar, table, chairs, service counter, sound system, *etc.* was present in the building and did not belong to Harris Investment Holdings, and that Harris Investment Holdings ground all of this equipment to dust. It is equally undeniable that the presence of plaintiff's valuable equipment does not allow Harris Investment Holdings to assert to this Court that its building was "vacant." When Harris Investments crushed this equipment under its bulldozers, it can hardly claim it was crushing vacant property on the ground that it belongs to someone else.

Here is another representative example of an incorrect statement—this time a statement of law—which further demonstrates why an Order of Dismissal is not appropriate. On page 4 of its Memorandum, Harris Investment Holdings asserts it "had the right under the Lease and South Carolina law to retake possession at the conclusion of the Lease term without any order of the Court." First, as set forth above, the plaintiff occupied the property under a Court Appeal Bond

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Order. Second, also as set forth above, the plaintiff had pending at the time of the destruction two motions for injunction (technically a motion for contempt and a motion for temporary restraining Order) to prevent the very thing Harris Investments did; however, the Clerk's Office had not scheduled them in time to prevent Harris Investment Holding's destruction of plaintiff's equipment. Third, the Lease, under which Harris Investments contends gave it the right to crush plaintiff's property, contains a holdover clause resetting the rent at 150% of rental if a tenant holds over. (¶22 of the lease says: "**HOLDOVER**. . . . If Tenant remains in possession of the premises or any part thereof after the expiration of the Agreement, such holdover places Tenant in default and the Monthly Base Rental shall be increased to one hundred fifty (150%) of the last month's Monthly Base Rental unless given a month to month tenancy in writing from the Landlord.") Fourth, the defendant misstates the law. The correct statement of the law is that a Landlord may retake possession of the property at the conclusion of a Lease **provided it can do so without a breach of the peace**. Because there are not a lot of cases in which a landlord bursts through a court order, ignores pending motions for injunction, and resorts to posting local police officers (who have no jurisdiction over ejectments) to stand guard to prevent the plaintiff from access to her property and then bulldozes it and her possessions to the ground, we have to go all the way back to 1939 to find the correct statement of law in South Carolina:

> The forcible dispossession of an occupant of real property without legal process by one entitled to possession is looked upon with considerable disfavor by the Courts, and in many, if not all jurisdictions the dispossessor is liable in damages, compensatory if not exemplary, for his act; but where the dispossession has been performed peaceably upon the termination of the tenancy, or after notice to quit, the majority of the Courts, including our own, refuse to allow any recovery by the one dispossessed.
>
> *Barbee v. Winnsboro Granite Corporation*, 190 S.C. 245, 2 S.E.2d 737 (1939)

The *Barbee* Court goes on to offer examples of "peaceable" dispossession, such as when the landlord provides notice and places the tenant's possessions **unharmed** on the street. (See

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also § 27-37-160, S. C. Code, Ann., cited above as well as § 27-37-140, which gives the plaintiff a cause of action for destruction of her property.) The wanton destruction of the plaintiff's valuable commercial restaurant equipment in the face of Court Orders and pending litigation does not fit any definition of peaceable, and the General Assembly made clear that in matters of forcible ejectment, only a Sheriff's Deputy can effect the ejectment. "Twenty four hours following the posting of the writ, if the occupants have not vacated the premises voluntarily, the deputy sheriff, but not a constable, may then enter the premises by force, using the least destructive means possible, in order to effectuate the ejectment." § 27-37-160, S. C. Code, Ann.

In short, the plaintiff has made out proper claims for all her causes of action, and if she has not, then the Court can identify the technical deficiencies, dismiss the complaint, and allow the plaintiff to file an amended complaint as authorized by *Spence*. Based on her prior litigation experience with Harris Investment Holdings, L.L.C., the plaintiff is aware that any combination of words or description of claims will call forth additional technical objections from the defendants as to the manner in which she pleads. Therefore, it serves both the interests of justice and judicial economy for the Court to examine the plaintiff's complaint, and if it finds a deficiency, identify it, dismiss the complaint with leave to amend, and then the parties can move forward and prepare the case for trial.

Respectfully submitted,

May 27, 2021

/s/Thomas R. Goldstein
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	Case No.: 2021-CP-08-00513
	)	
Aracelis Santos,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	MOTION FOR RECONSIDERATION
Harris Investment Holdings, L.L.C., City of Hanahan, City of Hanahan Police Department, John Doe #1 and John Doe #2, employees of the City of Hanahan Police Department,	)	
	)	
Defendants.	)	
	)	

TO MERRIT ABNEY, ATTORNEY FOR HARRIS INVESTMENT HOLDINGS, L.L.C

Please take notice that the plaintiff will move ten days after notice hereof, or as soon thereafter as counsel may be heard, for an Order amending or altering the Court's Order of Dismissal dated June 14, 2021. This motion is based on the following grounds:

1. The Form Order does not identify if the complaint is dismissed as to Harris Investment Holdings, L.L.C. with prejudice or without prejudice. (As discussed more fully below, the complaint cannot be dismissed with prejudice.)

2. The Order fails to apply the correct standard of review governing peremptory motions to dismiss.

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3. The Order denies the plaintiff procedural due process because it ends plaintiff's claims without identifying the basis for the dismissal, which is required under Rule 52 of the *South Carolina Rules of Civil Procedure.*

A. By failing to identify the reason for the dismissal, the Court deprives the plaintiff of fundamental due process because she has no basis on which to decide whether to accept her loss or to seek appellate review.

B. By failing to identify the reason for the dismissal, the Court deprives an appellate court of the ability to review the decision for error and thus denies the plaintiff a meaningful opportunity to exercise her right to judicial review.

1. **Dismissal with or without prejudice**

Circuit courts are not permitted to dismiss cases with prejudice at the motion to dismiss stage. Since a dismissal with prejudice acts as an adjudication on the merits of the legal claims asserted, and requires the Court to weigh facts, the Court is required to allow a party to amend to address pleading deficiencies if any exist. When the Court evaluates a Motion to Dismiss, it is not permitted to weigh the facts or the credibility or believability of claims, or even the strength of the plaintiff's case, and for those reasons, it is required to dismiss without prejudice in order to allow a party whose case is being dismissed an opportunity to amend to address deficiencies identified by the Court.

See *Spence v. Spence* 368 S.C. 106, 628 S.E. 869 (2006):

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where

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amendment would have stated alternative theory of recovery); *Small v. Mungo*, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); *Dockside Assn., Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); *accord Arkansas Dept. of Environ. Quality v. Brighton*, 352 Ark. 396, 102 S.W.3d 458, 468 (2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); *Giuliani v. Chuck*, 1 Haw. App. 739, 620 P.2d 733, 737 (1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan, *South Carolina Civil Procedure* 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect).

Here, the Form Order does not inform the parties whether the dismissal is with or without prejudice, which leaves the parties (and any reviewing court) to grope in the dark as to the rationale for the dismissal. As set forth above, trial courts are required to dismiss actions without prejudice on 12(b)(6) motions because it has the effect of terminating a case without affording the plaintiff an opportunity to amend to meet any technical deficiencies that the Court identifies. Moreover, the Court's failure to identify the basis for the dismissal—as required by Rule 52—is not a defect that can be corrected by issuing a fuller Order on Reconsideration because that procedure freezes the plaintiff out of the process since she discovers the reasons for dismissal for the first time on reconsideration which leaves her no opportunity to be heard on findings and/or conclusions being identified for the first time.

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2. **The Standard of Review**

In dismissing the case, the Court fails to apply the correct standard of review, which requires the Court to confine itself to the allegations contained in the complaint. At the June 3, 2021, oral argument on the Motion to Dismiss, defendant's counsel relied entirely on **his view** of highly disputed facts, which is irrelevant at this stage of the litigation. On a motion to dismiss, the Court is required to confine itself to the plaintiff's complaint and it does not matter if opposing counsel has a different view of the strength of plaintiff's evidence. However, the Court's Form Order fails to recognize or apply this mandatory standard, which it is required to apply under the under the Rule 12(b)(6) standard of review :

> In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiffs complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*
> *Plyer v. Burns,* 373 S.C. 637, 647 S.E.2d 188 (2007)

The Order dismissing the complaint fails to apply this standard because under this standard, the plaintiff has pled multiple, viable theories of recovery under well recognized and well established statutory and common law tort standards.

At oral argument before the Court on June 3rd, defendant's counsel argued that because the plaintiff was in breach of her lease, the landlord had the right to lock her out and destroy her property, ignoring that the General Assembly has provided a statutory remedy for tenants who are mistreated in such a fashion (as well as established the minimum standards and procedures for retaking property, which the landlord ignored) and that she held the property subject to an appeal

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bond Order, and had two motions pending to prevent the landlord from doing exactly what it did. In implicitly finding the landlord's view of disputed facts to be more believable than the plaintiff's, the Court tacitly made a judgement on the ultimate issue raised by finding the landlord's view of the facts is more believable than the plaintiff's. In essence, the Court tried the entire case without hearing from a single witness and found that the landlord was within its rights to commit the torts alleged in the complaint. By doing this, the Court not only improperly construed disputed facts, but also misapplied case law which protects landlords when, **and only when**, they take action **without a breach of the peace**:

> The forcible dispossession of an occupant of real property without legal process by one entitled to possession is looked upon with considerable disfavor by the Courts, and in many, if not all jurisdictions the dispossessor is liable in damages, compensatory if not exemplary, for his act; but where the dispossession has been performed peaceably upon the termination of the tenancy, or after notice to quit, the majority of the Courts, including our own, refuse to allow any recovery by the one dispossessed.
>
> *Barbee v. Winnsboro Granite Corporation*, 190 S.C. 245, 2 S.E.2d 737 (1939)

The *Barbee* Court gives examples of "peaceable" dispossession, such as when the landlord provides notice and places the tenant's possessions **unharmed** on the street. Moreover, the Court ignored the requirements of South Carolina law, §§ 27-37-140, 160, S. C. Code, Ann., which specifically give the plaintiff a cause of action for destruction of her property. The wanton destruction of the plaintiff's valuable commercial restaurant equipment in the face of Court Orders and pending litigation does not fit any definition of peaceable, and the General Assembly made clear that in matters of forcible ejectment, **only a Sheriff's Deputy** can effect the ejectment, which did not happen here: "Twenty four hours following the posting of the writ, if the occupants have not vacated the premises voluntarily, the deputy sheriff, but not a constable, may then enter the premises by force, using the least destructive means possible, in order to effectuate the ejectment." § 27-37-160, S. C. Code, Ann. That is not what happened here. Here, the landlord, in furtherance

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of its conspiracy with the City of Hanahan to destroy a minority owned business that catered to a minority crowd deemed unworthy by the City, deployed two **City Police Officers**, who are statutorily barred from participating, to stand guard over the premises and keep the plaintiff out while Harris Investments bulldozed the building to the ground. (In oral argument to the Court on June 3rd, opposing counsel recited a long list of **alleged** criminal activity at the plaintiff's business, but the truth is that the City of Hanahan in combination with Harris Investments saturated El Alamo with a police presence to make it appear there was criminal activity, and the charges, most of which were dismissed, were for minor zoning violations. See the attached Exhibit 1. The Court can review the transcript for itself, but opposing counsel identified only **allegations** of criminal activity, not convictions. And these allegations, the plaintiff will prove, were pretext, designed to drive a minority business out of the City.) City police officers may have wide law enforcement authority in the municipal limits of Hanahan, but they have no authority when it comes to matters of landlord and tenants, and the General Assembly has specifically prohibited their participation, and the violation of these statute not only give rise to plaintiff's claims for damages, but also is evidence of at least gross recklessness.

Whatever pleading deficiencies the Court might find in the plaintiff's complaint, it does not say, but applying the proper standard of review to the plaintiff's complaint, the plaintiff made out proper claims for all her causes of action, and if she has not, then the law requires the Court to identify the technical deficiencies but allow the plaintiff to file an amended complaint as authorized by *Spence, op cit.* The Court is not authorized to dismiss a complaint because it does not believe the plaintiff's allegations.

3. **The Order ends plaintiff's claims without identifying the basis for the dismissal, depriving the plaintiff of due process.**

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A. By failing to identify the reason for the dismissal, the Court deprives the plaintiff of fundamental due process because she has no basis on which to decide whether to accept her loss or to seek appellate review.

The *Rules of Civil Procedure* do not permit a trial court to dismiss an action with prejudice without making specific findings of fact and conclusions of law. Rule 52(b) says in applicable part: " Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion **except as provided in Rule 41(b)**." (emphasis added) Rule 41(b) is, of course, the Rule that governs the dismissal of actions with prejudice. See Rule 41(b), *South Carolina Rules of Civil Procedure*. The purpose of the Rule is obvious. If an Order is going to discontinue a case, then a party is entitled to know why she lost so she can decide wither the accept her loss or seek further judicial review. Without an explanation, an appellate court is deprived of any means of review. In applying the proper motion to dismiss standard here, there is nothing before the Court other than the plaintiff's complaint, and the Court is required to accept all of her pleadings and "facts alleged and inferences reasonably deducible therefrom [that] would entitle the plaintiff to any relief on any theory of the case." *Plyer v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007) citing *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) For purposes of evaluating the motion to dismiss, the court is required to assume that everything plead in the plaintiff's complaint is true, and thus, opposing counsel's statements that the facts are otherwise is not a ground to support dismissal. At this stage, there is nothing controverting the plaintiff's allegations, and statements of opposing counsel, which are not even evidence, are legally insufficient to controvert the allegations of a well pleaded (or even a poorly pleaded) complaint. And, as set forth above, if the complaint is not well-pleaded, then the Court is required to give the plaintiff an opportunity to cure technical deficiencies. Because the form Order gives no explanation as to the basis for the dismissal, she lacks the ability to comprehend why her case

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is being discontinued, a violation of procedural due process, and deprives her of even having a basis to evaluate whether she should accept her loss or seek judicial review.

B. By failing to identify the reason for the dismissal, the Court deprives an appellate court of the ability to review the decision for error.

Should the plaintiff elect to seek further review of the Court's decision to terminate her case, the plaintiff will be unable to brief the issues meaningfully because she does not know why her case is dismissed, and likewise, the appellate court will have to grope in the dark as to the basis for the dismissal. As set forth above, Rule 52 requires courts to state why they end cases if they are ending the case with prejudice. This is especially true where the failure to explain will deprive a litigant of an opportunity to have her case reviewed:

> Second, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); [361 S.C. 24] Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court...
>
> *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (S.C. 2004)

Here, the plaintiff is left groping in the dark as to why her case is dismissed, and this procedural vacuum cannot be cured by entering a fuller Order for the first time after reconsideration because that procedure freezes the plaintiff out of the process because she might learn the reasons for the dismissal for the first time when is too late to ask for reconsideration, and thus be deprived of any

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opportunity to make a full record by asking the Court for reconsideration of overlooked facts or misapplied law.

Moreover, as set forth above, this one-sided process—if it occurs—is not an error that can be cured consistent with due process by providing the plaintiff a fuller explanation following a Motion for Reconsideration because such a procedure precludes a litigant from participating **meaningfully** in her own case, a profound deprivation of fundamental procedural due process. See *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972): "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" (Hearing on replevin of goods scheduled after seizure of goods declared unconstitutional.) Here, the Form Order drives the plaintiff into a procedural cul-de-sac because even if the Court entertains reconsideration and issues a fuller explanation following reconsideration, this procedure denies the plaintiff an opportunity to be heard on such an Order "at a meaningful time and in a meaningful manner."

For all these reasons the plaintiff requests that she be given a reconsideration and that the Court amend its Order to provide that the dismissal is **without prejudice**, granting the plaintiff the opportunity to file an amended complaint to address any pleading deficiencies identified by the Court.

Respectfully submitted,

June 15, 2021

/s/Thomas R. Goldstein
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Attorneys for plaintiff

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(Revised March 13, 2018)

DATE	DEFENDANT	CHARGE

Hanahan Municipal Court

(1) August 20, 2016 Benjamin F. Reyna After Hours Consumption
Ticket No. 4102P0213362—Officer Dodd
Consolidated Bench Trial—Tried December 14, 2017

(2) October 1, 2016 Benjamin F. Reyna After Hours Consumption
Ticket No. 2007—Officer Dodd
Consolidated Bench Trial—Tried December 14, 2017

(3) October 2, 2016 Benjamin F. Reyna After Hours Consumption
2008—Officer Dodd
Consolidated Bench Trial—Tried December 14, 2017

(4) October 2, 2016 Benjamin F. Reyna Public Nuisance
Ticket No. 2009
Consolidated Bench Trial—dismissed
(Nuisance = Violation of § 4-2)

(5) October 2, 2016 Benjamin F. Reyna Disorderly House
Ticket No. 2010
Jury Trial—dismissed

(6) October 2, 2016 Benjamin F. Reyna Unsafe Building (Occupancy)
Ticket No. 2011
Case re-opened, No contest plea Feb. 16, 2018 $50.00 fine

(7) October 23, 2016 Aracelis Santos Gomez Assault & Battery 3d degree
Ticket No. 52737GT
Dismissed

(8) October 29, 2016 Benjamin F. Reyna After Hours Consumption
Ticket No. 2012
Consolidated Bench Trial—trial in absence—on appeal (same as (6)?

(9) November 5, 2016 Nicole Lynn Franz After Hours Consumption
4102P0213823—Officer Dodd

Consolidated Bench Trial

(10) November 5, 2016 Agustin Torres-Sanchez After Horus Consumption
4102P0213825—Officer Dodd

Consolidated Bench Trial (?)

(11) November 5, 2016 Guillermina Anastacio- After Hours Consumption
4102)0213828—Officer Dodd Eleuterio

Consolidated Bench Trial (?)

(12) November 5, 2016 Angela Hernandez After Hours Consumption
4102P0213829—Officer Dodd

No Contest Plea Feb. 16, 2018. $50.00 fine

(13) November 5, 2016 Arelia Santos Gomez After Hours Consumption
4102P0213830—Officer Dodd

Consolidated Bench Trial

(14) November 5, 2016 Cruz Torres After Hours Consumption
4102P0213824—Officer Dodd

Consolidated Bench Trial (?)

(15) November 5, 2016 Juan Balderas After Hours Consumption
(No ticket number)—Officer Dodd

Consolidated Bench Trial

(16) November 5, 2016 Gisel Gonzales Cruz After Hours Consumption
4102P0213827—Officer Dodd

No Contest Plea Feb. 16, 2018 $50.00 fine

(17) November 6, 2016 Arelis Santos Gomez Unlicensed Sales
4102P0213834

Deferred Prosecution for 90 days from Feb. 16, 2018

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(18) November 11, 2016 Arelis Santos Gomez After hours Consumption
Ticket No. 4102P0213835—Officer Dodd
No Contest Plea Feb. 16, 2018 $50.00 fine

(19) November 16, 2016 Benjamin F. Reyna Disorderly Conduct
Ticket No. 52738GT
Dismissed by Court Order

(20) November 16, 2016 Benjamin F. Reyna After Hours Consumption
Ticket No. 52739GT
Dismissed by Court Order

(21) November 26, 2016 Brandon Leroy Washington-Brown After Hours Consumption
Ticket No. 4102P0214311—Officer Dodd
No Contest Plea Feb. 16, 2018 $50.00 fine

(22) December 10, 2016 Leroy Washington-Brown Operating w/o license
Ticket No. 4102P0214334
Dismissed

(23) December 10, 2016 Leroy Washington-Brown After Hours Consumption
4102P0214335—Officer Dodd
No Contest Plea Feb. 16, 2018 $50.00 fine

(24) December 10, 2016 Leroy Washington-Brown Noise Ordinance
4102P0214336
Chief Turner reviewing

(25) December 24, 2016 Anthony Dale Foster After Hours Consumption
4102P0214347—Officer Dodd
Consolidated Bench Trial—dismissed

(26) January 7, 2017 Arelis D. Santos Gomez After Hours Consumption
4102P0214411—Officer Dodd
Consolidated Bench Trial

(27) January 7, 2017 Arelis D. Santos Gomez Operating w/o business license
4102P0214412—Officer Dodd
Dismissed

(28) January 7, 2017 Arelis D. Santos Gomez Interfering with City employees
4102P0214413—Officer Dodd
Dismissed by Court Order (Judge Stokes)

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(29-42)

January 7, 2017

3400	Arelis D. Santos Gomez	2015 IFC, 609.3.3.3.1
3401	Arelis D. Santos Gomez	2015 IFC, 609.3.3.3
3402	Arelis D. Santos Gomez	2015 IFC, 609.3.3.1
3403	Arelis D. Santos Gomez	2015 IFC, 509.1
3404	Arelis D. Santos Gomez	2015 IFC, 901.6
3405	Arelis D. Santos Gomez	2015 IFC, 315.3.3
3406	Arelis D. Santos Gomez	2015 IFC, 605.1
3407	Arelis D. Santos Gomez	2015 IFC, 605.3
3408	Arelis D. Santos Gomez	2015 IFC, 605.4
3409	Arelis D. Santos Gomez	2015 IFC, 605.5
3410	Arelis D. Santos Gomez	2015 IFC, 605.6
3411	Arelis D. Santos Gomez	2015 IFC, 1010.1.9.1
3412	Arelis D. Santos Gomez	2015 IFC, 1010.1.9.3.2.2
3413	Arelis D. Santos Gomez	2015 IFC, 110.1.1
3414	Arelis D. Santos Gomez	2015 IFC, 111.1

29-42: Dismissed

(43)
November 6, 2016
Ticket No. 4102P0210213836

Lance Grimes — Disorderly conduct

Dismissed

(44)
Ticket No. unknown

Evodio Hernandez Santos — Unlawful use of 911

Chief Turner reviewing—Clerk's Office says convicted

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(45) Ticket No. 52737 GT	Arelis Santos Gomez **Dismissed.** (Same as No. 7)	Assault & Battery 3d degree
(46) September 3, 2017 Ticket No. 4102P0216292	Arelis Santos Gomez **No Contest Plea Feb. 16, 18 $50.00 fine**	Unlawful Consumption Ordinance 4-2
(47) November 23, 17 Ticket 2251	Arelis Santos Gomez **Consolidated Bench Trial**	Unlawful Consumption Ordinance 4-2

Moncks Corner-Traffic Tickets- SLED

(48) March 20, 2017 Ticket No. 26437 DB	Anthony Dale Foster **No Contest Plea, fine $50.00**	Unlawful sale of beer/and Operating w/o a permit
(49) March 20, 2017 Ticket No. 26438 DB	Arelis Santos Gomez **Dismissed**	Unlawful sale of beer/and Operating w/o a permit
(50) October 2, 2017 Ticket No. 86689 EF	Arelis Santos Gomez **Pending**	Unlawful sale of beer
(51) October 2, 2017 Ticket No. 86690 EF	Benjamin Reyna Flores **Pending**	Unlawful sale of beer

25	Dismissed
1	Deferred
8	No contest
16	pending

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.
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June 28, 2021

Hon. Bentley Price
Presiding Judge
100 Broad Street
Suite 432
Charleston, S. C. 29401

Re: Santos v. Harris Investment Holdings, L.L.C., *et. al.*
Case No.: 2021-CP-10-00513

Dear Judge Price,

On June 15, 2021, I filed a motion for reconsideration, and requested a hearing, in the above referenced case. (See enclosed cover letter.) On June 28, 2021, opposing counsel e-filed an unsolicited proposed Order without providing a copy to me. (After calling this omission to his attention, his legal assistant provided a copy. When I consulted with counsel about this oversight, he took the position that by e-filing it, he provided a copy to me. This is not correct. E-filing a proposed Order does not make it visible to opposing counsel.) After I received the Order, I see that it is not only inaccurate, but also purports to dismiss, with prejudice, the case, including my motion for reconsideration that has not yet been scheduled or heard. I consulted with opposing counsel and asked him to withdraw the proposed Order on numerous grounds, which he declined to do. Therefore, I am respectfully asking that your Honor not sign the proposed Order until such time as I am permitted an opportunity to be heard and make a full and fair record. With kind regards, I am

Very truly yours,

Belk Cobb Infinger & Goldstein, PA
Thomas R. Goldstein

TRG/

cc:
Mr. Merritt G. Abney
Nelson Mullins Riley & Scarborough, L.L.P.
151 Meeting Street
Sixth Floor
Charleston, S. C. 29401-2239

Mr. Mac McQuillian
Haynsworth, Sinkler Boyd, P.A.
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June 15, 2021

Hon. Bentley Price
Presiding Judge
Charleston County Courthouse
100 Broad Street
Suite 432
Charleston, S. C. 29401

Re: Santos v. Harris Investment Holdings, L.L.C., et. al.
Case No.: 2021-CP-10-00513

Dear Judge Price,

In accordance with the Rules governing Motions for Reconsideration, I am providing to you a copy of the plaintiff's motion filed today in the above case. By copy of this letter, I am also providing copies to opposing counsel. With kind regards, I am

Very truly yours,

Belk Cobb Infinger & Goldstein, PA
Thomas R. Goldstein

TRG/

enclosure: Motion for Reconsideration

cc:

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Nelson Mullins Riley & Scarborough, L.L.P.
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Stafford J. McQuillin, III
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Bentley Price, Circuit Court Judge

Case No. 2021-CP-08-00513

Aracelis Santos, ...Appellant,

vs.

Harris Investment Holdings, L.L.C.
the City of Hanahan, John Doe #1 and
John Doe #2 .....Defendants,

of whom

Harris Investment Holdings, L.L.C. is .....Respondent.

NOTICE OF APPEAL

Aracelis Santos appeals the Order of Dismissal signed and filed June 14, 2021, and the Order denying Reconsideration signed and filed June 29, 2021. (On July 7, 2021, the Clerk's Office filed a blank "decline to sign" notation following the entry of the Order denying Reconsideration on June 29, 2021. Since the June 29, 2021 Order is signed, filed, and not withdrawn, Appellant calculates her 30-day period for appeal runs from June 29, 2021.)

July 14, 2021

Thomas R. Goldstein, #2186
/s/ Thomas R. Goldstein
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ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF BERKELEY) Case No. 2021-CP-08-00513

----------x
ARACELIS SANTOS,)
)
Plaintiff,)
)
vs.) TRANSCRIPT OF RECORD
)
HARRIS INVESTMENT HOLDINGS,)
L.L.C.,)
)
Defendants.)
----------x

June 3, 2021

B E F O R E:

The Honorable Bentley D. Price, Presiding Judge

A P P E A R A N C E S:

Thomas R. Goldstein, Esq.
Attorney for the Plaintiff

Merritt Abney, Esq.
Attorney for Defendant Harris Investment Holdings, L.L.C.

Stafford J. McQuillin, Esq.
Attorney for Defendant Town of Hanahan

Court Reporter: Denise Lauder (retired)

Transcribed by: Bobbi Fisher, RPR

I N D E X

WITNESS/DESCRIPTION	PAGE
ARGUMENT BY:	
Mr. Abney	3
Mr. Goldstein	9

E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)	[Transcription] Indicates word(s) is not known due to audio recording quality

PROCEEDINGS

(Whereupon, the following proceedings commenced as follows:)

MR. ABNEY: Merritt Abney for Harris Investment Holdings, Your Honor. There's actually two motions to dismiss. And Mr. McQuillin represents the Town. He may be coming in the building about now.

THE COURT: Well, what time was this one? 10:45?

MR. ABNEY: 10:45.

THE COURT: I can't see. What time is it?

COURT REPORTER: 10:35.

THE COURT: We'll stand back. All right. We'll just stand back. All right. We'll just be in recess.

(Pause in the proceedings.)

MR. ABNEY: There were two motions to dismiss that were filed. I assumed both of them had been placed on your roster for today, but it looks like only mine is on the roster and one by the Town, I guess, to be scheduled for another day.

THE COURT: All right.

MR. ABNEY: So, Judge, this case is the latest and hopefully last chapter of a dispute that's been pending in this court, magistrate's court, and the Court of Appeals for roughly the last five years. It's a dispute over a commercial lease agreement.

Aracelis Santos, who is the plaintiff, leased a commercial property located on Loftis Road in Hanahan from my

client, Harris Investment Holdings, back in 2015. Santos and her boyfriend, a man named Benjamin Rena, operated a nightclub on the property known as El Alamo. The lease agreement, as I said, was commenced in 2015 and was set to expire on November 30th, 2018. It was a three-year lease. It contained no right of renewal, and it expressly required Santos to surrender the property at the expiration of the term in spring clean condition. The remedy provided for in the agreement for failure to do that allowed Harris to re-enter forthwith, quote "repossess the entire premises."

Now, in 2016 -- so this is a year into the three-year lease, after receiving reports of dangerous criminal activity taking place at El Alamo, including violation of local alcohol ordinances, illegal drug use, and weapons possession, on November 14th, 2016, Harris filed an application for ejectment in the magistrate's court. And, importantly, this -- you'll see it's important later on. This was two years before the lease was set to expire, so we're moving to eject her early.

Following a bench trial in 2017 before Magistrate Deaton, the magistrate granted HIH's application for ejectment and granted my client their attorney's fees -- reasonable attorney's fees incurred in connection with the dispute.

The magistrate concluded this in the order -- this is expressly stated in the order of ejectment -- quote: "Santos has maintained El Alamo as a place where the laws are

publicly, repeatedly, persistently, and intentionally violated, thus disturbing the public peace."

Santos appealed that decision to this court. And after several months of litigation over what the appeal bond would be, the magistrate ultimately set the appeal bond and issued an amended bond to stay execution on appeal, and that order is attached as Exhibit D to the memo that we filed with the Court.

The bond order provided, as it typically does, that once Santos posted the bond, the execution of the ejectment warrant would be stayed pending the appeal.

Now -- so that was back in 2017. On November 30th, 2018, while the circuit court appealed a prior ejectment order remained pending, the lease expired according to its terms. A three-year lease on November 30th, 2018. The lease expired.

Harris sent, via certified mail, a notice on October 16th, 2018, to Santos that the lease was expiring and to remove her belongings by midnight on November 30th of 2018. She did not vacate the property.

On February 26, 2019, Harris again instructed Santos to remove her belongings and vacate the property and notified her that she was trespassing. When she failed to vacate the property in accordance with the notices, Harris re-took possession of the premises in early 2019. And then, on or about March 22nd, 2019, Harris demolished its building while

police officers from the town of Hanahan were present at the scene to keep the peace.

On June 6, 2019, the circuit court affirmed the magistrate's orders on evict ejectment and attorney's fees. Santos subsequently filed a notice of appeal of that order -- of the circuit court, but she appealed only the circuit court orders affirming the magistrate's award of fees as the prevailing party. She did not appeal the lower court's conclusion that Santos breached the lease and ejectment was proper. So that is the law of the case.

On March 22nd -- or, I'm sorry, March 2nd of this year, approximately two years after the property/building was demoed, Santos filed this action alleging that Harris wrongfully repossessed and demolished the building and conspired to do so with the City of Hanahan.

There are a number of causes of action in the case, but they are all generally based on that alleged wrongful conduct. Repossessing the property when they claim they had a right to be there and demolishing the building, allegedly with some of their personal property inside.

So all of these causes of action should be dismissed because both, under the lease agreement, which is attached as Exhibit A to our memo, and South Carolina law, my client had the right to repossess the property at the expiration of the lease term and retake possession. The lease, as I said,

expressly granted Harris the right, upon Santos' failure to surrender the premises to, quote, "re-enter forthwith and repossess the entire premises."

Under South Carolina law, where a tenant has no right to continue in possession upon expiration of a lease term, the landlord may expel her from the premises without legal process and may not be held liable for doing so. We cite the *Rush* case, Supreme Court decision, and *Barbee vs. Winnsboro Granite, Corp.* where the Court stated, quote, "The rule in this state is that, where a tenancy has terminated, the landlord may enter upon and retake possession of the premises, and he commenced no trespass upon the real estate in doing so, even if force is used in making such entry. And, therefore, in such a case, he is not liable in a civil action for trespass." End quote.

Here, as I said, the lease term ended on November 30th, 2018. There was no right of renewal. Ms. Santos was notified to leave the property. She did not do so, and so my client exercised its right to repossess the property. Now -- therefore, the claim should be dismissed.

What you'll hear, I think, in response, based on the response that was filed by Mr. Goldstein, is three things at least. One is that there was a holdover provision in the lease, Section 22 of the lease. Mr. Goldstein claims that Santos was entitled to stay beyond the expiration of the lease

pursuant to this provision. I ask you just to read the provision. It clearly does not say that. It very clearly says she must leave the premises upon expiration of the lease and leave the property in, quote, "spring clean condition." And if she doesn't do, it's a default.

However, if she's there beyond that period, the rent jumps from 100 -- up to 100 percent of the base -- 150 percent of the base rent. That is not an entitlement to stay beyond the lease. It's a penalty for a breach of the lease.

And so that doesn't give her a right to remain on the premises or make my client's decision to retake possession wrongful.

Next, he'll argue that the bond order prevented Harris from retaking possession without court process. The bond order didn't do that. Remember, the bond order was from 2016 and related to the order of ejectment, which was entered on the ground that the tenant had violated local law and created a public nuisance on the property. It said nothing about what would happen two years down the road when the lease term expired, and it did not prevent my client from retaking possession. All it did was hold that earlier warrant of ejectment in abeyance.

And, finally, he'll say that, when the property was bulldozed, his client's valuable restaurant equipment was destroyed in the process. Okay. Our position is that -- what

he's talking about primarily is a walk-in cooler. The walk-in cooler was there before his client ever got to the property. I will grant you, that's a factual issue, and if we want to have a trial on whether there was personal property in the building when it was demolished, who it belonged to, and whether -- even if any of it belonged to her, she should have removed it, having received two notices to get her belongings out of the building, we can do that.

But that is a very narrow case, a very narrow lawsuit based on a single claim for trespass to chattels, which is one of the many claims that is in this complaint, and that is not how this complaint is pleaded.

For example, there is a claim for fraud against my client. Of course Santos can plead no statement that my client made that was false to her. The only thing they say is that Harris purportedly stated to the City that a demolition permit was necessary to abate asbestos. But to bring a claim for fraud, she's got to allege in a statement made to her. The complaint alleges no such misstatement.

There's a claim for tortious interference with prospective business collections. There, she would have to allege a specific contract that was thwarted by virtue of my client's alleged interference. There is no such thing alleged in the complaint. It simply says that she was, quote, "Damaged by the defendant's acts in destroying her business

and equipment."

There's a claim for abuse of process. Abuse of process requires commencement or a continuation of litigation for an ulterior purpose. The only litigation we commenced against Ms. Santos was in 2016, which, incidentally, would be outside the statute of limitations. But, in any event, it is litigation that we won. Having prevailed on that claim, we cannot be held liable for initiating a lawsuit for some ulterior purpose.

And, again, we had the right -- to the extent it's alleged that our abuse of process was somehow related to retaking possession, again, we had the right to retake possession upon expiration of the lease.

There's a claim for breach of the covenant of quiet enjoyment. And you have a right to quietly enjoy your property during the term of the lease. That right expires along with the expiration of the term of the lease. So that claim would have to be dismissed.

There is a claim for intentional interference -- or intentional infliction of emotional distress. It is not extreme and outrageous conduct to retake possession, having provided adequate notice to the plaintiff -- to the tenant that the lease term has expired and that she needs to remove her belongings from the property and vacate.

There are other causes of action, all of it -- and the

grounds for dismissal for each one is detailed in our memorandum. Unless the Court has any questions, I'll turn it over to Mr. Goldstein.

THE COURT: All right. Mr. Goldstein?

MR. GOLDSTEIN: Thank you, Your Honor. I guess if we're allowed to --

THE COURT: Oh, yeah. We're all vaccinated.

MR. GOLDSTEIN: All right. I'm fully vaccinated.

I'll be very brief. We're here on a motion to dismiss under Rule 12(b). I have cited the applicable standard under the *Spence* case citing, all sorts of things. If there are any deficiencies in my complaint, the Court can point them out and identify them, and I'll be happy to file an amended complaint to conform to any deficiencies in the pleading.

So, unless you have any other questions, that's it. I didn't come here to argue the case today. We're here on a motion to dismiss.

THE COURT: Sounds like this case has already been litigated once before.

MR. GOLDSTEIN: Oh, it's been litigated, and it is on appeal. And while it was on appeal, they thought it was a good idea to bulldoze the building. If they can show me a case where that's -- and he's right: A landlord is entitled to retake possession of the property, if it can be done without breach of deeds. That's what the case he cited says.

That's what the statute says, the landlord-tenant statute.

And what were the City of Hanahan police officers doing there? Under the statute, they're specifically prohibited from participating in that process. The proper procedure was to file a motion to dissolve the appeal bond and to get a writ of ejectment, which is, by statute, administered by the Berkeley County Sheriff's Department, not the City of Hanahan Police Department. And I'll reserve my remarks about the City of Hanahan when Mr. McQuillin's motion to dismiss is before the Court.

But the City of Hanahan has been operating illegally since, I think, 1984, when the U.S. Supreme Court outlawed single-member -- I mean, at-large elections. I mean, talk about racial animus. But that's in the other case, not this case.

THE COURT: All right. All right. I'll take it under advisement and put you on my expedited, end of the day.

MR. ABNEY: I just want to add -- I mean, under the point about this already being litigated and now being on appeal, I want to point out that the only issue that is on appeal is whether my award of attorney's fees stands. The propriety of that eviction ejectment is not on appeal. That is the law of the case at this point.

THE COURT: And that's still on appeal?

MR. ABNEY: That is not on appeal.

THE COURT: Oh.

MR. ABNEY: The only case that's on appeal is whether or not the fees were appropriate.

THE COURT: All right.

MR. GOLDSTEIN: Well, I take issue with that. And what I'd suggest is we'll send you the briefs and you can see that ejectment is fully argued in the briefs, but I acknowledged that the Court could no longer grant relief on ejectment because the building had been destroyed, rendering it moot. That's what my brief says.

THE COURT: All right. I'll let you know something by the end of the day.

MR. GOLDSTEIN: Thank you, Judge.

(The above hearing concluded.)

CERTIFICATE OF TRANSCRIBER

CASE/NO.: Santos v. Harris Investment Holdings

2021-CP-08-00513

DATE OF PROCEEDING: 2021-CP-08-00513

I, Bobbi J. Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; **that said proceedings were transcribed to the best of my ability from the audio recording and supporting information**, and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

Bobbi Fisher

__/s/ Bobbi Fisher_____

Bobbi J. Fisher, RPR

NCRA Registered Professional Reporter (RPR)

Prepared: February 1, 2022

NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF $1.00 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." ALL REQUESTS FOR COPIES OF THE ATTACHED TRANSCRIPT (FORM 800) FROM OPPOSING PARTY OR NON-PARTIES MUST BE SENT TO THIS REPORTER AT BFISHER@SCCOURTS.ORG.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)

2016CV0810605290
CIVIL CASE NUMBER
MAGISTRATE'S COURT
RULE TO VACATE OR SHOW CAUSE

Harris Investment Holdings, Llc

PLAINTIFF(S)

Vs

Aracelis Santos
5901 Loftis Road
Hanahan, SC 29410

DEFENDANT(S)

Upon the application of the Plaintiff(s) listed above, which states:
THE TERMS OR CONDITIONS OF THE LEASE HAVE BEEN VIOLATED. Tenant violated Section 10 of the lease by failing to comply with local laws and ordinances, resulting in revocation of the business license issued by the City of Hanahan in connection with the business operated by Tenant (or with her consent) on teh Premises. Tenant further violatted Section 10 by continuing to operate the business without a valid business license. Tenant violated Section 10 of the lease by repeatedly violating the International Fire Coade, adopted by the City of Hanahan, regarding the maximum capacity for the building located on teh Premises. Tenant violated Section 8 of the lease by failing to provide evidence of increased insurance coverage as demanded by Landlord pursuant to Section 15 of the lease and the Notice of Default. Tenant violated the Lease by creating a nuisance and threat or others as determined by the City of Hanahan in revoking the business license for the business operqted by Tenant (or with her consent) on teh Premises. Accoding to the City, Tenant has naintained and utilized the Premises in a manner that poses an unreasonable risk to others.

You the defendant(s) or lessee(s) of the premises located at the address listed above, **and all others,** are ordered to vacate the premises immediately pursuant to S.C. Code of Laws Section 27-37-10 or contact the

Goose Creek Magistrate
303-B North Goose Creek Blvd.
Goose Creek, SC 29445
(843) 553-7080

within ten (10) days excluding date of service, for the purpose of showing why you and all occupants should not be ejected from these premises.

FAILURE TO VACATE THE PREMISES OR TO RESPOND WITHIN TEN (10) DAYS MAY RESULT IN THE ISSUANCE OF A WRIT OF EJECTMENT.

Monday, November 14, 2016

JUDGE, Goose Creek Magistrate

Personally appeared before me, the undersigned deponent, being duly sworn, says that he attempted to serve the Rule to Vacate or Show Cause on Aracelis Santos on the following dates/times:

DATE	TIME	INITIALS
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____

DATE OF SERVICE _____
TIME OF SERVICE _____
SETTLED/DATE _____
VACANT/DATE _____

PERSON SERVED & RELATIONSHIP IF NOT DEFENDANT:

_____

Sworn to and subscribed before me
This _____ day of _____, 20____.

_____ _____
NOTARY PUBLIC OR JUDGE **SIGNATURE OF SERVER**

N_____ I DEPOSITED IN THE UNITED STATES MAIL IN AN ENVELOPE ADDRESSED TO THE DEFENDANT(S) ABOVE WITH FIRST CLASS POSTAGE AFFIXED THERETO, A COPY OF THIS DOCUMENT.

_____
MAGISTRATE'S CLERK

MV204

ELECTRONICALLY FILED - 2019 Mar 19 11:29 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0801008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEREKLEY	)	Case No.: 2018-CP-08-01008
	)	
Aracelis Santos,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION FOR TEMPORARY RESTRAINING ORDER
	)	Rule 65, *S. C. Rules of Civil Procedure*
Harris Investment Holdings, L.L.C., Costa DeLuca, Tri-Bay Construction, L.L.C., the City of Hanahan,	)	
	)	
Defendants.	)	

TO THE DEFENDANTS ABOVE NAMED:

PLEASE TAKE NOTICE that the plaintiff, above named, will move for an Order of the Court, ten days after notice hereof, or at some earlier time as the Court may allow under the exigent circumstances raised herein, for an Order of the Court directing the defendants immediately to cease and desist destroying the plaintiff's business and preserve the status quo until such time as the parties may be heard. This motion is based on the allegations contained in the amended complaint, attached to the plaintiff's motion to amend complaint and upon the affidavit of Benjamin Reyna previously filed with this Court and incorporated by this reference, and upon Rule 65, of the *South Carolina Rules of Civil Procedure*.

March 19, 2019

/s/Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar # 2186
BELK, COBB, INFINGER, & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, South Carolina 29415-1121
tgoldstein@cobblaw.net
(843) 554-4291
ATTORNEYS FOR PLAINTIFFS

ELECTRONICALLY FILED - 2019 Mar 19 11:29 AM - BERKELEY - COMMON PLEAS - CASE#2018CP080100

Certificate of Service

I certify that I have served a copy of this pleading on counsel for Harris Investment Holdings, L.L.C. by electronic mail and by regular first class mail with proper postage affixed and addressed to its counsel of record, Merritt Abney at 151 Meeting Street, Suite 600, Charleston, South Carolina 29201, this 19th day of March, 2019.

March 19, 2019

/s/Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar # 2186
BELK, COBB, INFINGER, & GOLDSTEIN, P.A.

ELECTRONICALLY FILED - 2019 Mar 20 6:33 PM - BERKELEY - COMMON PLEAS - CASE#2018CP0801008

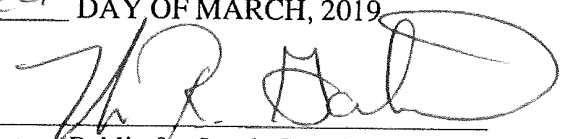
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEREKLEY	)	Case No.: 2018-CP-08-01008
	)	
Aracelis Santos,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF BENJAMIN REYNA
	)	
	)	
Harris Investment Holdings, L.L.C., Costa DeLuca, Tri-Bay Construction, L.L.C., the City of Hanahan,	)	
	)	
	)	
Defendants.	)	
	)	

Personally appeared before me, Benjamin Reyna, who being duly sworn, does depose and say:

Since my affidavit of December 13, 2018, the landlord has increased its interference in our quiet enjoyment of the property. He still refuses to accept the rent checks even though we timely tender them, and since December 13th, the landlord has battered down our door, and attempted to demolish our building. The City of Hanahan has now posted a police officer at our door, and instead of prosecuting the landlord for destroying the door, is standing guard to prevent us from entering the building. There is currently on file an Order of the Court authorizing us to be in possession so long as we pay the rent by the 5th of each month, which we have done.

Benjamin Reyna

SWORN TO BEFORE ME THIS
20th DAY OF MARCH, 2019



Notary Public for South Carolina
My Commission expires: April 16, 2020

Certificate of Service

I certify that I have served a copy of this pleading on counsel for Harris Investment Holdings, L.L.C. by electronic mail and by regular first class mail with proper postage affixed and addressed to its counsel of record, Merritt Abney at 151 Meeting Street, Suite 600, Charleston, South Carolina 29201, this 20th day of March, 2019.

March 20, 2019

/s/Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar # 2186
BELK, COBB, INFINGER, & GOLDSTEIN, P.A.

ELECTRONICALLY FILED - 2019 Mar 20 6:33 PM - BERKELEY - COMMON PLEAS CASE#2018CP0801008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEREKLEY	)	Case No.: 2017-CP-08-00177
		FILED
		2017 MAR 30 PM 12:10
		MARY P. BROWN CLERK OF COURT BERKELEY COUNTY, SC
Benjamin Reyna, d/b/a,	)	
El Alamo Restaurant and	)	
Arelis Santos Gomez,	)	
Plaintiffs,	)	
	)	
vs.	)	SUMMONS (AMENDED)
	)	VIOLATION OF CIVIL RIGHTS
	)	UNDER SOUTH CAROLINA CONSTITUTION
The City of Hanahan, Sgt. Travis Dodds,	)	(Jury Trial Demanded)
In his individual and official capacity,	)	
And J. Bowers, in his individual and	)	
Official Capacity,	)	
Defendants.	)	
	)	

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you; and to serve a copy of your Answer to the said Complaint upon the subscribers at their offices at 2344 Cosgrove Avenue, Post Office Box 71121, Charleston, South Carolina, 29415-1121 within thirty (30) days after the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN FURTHER NOTICE that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, exclusive of the day of such service, judgment by default will be entered against you for the relief demanded in the Complaint.

March 27, 2017

Thomas R. Goldstein, S. C. Bar # 2186
BELK, COBB, INFINGER, & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, South Carolina 29415-1121
(843) 554-4291
ATTORNEYS FOR PLAINTIFFS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEREKLEY	)	Case No.: 2017-CP-08-00177
Benjamin Reyna, d/b/a,	)	
El Alamo Restaurant and	)	
Arelis Santos Gomez,	)	
Plaintiffs,	)	
	)	
vs.	)	AMENDED COMPLAINT
	)	VIOLATION OF CIVIL RIGHTS
	)	UNDER SOUTH CAROLINA CONSTITUTION
The City of Hanahan, Sgt. Travis Dodds,	)	(Jury Trial Demanded)
In his individual and official capacity,	)	
And J. Bowers, in his individual and	)	
Official Capacity,	)	
Defendants.	)	
	)	

FILED
2017 MAR 30 PM 12:10
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

The plaintiffs, complaining of the defendant, show unto the Honorable Court as follows:

1. The plaintiffs are residents of the County of Berkeley doing business as El Alamo Restaurant. The actions brought herein are brought for violations of the South Carolina Constitution.

2. The defendant, City of Hanahan, is a municipal corporation organized and existing pursuant to the laws of the state of South Carolina and located within Berkeley County.

3. The defendant, Travis Dodds, is (or was during the time of the events described in this amended complaint) a police officer with the defendant, City of Hanahan and is a citizen and resident of the County of Berkeley.

4. The defendant, J. Bowers, is a fire official with the defendant, City of Hanahan, and is a citizen and resident of the County of Berkeley.

5. The Court has jurisdiction of the subject matter herein and the parties hereto.

6. On Thursday, May 26, 2016, the defendant, City of Hanahan, voted to revoke the plaintiff's, Benjamin Reyna's, business license on the ground that the plaintiff's business is allegedly a nuisance.

7. The municipal ordinances of the City of Hanahan authorize an appeal of such revocation to the Court of Common Pleas.

8. On June 3, 2016, the plaintiff, Benjamin Reyna, appealed the City's revocation of business license to the Court of Common Pleas at Case Number 2016-CP-08-1261. On November 15, 2016, the Court of Common Pleas issued an Order upholding the City's revocation of business license. On December 2, 2016, the plaintiff, Benjamin Reyna, moved for reconsideration of that decision. On January 27, 2017, the Court of Common Pleas denied the motion for reconsideration, and on March 6, 2017, the plaintiff, Benjamin Reyna, filed a Notice of Appeal.

9. The appeal of the business license revocation is automatically stayed both by municipal ordinance and by South Carolina law.

10. The City of Hanahan, acting through Sgt. Dodd and J. Bowers, who are acting, or have acted, outside the scope of their duties as a police officer and fire official for the City of Hanahan, refuse to adhere to South Carolina law and use and have used their authority as an armed police officer and a fire official to harass and intimidate the plaintiff, Benjamin Reyna, to prevent him from having access to the courts to prosecute an appeal,

and the City, acting primarily through Sgt. Travis Dodds and a fire official named J. Bowers, has written numerous pretext citations (summarized below) and used their powers under color of law to commit *ultra vires* acts taken under color of law designed to intimidate, harass, frighten, punish and thwart the plaintiffs' access to the Courts. To date the City, acting through Sgt. Dodds and J. Bowers, has issued the following citations:

TABLE OF CITATIONS ISSUED BY THE CITY TO DATE

DATE	DEFENDANT	CHARGE
(1) August 20, 2016 4102P0213362	Benjamin F. Reyna	After Hours Consumption
(2) October 1, 2016 2007	Benjamin F. Reyna	After Hours Consumption
(3) October 2, 2016 2008	Benjamin F. Reyna	After Hours Consumption
(4) October 2, 2016 2009	Benjamin F. Reyna	Public Nuisance
(5) October 2, 2016 2010	Benjamin F. Reyna	Disorderly House
(6) October 2, 2016 2011	Benjamin F. Reyna	Unsafe Building (Occupancy)
(7) October 23, 2016 52737GT	Aracelis Santos Gomez	Assault & Battery 3d degree
(8) October 29, 2016 2012	**Benjamin F. Reyna**	**After Hours Consumption**
(9) November 5, 2016 4102P0213823	Nicole Lynn Franz	After Hours Consumption

(10) November 5, 2016 Consumption 4102P0213825	Agustin Torres-Sanchez	After Hours
(11) November 5, 2016 Consumption 4102P0213828	Guillermina Anastacio-Eleuterio	After Hours
(12) November 5, 2016 Consumption 4102P0213829	Angela Hernandez	After Hours
(13) November 5, 2016 4102P0213830	Arelia Santos Gomez	After Hours Consumption
(14) November 5, 2016 4102P0213824	Cruz Torres	After Hours Consumption
(15) November 5, 2016 Consumption	Juan Valderas	After Hours
(16) November 5, 2016 4102P0213827	Gisel Gonzales Cruz	After Hours Consumption
(17) November 6, 2016 4102P0213834	Arelis Santos Gomez	Unlicensed Sales
(18) November 11, 2016 4102P0213835	Arelis Santos Gomez	After hours Consumption
(19) November 16, 2016 52738GT	Benjamin F. Reyna	Disorderly Conduct
(20) November 16, 2016 52739GT	Benjamin F. Reyna	After Hours Consumption
(21) November 26, 2016 4102P0214311	Brandon L. Washington-Brown	After Hrs. Consump.
(22) December 10, 2016 4102P0214334	Leroy Washington-Brown	Operating w/o license

(23) December 10, 2016 4102P0214335	Leroy Washington-Brown	After Hours Consumption
(24) December 10, 2016 4102P0214336	Leroy Washington-Brown	Noise Ordinance
(25) December 24, 2016 4102P0214347	Anthony Dale Foster	After Hrs. Consump.
(26) January 7, 2016 4102P0214411	Arelis Santos Gomez	After Hrs. Consump.
(27) January 7, 2016 4102P0214412	Arelis Santos Gomez	After Hrs. Consump.
(28) January 7, 2016 City4102P02244413	Arelis Santos Gomez	Interfering with City Employees
(29) January 7, 2016 3400	Arelis Santos Gomez	"2015IFC" 609.3.3.3.1
(30) January 7, 2016 3401	Arelis Santos Gomez	"2015IFC" 609.3.3.3
(31) January 7, 2016 3402	Arelis Santos Gomez	"2015IFC" 609.3.3.1
32) January 7, 2016 3403	Arelis Santos Gomez	"2015IFC" 509.1
33) January 7, 2016 3404	Arelis Santos Gomez	"2015IFC" 901.6
34) January 7, 2016 3405	Arelis Santos Gomez	"2015IFC" 315.3.3
35) January 7, 2016 3406	Arelis Santos Gomez	"2015IFC" 605.1
36) January 7, 2016 3407	Arelis Santos Gomez	"2015IFC" 605.3

37) January 7, 2016 3408	Arelis Santos Gomez	"2015IFC" 605.4
38) January 7, 2016 3409	Arelis Santos Gomez	"2015IFC" 605.5
39) January 7, 2016 3410	Arelis Santos Gomez	"2015IFC" 605.6
40) January 7, 2016 3411	Arelis Santos Gomez	"2015IFC" 1010.1.9.1
41) January 7, 2016 3412	Arelis Santos Gomez	"2015IFC" 1010.1.9.3.2.2
42) January 7, 2016 3413	Arelis Santos Gomez	"2015IFC" 110.1.1
43) January 7, 2016 3414	Arelis Santos Gomez	"2015IFC" 111.1

All of these charges are pending with the exception of the boldfaced ticket listed as #8. In the citation listed above as #8, the City conducted a trial in absence on that one citation and issued an Order finding the defendant guilty in his absence. When plaintiff learned that this one citation (out of 43 to date) went forward without him, the plaintiff timely moved to reopen the case, which the City refused to do. The City refused to issue an Order explaining why and refused to provide a copy of an Order. Plaintiff's counsel drove to the City of Hanahan on January 12, 2016, and physically retrieved a record of the denial, which is the one word "Order," attached here as Exhibit 1. None of the fire code citations, listed as #'s 29-43 contain an explanation of the alleged violation other than the reference number cited above.

11. Sgt. Dodds in particular has been particularly aggressive, verbally abusive and physically abusive and has engaged in a pattern of intimidation by transporting defendants to jail to be incarcerated on municipal charges for municipal offenses issued on

courtesy summonses, for which no bond hearing is required. Sgt. Dodds has been and continues to be abusive and disrespectful to the plaintiffs, including but not limited to using racial slurs directed at their status as Hispanic, and using excessive force to push, hand-cuff, and abuse the plaintiffs physically. In addition, Sgt. Dodds has contacted third parties in an effort to exert pressure on the plaintiff to shut down the business prior to the expiration of his right to judicial review.

12. In connection with the City's efforts to force the plaintiff's business to shut down prior to an opportunity for judicial review, the City has denied the plaintiff an opportunity to appear and be heard, finding the plaintiff, Benjamin Reyna, guilty on one citation, #2012 (listed as the boldfaced charge #8 in the table above) even though the City has yet to schedule the citations for trial. The City called citation #8 for trial without alerting plaintiffs' counsel that citation was being held separately, and thereafter refused to grant the plaintiff a hearing on his application to set aside the conviction, and refused to issue an Order explaining why the motion to set aside the conviction is denied. The plaintiff is not guilty of the charge set forth in citation 2012, has not been afforded an opportunity to be heard and appeals the conviction in his absence.

13. The initial decision of the City of Hanahan to revoke the plaintiff's/appellant's business license is not supported by evidence and is a violation of law because it is premised upon alleged events that have little or no connection to the plaintiff's business, and the City has unlawfully targeted the plaintiffs because they are Hispanic.

FOR A FIRST CAUSE OF ACTION
APPEAL/WRIT OF MANDAMUS

14. The plaintiffs repeat the above allegations as if set forth here *verbatim*.

15. The plaintiffs are informed and believe that they are entitled to an Order of the Court, both *pendent lite* and permanently, requiring the City of Hanahan to vacate the conviction on citation 2012, and to grant the plaintiff, Reyna, a hearing on his application to set aside the conviction in absence, or, in the alternative, issue a written Order stating findings of fact and conclusions of law as to why the City of Hanahan singled out one citation as a trial in absence without an effort to notify the defendant or his counsel of its intent to proceed on a single citation when both the defendant and his counsel are informed and believe that all the cases will be set for trial by jury as demanded by the plaintiff, Reyna.

16. The plaintiff, Reyna, is informed and believes that the City's misuse of its municipal citations, including Sgt. Dodds exceeding the scope of his authority by issuing pretext charges and thereafter transporting defendants to jail on municipal charges, using excessive force in arrests, and the City's policy of issuing multiple citations on a matter that is automatically stayed by appeal, demonstrates that the Town is misusing its policy powers to harass the plaintiffs and single them out for disparate treatment because they are minorities, and the defendants conduct is tantamount to operating a corrupt organization, and that the Court should appoint a third party receiver or referee to review the City's use of criminal process and enjoin the City from issuing additional citations without having the proposed citations reviewed by a third party receiver or referee to

determine if probable cause exists for the issuance of such a citation, and for an Order requiring the City to obey the automatic stay imposed by law.

17. As a direct and proximate result of the City's *ultra vires* and unlawful acts, the plaintiffs have been damages as set forth more fully below, and as part of a Writ of Mandamus, the Court should require the City to issue the plaintiff's business a temporary/conditional business license in order to put a stop to the police harassment and misuse of authority, and the defendants should be enjoined, both pendent lite and permanently, from suspending, or attempting to suspend the plaintiff's business license unless the Town comports with minimal due process standards as set forth below and allows the plaintiffs to exhaust their right to judicial review.

18. The plaintiff, Benjamin Reyna, prays for an Order of the Court vacating the trial in absence on Citation Number 2012 (listed in the above table as charge "# 8") and for directions to set the case for trial when consolidated with the other cases tabulated above, which is consistent with what the City has previously informed the parties is the manner in which it will dispose of these charges.

FOR A SECOND CAUSE OF ACTION
(Procedural and substantive due process)

19. The plaintiff repeats the above allegations as if set forth here *verbatim*.

20. The City of Hanahan has singled the plaintiffs because of their identity as a racial minority, which serve a minority clientele, and the City, acting through the defendants, Dodds and Bowers, has imposed unlawful, excessive and disparate treatment

and denied them both procedural and substantive due process in the following particulars:

A. In employing excessive and unlawful police force at the plaintiffs and their customers to prevent the plaintiffs from seeking judicial review and obtaining an extra-judicial resolution of the plaintiff's currently pending appeal of a business license revocation;

B. In using excessive force in abusing the plaintiffs physically and unlawfully incarcerating them on municipal courtesy summonses;

C. In threatening the plaintiffs with physical force and depriving they of liberty and freedom of movement without probably cause;

D. In treating the plaintiffs with excessive force and excessive pre-trial incarceration because of their minority status;

E. In denying plaintiffs substantive and procedural due process guaranteed under the Article I, § 3 of the South Carolina Constitution;

F. In denying the plaintiff, Reyna, an opportunity to be heard and scheduling one of the outstanding citations for special treatment even though all the others are consolidated for resolution;

G. In denying the plaintiff, Reyna, an opportunity to be heard on Citation 2012, and in refusing to issue an appealable Order regarding the plaintiff's application to set the conviction aside;

H. In making excessive and unlawful demands upon the plaintiffs for more concessions than the Town's ordinances require is an abuse of governmental power and a

violation of the plaintiff's civil rights under Article I §2, §3 § 9, § 10, and §22 of the South Carolina Constitution.

I. The actions of the City are intentionally fluid, vague, and specifically tailored to target the plaintiffs' business because it caters to a minority clientele. The City's actions, including the use of excessive police arrests and excessive force, are arbitrary and capricious and bear no rational relationship to legitimate goals of municipal government, and constitute a denial of substantive due process.

All of which, combining and concurring, are violations of the plaintiffs' civil rights done under the color of authority of the City's police power and in violation of the South Carolina Constitution, Article I §§ 2, 3, 9, 10 and 22 of the South Carolina Constitution.

21. The plaintiffs are informed and believe they are entitled to injunctive relief requiring the City to restore plaintiff's business license, or in the alternative, provide a meaningful opportunity to be heard in accordance with minimal guarantees of due process and to be enjoined, both temporarily and permanent, from unlawful uses of excessive police power to harass, intimidate, and deprive the plaintiffs of their constitutional rights.

22. The plaintiffs are informed and believe that they are entitled to trial by jury and for judgement against the defendants for violation of their civil rights and provided for by Article I, § 9 and § 14, South Carolina Constitution, and for an award for attorney's fees as provided for by South Carolina Section 15-77-300 and 310, S. C. Code, ann.

FOR A THIRD CAUSE OF ACTION
(Denial of Equal Protection)

23. The plaintiff repeats the above allegations as if set forth here *verbatim*.

24. Because the City revoked the plaintiff's, Reyna's, business license, and because the City is frustrated by the plaintiffs' Constitutional right to the judicial review that the law permits, and objects to Reyna's, right to seek an appeal of the revocation of his business license, the defendants have used unlawful force and exceeded their police powers and targeted the plaintiffs and their business for dissimilar treatment and use of excessive force and unlawful arrest without probable cause because the plaintiff's business is owned by a Hispanic person and his clientele is primarily Hispanic and minority patrons and because the plaintiff's appeal operates as an automatic stay of enforcement.

25. The City, acting through the defendants, Dodds and Bowers (and other city employees), has targeted the plaintiff's business for elimination because of plaintiffs' national origin and racial identity, and because the plaintiffs serve a minority clientele, and the Town has not undertaken suspension action against similarly situated business.

26. The City's targeting of the plaintiffs and of their business is in violation of Article I, § 3 of the South Carolina Constitution.

27. The plaintiffs are informed and believe that they are entitled to a trial by jury and for judgment against the City and the individual defendants for such amounts of actual damages as the jury finds to be just and proper.

FOR A FOURTH CAUSE OF ACTION
(Violation of South Carolina Constitution, Article I, §§ 2, §3 § 9, § 10, and §22 violation of civil rights)

28. The plaintiffs repeat the above allegations as if set forth here *verbatim*.

29. The plaintiffs have constitutionally protected fundamental liberty and property rights, including but not limited to, the right to own property and use it to the highest and best use and to seek judicial review of administrative actions.

30. The City of Hanahan through its elected and appointed officials, including, but not limited to the named defendants, has misused its governmental authority to arrest and prevent the plaintiffs' exercise of fundamental property rights, and has misused governmental authority to deprive the plaintiffs of their freedom and subjected them to unlawful arrests and detention in order to deprive them of their civil rights under color of law and force them to abandon the appeal of the business license revocation. Even if the plaintiffs do not ultimately prevail on the appeal currently pending, the City, acting through the named individual defendants and others, under color of law, has unlawfully deprived the plaintiffs of their freedom for which they are entitled to damages as may be determined by a jury.

31. The plaintiffs are entitled to have a jury to hear the facts of the case and to determine the amount of actual, consequential, and punitive damages caused by the City of Hanahan and its governmental officials, acting under color of law but outside and beyond the scope of their governmental authority, to harass, intimidate, and incarcerate the plaintiffs without justification, and in the event a jury determines that the City of Hanahan and the individually named defendants, acting through its officials who are acting outside the course and scope of their authority, have damaged the plaintiffs by denying them the exercise of fundamental civil rights under color of law, the plaintiffs are

entitled to judgment against the defendants in an amount found by a jury to be just and are entitled to a further award of attorney's fees under § 15-77-300, 310 S. C. Code, ann.

FOR A FIFTH CAUSE OF ACTION
(Tortuous Interference with Prospective Business Relations)

32. The plaintiffs repeat the above allegations as if set forth here *verbatim*.

33. The City of Hanahan is opposed to the plaintiff's operation of a lawful business and is attempting to prevent the plaintiffs from obtaining judicial review of the City's administrative decision to revoke the business license. During the pendency of the appeal, the defendants, acting jointly and severally, have instituted a policy of using excessive force, false arrest, and communication with third parties in an effort to damage the plaintiffs' relationship with their landlord.

34. The City of Hanahan and the individual defendants are aware that they have no legal basis to prevent the plaintiff's operation of a lawful business or prevent the plaintiffs from seeking judicial review of the City's license revocation, so the City and the individually named defendants have acted outside the scope of their authority and engaged in a course of conduct using excessive force, false arrest, and threats and intimation, designed to thwart the plaintiffs and wear them down by asserting fluid, unwritten, capricious demands designed to prevent the plaintiffs from operating and inducing the plaintiffs' landlord to eject them under threat of prosecution. In addition, the defendants have contacted third persons with whom the defendants have contractual relations and demanded that third parties terminate their contracts with the plaintiffs.

35. The defendants have contacted the plaintiffs' out-of-state landlord and threatened the landlord unless the landlord institute ejectment proceedings against the plaintiffs.

36. The defendants are aware of the plaintiffs' contract with an out-of-state landlord, and they have intentionally threatened the out-of-state landlord to eject the plaintiffs without legal justification.

37. The defendants' efforts to induce the out-of-state landlord to eject the plaintiffs are an intentional tortious interference with a contract.

38. The defendants have been damaged by the defendants' act in being forced to incur legal expenses and defend against an ejectment action.

39. The plaintiffs are entitled to judgment against the defendants for such amounts as both actual and punitive damages as found to be due by a jury.

FOR A SIXTH CAUSE OF ACTION
(False Arrest/Abuse of Process)

40. The plaintiffs repeat the above allegations as if set forth here *verbatim*.

41. The defendants have instituted numerous criminal prosecutions without probable cause for an ulterior purpose.

42. The defendants' use of criminal process to intimidate the plaintiffs and force them to drop a pending civil action is the intentional and wrongful use of criminal process that is not proper in the regular conduct of the proceedings because it is designed to obtain a collateral advantage is a pending civil matter.

43. The plaintiffs are entitled to judgment against the defendants for such amounts as both actual and punitive damages as found to be due by a jury.

FOR A SEVENTH CAUSE OF ACTION
(Civil Conspiracy)

44. The plaintiffs repeat the above allegations as if set forth here *verbatim*.

45. The defendants have instituted numerous criminal prosecutions without probable cause for an ulterior purpose and communicated with Reyna's immigration officials and with the plaintiffs' landlord in an effort to induce the plaintiff, Reyna, to be deported and for the plaintiffs' landlord to eject them from the premises.

46. The combination of the three named defendants along with the combination of unknown immigration officials and the plaintiffs' landlord is for the purpose of injuring the plaintiffs, which has caused the plaintiffs special damages.

47. The defendants unlawful combination has caused the plaintiffs special damages by threatening the plaintiff's, Reyna's, immigration status as well as forced the plaintiffs to defend an ejectment action brought by their out-of-state landlord, which began the ejectment action after the defendants threatened the landlord with legal action if it did not eject the plaintiffs, and the plaintiffs have been forced to incur substantial attorney's fees to defend against the defendants tortuous acts, which are designed to punish the plaintiffs through the use of excessive force and false arrest because they avail themselves of the statutory appeal process.

48. As a direct and proximate result of the defendants unlawful civil conspiracy, combining and concurring, the plaintiffs are entitled to judgment against the defendants

for such amounts as both actual and punitive damages as found to be due by a jury and for an award of special damages.

Wherefore, having fully set forth their complaint, the plaintiffs pray for

1. A trial by jury;

2. An award against the defendants, jointly and severally, for actual, punitive, and special damages for interference with the plaintiff's business, excessive force, and misuse of governmental authority, including consequential damages occurring as the result of the unreasonable delay in operating;

3. An award for attorney's fees as allowed by § 15-77-300, *et. seq.*, S. C. Code, ann.;

4. An order of the Court vacating the Town's May 26, 2016, revocation, and an Order requiring the Town to restore the plaintiff's business license, or in the alternative, the appointment of a third party referee to monitor the defendants' use of criminal process to harass and intimidate the plaintiffs;

5. A writ of mandamus requiring the City of Hanahan to vacate the plaintiff's, Reyna's, conviction on citation 2012 and for a writ of mandamus requiring the municipal court to state with particularly why it found the plaintiff guilty in his absence and why it refused to reopen the case upon timely application;

6. For pre-judgment interest on lease payments and taxes paid while the City has prevented the plaintiffs from using their property and for pre-judgment interest on the amount found by the jury to be lost profits and delay costs;

7. For an award found by the jury to be the fair market value of the property taken by the City of Hanahan;

8. For costs of this action;

9. For such other and further relief as the Court deems just and proper.

BELK, COBB, INFINGER & GOLDSTEIN, P.A.

March 27, 2017

Thomas R. Goldstein, S. C. Bar #2186
P.O. Box 71121
Charleston, S.C. 29415-1121
(843) 554-4291, (843) 554-5566 fax
tgoldstein@cobblaw.net
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for all parties in the foregoing matter with a copy of this pleading by:

☒ depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon

☐ handing counsel a copy thereof

☐ by facsimile and depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 27th day of March, 2017

BY: _____

FILED
2017 MAR 30 PM 12:10
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

ELECTRONICALLY FILED - 2022 Mar 30 3:38 PM - BERKELEY - COMMON PLEAS - CASE#2022CP0800767

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2022-CP-__-_____
	)	
TRI-BAY CONSTRUCTION, LLC	)	
	)	
Plaintiff,	)	**SUMMONS**
	)	
v.	)	
	)	
HARRIS INVESTMENT HOLDINGS, LLC	)	
	)	
	)	
Defendants.	)	

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscribers, Rosen Hagood, LLC at their offices at 151 Meeting Street, Suite 400 (P.O. Box 893), Charleston, South Carolina 29402, within thirty (30) days of the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint.

ROSEN HAGOOD, LLC

By: s/Elizabeth F. Nicholson
Elizabeth F. Nicholson
151 Meeting Street, Suite 400
P.O. Box 893
Charleston, SC 29402
(843) 577-6726
enicholson@rosenhagood.com

ATTORNEY FOR TRI-BAY CONSTRUCTION, LLC

Charleston, South Carolina
March 30, 2022

ELECTRONICALLY FILED - 2022 Mar 30 3:38 PM - BERKELEY - COMMON PLEAS - CASE#2022CP0800767

ELECTRONICALLY FILED - 2022 Mar 30 3:38 PM - BERKELEY - COMMON PLEAS - CASE#2022CP0800767

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2022-CP-08-_____
	)	
TRI-BAY CONSTRUCTION, LLC	)	
	)	
Plaintiff,	)	**COMPLAINT**
	)	**(Non-Jury)**
v.	)	
	)	
HARRIS INVESTMENT HOLDINGS, LLC	)	
	)	
Defendants.	)	

Plaintiff Tri-Bay Construction, LLC (hereinafter "Tri-Bay"), by and through their undersigned counsel, complains of Defendant Harris Investment Holdings, LLC (hereinafter collectively referred to as "HIH or Defendant") as follows:

PARTIES

1. Plaintiff Tri-Bay is a limited liability company organized and existing under the laws of the State of Florida and at all times relevant hereto was authorized to conduct business in Berkeley County, South Carolina.

2. Upon information and belief, Defendant HIH is a limited liability company organized and existing under the laws of the State of Georgia and at all times relevant hereto was authorized to conduct business in Berkeley County, South Carolina.

3. This Court has jurisdiction of the parties and claims which are set forth herein.

4. Venue is proper as this matter arises out of a contract for construction for the Project located in Berkeley County, South Carolina.

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FACTS

5. On January 13, 2021, Tri-Bay and Defendant entered into a contract ("Contract") for construction of the Loftis Road Development Project located at 5901 Loftis Road, Hanahan, Berkeley County, South Carolina ("Project"). The Contract is attached hereto as Exhibit 1, the terms and conditions of which are incorporated herein by reference.

6. Pursuant to the Contract, Tri-Bay mobilized to the Project site and began performing its scope of work set forth in the Contract.

7. On or about February 4, 2021, Tri-Bay was notified that there existed an easement issue with the Project, and HIH directed Tri-Bay to halt all current and future operations at the Project.

8. Through subsequent conversations with HIH, its agents and representatives, Tri-Bay was notified that the Project would not be completed due to no fault of Tri-Bay.

9. Article 12.5.1 of the Contract provides, in relevant part, as follows:

> Seven (7) Days after Owner's receipt of written notice from Constructor, Constructor may terminate this Agreement if the Work has been stopped for a thirty (30) Day period through no fault of Construction for any of the following reasons: (a) under court order or order of other government authorities having jurisdiction; (b) as a result of the declaration of a national emergency or other governmental act during which, through no act or fault of Construction, materials are not available; or (c) suspension by Owner for convenience pursuant to § 12.1.

10. Article 12.5.3 of the Contract provides, in relevant part, as follows:

> Constructor is entitled to recover from Owner payment for all Work executed and for any proven loss, cost, or expense in connection with the Work, including all demobilization costs plus reasonable Overhead and profit on Work not performed.

11. Pursuant to Article 12.5.1 of the Contract, on March 26, 2021, Tri-Bay provided seven (7) days written notice of its right to terminate the Contract. A copy of Tri-Bay's termination letter is attached hereto as Exhibit 2 and incorporated herein by reference.

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12. The Contract was terminated on April 2, 2021.

13. Upon termination, pursuant to Article 12.5.3, Tri-Bay requested payment from HIH for Tri-Bay's losses, costs, expenses, including demobilization costs, and reasonable Overhead and profits from the work not performed on the Project in the amount of 243,844.00, plus attorney's fees and costs.

14. To date, HIH has not paid Tri-Bay its proven loss, cost or expense in connection with the Work as set forth in Article 12.5.3 of the Project.

15. Tri-Bay is entitled to judgment against HIH in an amount to be determined by a trier of fact along with its attorney's fees, plus prejudgment interest at the statutory rate.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

16. Tri-Bay repeats and realleges the allegations contained in Paragraphs 1 through 15 hereinabove as if reiterated verbatim.

17. Tri-Bay entered into a Contract with HIH on January 13, 2020.

18. Tri-Bay has upheld and adhered to its obligations under the Contract.

19. HIH has materially breached its obligations under the terms and requirements of the Contract by failing to pay Tri-Bay monies owed pursuant to the Contract.

20. As a result, Tri-Bay has suffered and will continue to suffer actual and consequential damages, along with attorney's fees and costs in attempting to collect the unpaid balance.

21. Tri-Bay is entitled to judgment against HIH in an amount to be determined by a trier of fact along with its attorney's fees and costs, plus prejudgment interest at the statutory rates.

WHEREFORE, Plaintiff Tri-Bay prays that the Court grant the following relief:

a. Grant judgment in favor of Plaintiff Tri-Bay for damages as may be proven at trial against Defendant HIH;

b. Award Plaintiff Tri-Bay prejudgment interest;

c. Award Plaintiff its attorneys' fees and costs incurred in prosecuting this action against Defendant HIH; and

d. Award any other and further relief requested herein and as the Court deems just and proper.

ROSEN HAGOOD, LLC

By: s/Elizabeth F. Nicholson

Elizabeth F. Nicholson
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726
enicholson@rosenhagood.com

ATTORNEY FOR TRI-BAY CONSTRUCTION, LLC

Charleston, South Carolina
March 30, 2022

ELECTRONI LY FILED - 2022 Mar 30 3:38 PM - BERKELEY - COMMON PLE CASE#2022CP0800767

ELECTRONICALLY FILED - 2022 Mar 31 1:49 PM - BERKELEY - COMMON PLEAS - CASE#2022CP0800775

STATE OF SOUTH CAROLINA)) COUNTY OF BERKELEY)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT C.A. NO.: 2022-CP-08-_____
HARRIS INVESTMENT HOLDINGS, LLC, Plaintiff, v. ADC ENGINEERING, INCORPORATED; BYERS COLLABORATIVE, LLC A/K/A ELLIOTT STREET, LLC; AND TRI-BAY CONSTRUCTION, LLC Defendants.	SUMMONS [JURY TRIAL DEMANDED]

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said Complaint upon the subscriber at his office at 415 Mill Street, Post Office Box 806, Mount Pleasant, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer within the prescribed time, a judgment by default will be rendered against you for the amount or other remedy requested in the attached Complaint plus interest and costs.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By: */s/Justin Lucey*

Justin O'Toole Lucey
Joshua F. Evans
415 Mill Street
Post Office Box 806
Mount Pleasant, SC 29465-0806
(843) 849-8400 phone
jlucey@lucey-law.com
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March 31, 2022
Charleston, South Carolina

ELECTRONICALLY FILED - 2022 Mar 31 1:49 PM - BERKELEY - COMMON PLE, CASE#2022CP0800775

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT C.A. NO.: 2022-CP-08-_____
HARRIS INVESTMENT HOLDINGS, LLC, Plaintiff, v. ADC ENGINEERING, INCORPORATED; BYERS COLLABORATIVE, LLC A/K/A ELLIOTT STREET, LLC; AND TRI-BAY CONSTRUCTION, LLC Defendants.	)	COMPLAINT [JURY TRIAL DEMANDED]

NOW COMES Plaintiff Harris Investment Holdings, LLC ("HIH"), by and through its undersigned counsel, and hereby submits this Complaint against Defendants ADC Engineering, Incorporated ("ADC"), Byers Collaborative, LLC a/k/a Elliott Street, LLC ("Byers"), and Tri-Bay Construction, LLC ("Tri-Bay") (collectively hereinafter "Defendants'), and would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. HIH is a limited liability company organized under the laws of the State of Georgia that is authorized to do business in the State of South Carolina.

2. ADC is a South Carolina corporation with multiple offices located throughout the State of South Carolina that provides engineering services in several sectors, including civil engineering, aviation engineering, structural engineering, and landscape architecture.

3. Byers is a limited liability corporation organized pursuant to the laws of South Carolina that provides professional architectural consulting services.

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4. Tri-Bay is a limited liability corporation organized and existing pursuant to the laws of the State of Florida that provides construction services.

5. This Court has jurisdiction over the subject matter and the parties to this action.

6. Venue is proper in this forum.

FACTUAL ALLEGATIONS

7. HIH is the fee simple owner of real property located at 5901 Loftis Road, Hanahan, SC 29410 known as "Parent Track A" and is also the owner of "Tract B," Loftis Rd, Hanahan, SC 29410, each as more fully described in Exhibit "A" attached hereto and incorporated herein by reference (collectively, the "Property")[1].

8. In 2019, HIH sought to develop the Property to include, among other elements, an office building, a road-front retail building, and a parking lot to service both buildings (collectively, the "Improvements").

9. In order to develop the Property and the Improvements, HIH employed the services of engineers and architects.

10. ADC provided professional engineering services to HIH, including, among other things, civil engineering site design plans for the Improvements consistent with the dimensions of the Property, according to the September 25, 2019 Contract between HIH and ADC (attached hereto as "Exhibit B").

11. Byers provided professional architectural services to HIH, including, among other things, designing and creating builder's site plans that included the building footprint with general site and zoning information as required with the City of Hanahan review, parking layout,

[1] According to parcel records Tract B (0.929 acres) merged with Parent Tract A (0.412 acres) becoming "1.341 acres, New Parcel A."

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landscaping plans, and ensure that ADA compliance was met, pursuant to the December 10, 2018, Contract between HIH and Byers (attached hereto as Exhibit "C").

12. To provide a site design consistent with the dimensions of the Property, ADC and Byers received topographic and boundary information furnished by Parker Land Surveying, LLC ("Parker").

13. The topographic and boundary information furnished by Parker is a survey dated March 24, 1999 (the "Parker Survey").

14. The Parker Survey contains reference to the existence of a non-exclusive parking easement existing on the Property ("the Easement").

15. The easement is in favor of the adjacent property owner, 5909 Loftis, LLC.

16. The referenced Easement is further detailed in property records and surveys recorded with the Berkeley County Register of Deeds. By way of example, this includes a deed recorded at Book 2067, Pages 484-487 wherein the Easement is described as existing "over the eastern most one hundred feet (100')" of the Property "for the purpose of parking vehicles, [with] said easement to run with the land."

17. ADC and Byers delivered civil engineering and architectural site design plans for the Improvements that was incompatible with, the Easement. The site design plans, originally dated February 10, 2020, were subsequently revised on February 21, 2020, April 8, 2020, June 30, 2020, and September 1, 2020, were all incompatible with the Easement.

18. For example, ADC and Byers' site design plans called for the construction of a dry pond and a point of ingress and egress for the Improvements, both of which were incompatible with the Easement.

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19. HIH relied upon the professional architectural and civil engineering expertise of Byers and ADC.

20. The plans came with the implicit representation that the site design for the Improvements was suitable, i.e., would not encroach upon any real property rights of any third party, including the Easement.

21. The plans developed by ADC and Byers were ultimately incorporated into HIH's contract with a general contractor, Tri-Bay, for Tri-Bay to perform the work set forth in ADC and Byers' plans.

22. Pursuant to the HIH-Tri-Bay contract, Tri-Bay was required to examine and compare the site plans and construction specifications to discover any errors and violations.

23. The HIH-Tri-Bay Contract was executed on or around December 15, 2020 (attached hereto as Exhibit "D") and work began shortly thereafter. This initial work included demolition of existing structures, excavation, and leveling of the footprint depicted in the site designs delivered by ADC and Byers.

24. In February 2021, HIH learned that the site design plans encroached upon and were incompatible with the Easement.

25. HIH was compelled to cease all work at the Property.

26. Upon learning of the Easement ADC conceded in written correspondence that it missed the Easement and that its site design plans were incompatible with the Easement. A copy of this correspondence is attached hereto as Exhibit "E."

27. HIH has incurred, and continues to incur, substantial damages as a result of the Defendants errors and omissions. This action seeks the recovery of all such damages directly and proximately caused by the Defendants.

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FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to all Defendants)

28. HIH re-alleges each and every allegation set forth above and fully incorporates the same herein.

29. Defendants owed a duty of professional and due care to HIH.

30. The Defendants breached the duties of care they owed to HIH in a manner that was negligent, careless, reckless, grossly negligent, willful, and wanton in the following particular breaches, without limitation:

a. Failing to properly design and prepare a site design plan consistent with the dimensions of the Property;

b. Failing to design and prepare a site design plan that did not infringe upon or encroach upon the Easement;

c. Failing to properly consider and/or accommodate the information contained in documents provided to it regarding the Property, including the Parker Survey;

d. Failing to inform HIH of the fact that the site design it engineered was incompatible with the dimension of the Property;

e. Failing to discover the defective site design work it performed;

f. Failing to act as a reasonably prudent architect, engineer, and/or general contractor would have acted under similar circumstances; and

g. Other breaches may be shown through the course of discovery or at trial.

31. Pursuant to S.C. Code Ann. § 15-36-100, the Affidavit of Thomas Nelson True is attached hereto as Exhibit "F" and is incorporated herein by reference. The Affidavit sets forth at least one negligent act or omission and the factual basis for the same for the claims against ADC and Byers. *See* S.C. Code Ann. § 15-36-100(B).

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32. As a direct and proximate result of the negligence, carelessness, recklessness, gross negligence, willfulness, and wantonness of Defendants' breaches, HIH has incurred, and continues to incur, significant damages, and it is entitled to a damage award against Defendants

33. If it is shown said failures and breaches were committed with gross negligence, negligence *per se*, and/or reckless disregard for the rights of others, HIH is entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranties as to All Defendants)

34. HIH re-alleges each and every allegation set forth above and fully incorporates the same herein.

35. The design, planning, and construction of the Project came with implied warranties that the site design plan would be performed in a careful, diligent, and thoughtful manner and free from errors and oversights infringing upon or encroach upon any easement and consistent with the dimensions of the Property.

36. The Defendants breached their implied warranties by designing and implementing a site and construction plan that infringed upon and encroached upon the above-described Easement and was inconsistent with the buildable dimensions of the Property.

37. As a direct and proximate result of the Defendants' breach of implied warranties, Plaintiff has suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract as to All Defendants)

38. HIH re-alleges each and every allegation set forth above and fully incorporates the same herein.

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39. For valuable consideration, Plaintiff entered into contractual relationships with the Defendants, to wit the aforementioned Contracts.

40. The Defendants breached their obligations under their respective Contract with Plaintiff by failing to recognize and accommodate the conflicting easement.

41. As a result of the foregoing breach, Plaintiff has suffered damages in such amount as to be determined by the trier of fact, including but not limited to actual damages, including attorneys' fees and consequential and punitive damages.

PRAYER FOR RELIEF

WHEREFORE, HIH respectfully prays for judgment against the Defendants as follows: (1) all actual, direct, indirect, compensatory, resulting, consequential, and special damages against Defendants, in an amount to be shown at trial; (2) punitive damages; (3) all costs and attorneys' fees; and (4) for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

By: */s/Justin Lucey*

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Joshua F. Evans
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March 31, 2022
Charleston, South Carolina

ELECTRONICALLY FILED - 2022 Mar 31 1:49 PM - BERKELEY - COMMON PLEAS - CASE#2022CP0800775

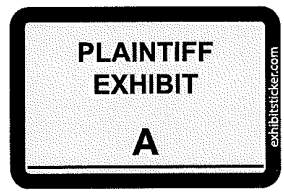

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

Parent Tract A, 5901 Loftis Rd, Hanahan, SC 29410

All that lot, tract, piece or parcel of land, consisting of approximately 0.40 acres, more or less, situate, lying and being in the City of Hanahan, County of Berkeley, State of South Carolina, shown and designated as Tract A on a plat entitled, "Boundary Line Adjustment Survey 5901 Loftis Road Berkeley County, South Carolina" made by Jack A. Mahony, R.L.S., S.C. Reg. 16816, dated June 24, 2005, and recorded in the Register of Deeds Office for Berkeley County, S.C. on October 18, 2005, in Plat Cabinet M, at Page 143-H. Said tract having such size, shape, location, dimensions, buttings and boundings, more or less, as will by reference to the aforementioned plat more fully appear.

BEING the same property (as to 0.31 ac +/-) conveyed to Francon, LLC, by Deed of Michael T. Leonard dated September 5, 2002, and recorded on October 7, 2002 in the RMC Office for Berkeley County, SC, in Book 2938, at Page 144; ALSO being a portion of the same property (as to 0.09 ac +/-) conveyed to Francon, LLC, by Deed of Paragon Resources, Inc. dated October 2, 2003, and recorded on October 8, 2003 in the RMC Office for Berkeley County, SC, in Book 3621, at Page 306.

Tract B (now merged with Parent Tract A), Loftis Rd, Hanahan, SC 29410

All that lot, tract, piece or parcel of land, consisting of approximately 0.92 acres, more or less, situate, lying and being in the City of Hanahan, County of Berkeley, State of South Carolina, shown and designated as Tract B on a plat entitled, "Boundary Line Adjustment Survey 5901 Loftis Road Berkeley County, South Carolina" made by Jack A. Mahony, R.L.S., S.C. Reg. 16816, dated June 24, 2005, and recorded in the Register of Deeds Office for Berkeley County, S.C. on October 18, 2005, in Plat Cabinet M, at Page 143-H. Said tract having such size, shape, location, dimensions, buttings and boundings, more or less, as will by reference to the aforementioned plat more fully appear.

BEING a portion of the same property conveyed to Francon, LLC, by Deed of Paragon Resources, Inc. dated October 2, 2003, and recorded on October 8, 2003 in the RMC Office for Berkeley County, SC, in Book 3621, at Page 306.

RECEIVED
Jul 20 2022
SC Court of Appeals

CERTIFICATE OF COUNSEL

I certify that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 28, 2022

/s/Thomas R. Goldstein
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