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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
MAYBANK HOLDING'S, LLC,	)	CASE NO. 2017-CP-10-06111
PLAINTIFF,	)	
vs.	)	**ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO JAMES ISLAND CENTER, LLC ON FRAUD CAUSES OF ACTION**
James Island Center, LLC,	)	
DEFENDANT.	)	

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Sep 28 2022
SC Court of Appeals

This matter came before me upon the motion of the Defendant James Island Center for summary judgment as to all of Maybank Holding's causes of actions except for Breach of Lease. However, this Order only addresses Maybank Holding's claims for (1) Breach of Lease Accompanied by Fraudulent Act, (2) Fraud, (3) Fraud in the Inducement, (4) Negligent Misrepresentation, (5) Trespass, and (6) Unjust Enrichment/Restitution. The claims for Breach of Implied Covenant of Good Faith and Fair Dealing, Nuisance, Constructive Eviction, and Unfair Trade Practices were dismissed by a separate Order dated December 30, 2021.

A hearing was held in this Court on November 22, 2021 on all outstanding motions. The Center was represented by Edward D. Buckley, Jr., W. Siau Barr, Jr., and W. Cole Shannon and Maybank Holding's was represented by M. Dawes Cooke, Jr, Justin P. Novak, and E. Merritt Farmer, Jr. Having reviewed the court record, the parties' motions, memoranda, attachments and exhibits, affidavits, and having considered the oral arguments of counsel, and the applicable law, I hereby GRANT the Defendant James Island Center's motion as to Maybank Holding's claims for Breach of Lease Accompanied by Fraudulent Act, Fraud, and Fraud in the Inducement.

As I find there are genuine issue of material fact as to some issues, I DENY the Defendant James Island Center's motion as to the causes of action for Negligent Misrepresentation, Trespass, and Unjust Enrichment/Restitution.

PROCEDURAL BACKGROUND

A. The Parties

Defendant owns and operates the James Island Shopping Center located at the corner of Maybank Highway and Folly Road in Charleston, South Carolina (the "Shopping Center"). Plaintiff leased space within the Shopping Center, having entered into an Assignment and Assumption Agreement and Modification to Lease Agreement on August 1, 2014, whereby the lease, as modified thereby, was assigned by the former tenant to Plaintiff as the new tenant. Plaintiff was formed on July 7, 2014, and it eventually operated as CURE restaurant within the Leased Premises. Four (4) partners[1], Richard Tuorto, Heath Verner, John Hibbits, and Chandler Frierson (collectively, the "Partners"), own Plaintiff along with several entities which operate other restaurants in the Charleston area. Mr. Tuorto, Mr. Frierson and his wife, Natalie Meyers, along with Mr. Hibbits and his wife, Elizabeth Hibbits, guaranteed Plaintiff's lease obligations to the Defendant.

B. The Leased Premises and the Original Lease

The Shopping Center contains an outparcel building along Maybank Highway. That outparcel building contains two commercial spaces, one of which was constructed for the operation of a restaurant (the "Leased Premises"). On June 16, 2004, the Center entered into a

[1] While the court herein refers to the members of the LLC as partners, the Limited Liability Company (LLC) is correctly made up of members. The IRS generally treats the members of an LLC as partners for tax purposes. There is a legal distinction not yet applicable in this case.

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ten (10) year lease agreement with Z & Snap, Inc. (the "Original Lease") whereby Z & Snap, Inc. would operate a tapas restaurant, J. Paulz, within the Leased Premises. Exhibit A.

The Original Lease contained three (3) five (5) year renewal options. Under the terms of the Original Lease, assignment was allowed subject to the Center's approval. The Original Lease commenced upon delivery of the premises to the tenant and continued for the initial ten (10) year lease term. Due to construction delays and the required up fit, Z & Snap, Inc. and the Center agreed to a commencement date of April 15, 2006 which was memorialized via an estoppel agreement. Exhibit B. This shifted the ten-year lease expiration date to April 14, 2016.

C. Robert Walker and J Paul'z

In late 2009, Robert Walker agreed to assume Z & Snap, Inc.'s rights and duties under the Original Lease. On December 16, 2009, Mr. Walker, Z & Snap, Inc. and the Center entered into an agreement approving the assignment of the Original Lease from Z & Snap, Inc. to Mr. Walker Exhibit C. Thereafter, Mr. Walker operated the restaurant, J. Paulz, in the Leased Premises from 2009 to 2014,

In August of 2012, Mr. Walker experienced a sewer backup when the grinder pumps servicing the Leased Premises failed. The grinder pumps were then replaced by the Center, and Mr. Walker never experienced another sewer backup during the remainder of his tenancy. In April or May of 2014, Mr. Walker closed J. Paulz intending to rebrand, renovate, and reopen as My Father's Moustache, an English and Irish Pub concept.

On April 9, 2014, Mr. Walker and I'On Holding's, LLC entered into a contract for the sale/purchase of Mr. Walker's restaurant for $385,000.00. That agreement was contingent upon the purchaser either (1) obtaining landlord approval of the assignment of the existing lease with modifications or (2) obtaining a new, acceptable lease from the landlord.

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D. Negotiation of the Lease Modification Agreement and Assignment of the Lease

In April of 2014, Mr. Walker began to remodel the Leased Premises to conform to his My Father's Moustache concept. At the same time, the Partners and Mr. Walker executed a contract for the purchase and sale of the assets of J. Paulz for $385,000.00. Exhibit D.

Following Mr. Walker's acceptance of the Partner's offer, he began coordinating the assignment of the Lease with Mr. Tuorto and informed him of his prior issues with the grinder pumps. According to Mr. Walker, he "had 4-5 conversations with Mr. Tuorto and explained to him in detail the issues [he] had with the sewage grinder pumps in 2012. These conversations occurred in the four months preceding assignment." Exhibit E. In fact, Mr. Walker did more than just tell Mr. Tuorto about the sewage back up issue. He testified that he met with Mr. Tuorto and representatives of the Center in the summer of 2014 in order to discuss the lease assignment terms and "the issues with the sewage grinder pumps in 2012" and that he met Mr. Tuorto at the Leased Premises prior to the assignment in order to explain to him where the grinder pumps were located and the results of a malfunction. Exhibit E. Finally, Mr. Walker provided Mr. Tuorto, and by extension Maybank Holding's, all the emails between himself and the Center regarding the 2012 sewer incident prior to the signing of the Lease Modification Agreement. Exhibit F. Mr. Walker forwarded those emails to Mr. Tuorto in February of 2016, while Maybank Holding's and the Center were negotiating the Current Lease, and forwarded them for a third time following the 2017 sewer backup incident which CURE experienced. Exhibit F.

Negotiations regarding the assignment of the Original Lease began in earnest following Mr. Walker's meeting with Mr. Tuorto and representatives of the Center. On July 7, 2014, Maybank Holding's, LLC was formed with Mr. Frierson serving as its sole member. Mr. Verner,

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a commercial real estate broker, negotiated the assignment on behalf of Maybank Holding's. Tim Hagar, a restaurant broker, represented Mr. Walker. Ken Miller, the Chief Operating Officer of Beatty Management, handled the negotiations on behalf of the Center. In early July, Mr. Walker's broker, Mr. Hagar, drafted a document titled "Second Assignment of Lease." Mr. Verner revised that document and forwarded the revised version to Mr. Miller on July 11, 2014. The proposed Second Assignment of Lease, as revised by Mr. Verner contained a number of important provisions. That document reflected that the current the lease term would expire on June 30, 2019, that the Lease include a fourth (4th) five (5) year renewal option, and that the lease "include language addressing the odor/water issue that really caused Rob problems," namely that Center assume responsibility for all exterior water issues affecting the Tenant's business. Ex. G.

The Center rejected most of Mr. Verner's proposed terms. However, the Center agreed to grant Maybank Holding's one (1) month's free rent, twenty percent (20%) base rent abatement while the site of the Center's anchor tenant was renovated by a new grocery tenant: Harris Teeter. On JULY 24, 2014, Mr. Miller forwarded to Mr. Walker and Mr. Verner a document titled "ASSIGNMENT AND ASSUMPTION AGREEMENT AND MODIFICATION OF LEASE AGREEMENT" (the "Lease Modification Agreement"). On July 24, 2014, prior to closing, Mr. Verner wrote to Mr. Hagar asking why the Center "has 4/14/16 as the expiration of the initial term" and wondering if Mr. Walker, the Center, or its agents had an agreement "explaining all of this?" Exhibit H. He also noted that the Center agreed to give Maybank Holding's a fourth (4th) option but failed to include it in the most recent draft of the Assignment. Exhibit H. Later that same night, Mr. Verner wrote to Mr. Miller inquiring as to why the fourth (4th) option was not included in the most recent draft. Exhibit I. The next day, Mr. Verner wrote to inform Mr. Miller that "we are close" and requested that the Assignment Agreement read that

(1) contract rent will resume the first month following the Harris Teeter reopening, (2) that the term "tapas" as used in the Original Lease "be removed and something to the effect 'traditional restaurant and bar' be added," (3) and that the fourth (4th) five (5) year option be included. Exhibit J.

The Center accepted all of these requests, and the parties entered into the Lease Modification Agreement on August 1, 2014. Exhibit K. The relevant portions for this Court's analysis state:

> As used in this Agreement the term "Lease" shall mean the "Lease" *as modified hereby*; unless context expressly requires it to mean the Original Lease and/or the First Assignment;

. . .

> 4. Assumption of Lease by Assignee. Assignee hereby accepts the Assignment of the Lease and assumes and agrees to perform each and every one of Assignor's obligations under the Lease as amended hereby

. . .

> 8. Term. The term of the Lease as set forth in Paragraph 3 remains in full force and effect *with the initial term of the Lease set to expire on April 14, 2016*. The provisions in the Original Lease at paragraph 2b entitled "Lease Renewal" containing the right of Tenant to renew the Lease for three consecutive five year terms remains in full force and effect on the same terms and conditions contained in the Original Lease. In addition thereto and provided that Tenant: (i) actually exercises each right to renew for three consecutive five year terms set forth in Paragraph 3b, and (ii) is not in default beyond the expiration of any applicable grace or cure period and gives Landlord no less than one hundred eighty (180) days written notice of Tenant's intent to further extend the Lease prior to the expiration of the current term, Landlord hereby grants Tenant the additional right to extend the Lease for a fourth five year term ("Fourth Extension Period) with the Minimum guaranteed Rental for the Fourth Extension Period to be set at a mutually agreed upon market rate for the Demised Premises but in no case shall the Minimum Guaranteed Rental be set at a rate that is less than the Minimum Guaranteed Rental rate for the immediately preceding Lease Year.[2]

. . .

[2] The Court takes judicial notice that, under these terms, Plaintiff was required to give the Center written notice of its intent to exercise the first renewal option on or before October 17, 2015.

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> 13. USE OF THE DEMISED PREMISES
>
> TENANT may use the Demised Premises for the operation of a traditional restaurant and bar and no other purpose.

. . .

> 15. Miscellaneous. Assignor, Assignee, Original Guarantors and Additional Guarantors hereby acknowledge that the Original Lease as modified hereby is and remains in full force and effect. *In the event of an express conflict between the terms and conditions of this Amendment and the remainder of the Lease, this Amendment shall control.*

Exhibit K (emphasis added). Under the Lease Modification Agreement, Mr. Walker and his wife, Wendy Walker, remained as guarantors, and Mr. Tuorto, Mr. Frierson, Mr. Hibbits and their wives were added as additional guarantors. Exhibit K. At closing, Mr. Walker, as Assignor, and Maybank Holding's as Assignee, were represented by the same counsel, Alex Dallis, of Dallis Law Firm.

E. The Harris Teeter Refit

In 2014, the Center's anchor tenant, Piggly Wiggly, closed. Harris Teeter agreed to become the new anchor tenant and proceeded to extensively renovate the existing grocery store space. Due to the interruption that the Harris Teeter renovation would cause, the Center abated the rent of several tenants, including Plaintiff, agreeing to one (1) month rent-free and a twenty percent (20%) reduction in the base rent for the earlier of twelve (12) months or the Harris Teeter opening.

While the Harris Teeter renovations were underway, Plaintiff began construction and upfit within the premises. According to its profit and loss statements, construction expenses were first paid in January, 2015 and ended in November, 2015, the month both Plaintiff and Harris

Teeter opened for business. Plaintiff had received its certificate of occupancy several months earlier on March 26, 2015.

F. Maybank Holding's Failure to timely Exercise the Lease Renewal Option

Plaintiff opened in November 2015. The same month, the Center notified Plaintiff that it had missed the October 17, 2015 deadline exercise its renewal option required by the Lease Modification Agreement for an additional five (5) year term. Plaintiff, through Geoffrey Smith, Esq., challenged the Center's position but ultimately conceded that the deadline had been missed and that the Original Lease would terminate on April 14, 2016. *Compare* Exhibit L *with* Exhibit M.

G. Maybank Holding's Tenant Estoppel Certificate and the Present Lease

Thereafter, Maybank Holding's and the Center began negotiating a new lease in 2016 (the "present Lease"). Both parties were represented by counsel. Initially, Plaintiff was represented by Geoffrey Smith, but he was replaced as counsel for Plaintiff by Merritt Farmer, Esq. in 2016. While the lease negotiations were underway, the Center refinanced its mortgage on the Shopping Center. In connection with the Center's refinance, the mortgagee, the Bank of North Carolina, required Maybank Holdings to execute a notarized Tenant Estoppel Certificate on April 6, 2016. Exhibit N. In signing the Estoppel Certificate, Mr. Verner, on behalf of Plaintiff swore:

> 12. Landlord has fully performed its obligations of Landlord under the Lease and the Lease is in full force and effect.
>
> 13. Tenant has no offsets or outstanding claims against the Landlord in connection with the Lease. There has occurred no event of default under the Lease nor has there occurred any event which with the passage of time or the giving of notice or both would constitute an event of default.

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Exhibit N. The Estoppel Certificate also stated that Maybank Holding's agreed to deliver to Mary D. Garcia, SVP/City Executive, by registered mail a copy of any notice of default served upon the landlord. Exhibit N. Maybank Holding's further agreed that if the landlord failed to cure any default within the time provided in the lease, Lender shall have a minimum of sixty (60) days to cure the default. Exhibit N. Maybank Holding's has never provided a notice of default to the Center's mortgagee as required under the Tenant Estoppel Certificate.

The present Lease was executed on June 1, 2016. Exhibit O. Like the Estoppel, Article 25.3 of the present Lease provided that Maybank Holding's must deliver notices either personally or by certified mail or overnight delivery courier to the Center's address in McLean, Virginia. Exhibit O. That Article further states that no notice is effective for any purpose unless and until it is given to the Center's mortgagee. Exhibit O. Maybank Holding's never provided a notice of default to either the Center or its mortgagee as required under the Lease.

H. The 2017 Sewer Incident and Development of Mold in the Leased Premises

On or about July 29, 2017, there was a grinder pump stoppage which resulted in sewage flowing out of a manhole cover near the entrance to CURE and Muddy Waters. The sewer backed up into the plumbing and flowed into the parking lot and pooled in front of Muddy Waters. The Center's local property manager, Joe Fabie of Avison Young, was notified of the problem by text message and/or phone on August 2, 2017 and arranged for the grinder pump pit or lift station to be pumped while he was awaiting troubleshooting and repairs by a local plumbing contractor. Both CURE and Muddy Waters remained open, and the grinder pump issue was resolved.

On or about August 14, 2017, Mr. Verner reported to Mr. Fabie for the first time that a mold condition had developed along an exterior wall on the Maybank Highway side of the

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Leased Premises. Months earlier in March of 2017, Maybank Holding's hired a mold remediation contractor, 911 Restoration, to address a mold condition within the Leased Premises. Neither the presence of mold nor the remediation by 911 Restoration were reported to the Center. In response to Mr. Fabie's inquiry regarding the duration of the water intrusion condition, Mr. Verner responded as follows: "We already replaced the wood panels once after the hurricane last year. Anytime heavy rain happens or high condensation the walls get worse." Exhibit P.

After learning of the mold/water intrusion in mid-August, the Center arranged for the inspection and repair of any water intrusion issues causing mold. However, Hurricane Irma arrived September 11, 2017, complicating the repair efforts. All repairs were completed on or about October 26, 2017.

I. Maybank Holding's Failure to Surrender the Leased Premises

On September 25, 2017, Plaintiff listed the restaurant for sale with National Restaurant Properties for $499,000.00. Exhibit Q. On that date, Mr. Tuorto emailed Mr. Verner and Mr. Hagar, the listing broker, "Tim go forward aggressively." Exhibit R.

Plaintiff's August 23, 2017 check representing payment of the September 2017 rent, bounced. Plaintiff paid September rent on October 10, 2017. October rent was never paid, and, on October 11, 2017, the Center delivered notice of default for failure to pay rent to Maybank Holding's by certified mail addressed to Maybank Holding's, LLC c/o Richard Tuorto, 53 Country Club Drive, Charleston, SC 29412, as the Notice provisions of the Lease require. On October 20, 2017, the Center delivered a second notice of default reiterating the unpaid rent and advising that the cessation of business constituted a second default by Plaintiff. CURE did not reopen and Plaintiff continued to market the restaurant for sale without paying rent.

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Plaintiff sued the Center on November 29, 2017 for (1) Breach of Lease, (2) Trespass and Nuisance, and (3) Constructive Eviction while maintaining possession and continuing to market the restaurant for sale. Plaintiff refused to vacate the Leased Premises and return possession of the premises to the Center. In August of 2018, Plaintiff amended its Complaint to add various fraud causes of action, a SCUTPA claim, and a claim for unjust enrichment/restitution. The Center, in turn, has filed counter claims for (1) Breach of Contract, (2) Ejectment, and (3) Foreclosure of Contractual Lien and Security Interest.

The Center also filed an ejectment action in Magistrate's Court. Plaintiff opposed the Center's efforts to regain possession of the Leased Premises in both the Magistrate's Court and in the Court of Common Pleas based upon jurisdictional or venue grounds. Plaintiff continued to refuse to surrender the Leased Premises through September of 2018, until this Court ordered on September 19, 2018 that it pay all back rent on or before September 30, 2018, and pay future rent as required under the present Lease. Exhibit S. Plaintiff disregarded this Court's order, paid no back rent, and ultimately turned over the keys to the Leased Premises on or about October 9, 2018.

Following extensive discovery, the Center timely filed three (3) motions for summary judgment on June 30, 2021. Argument was presented before me on November 22, 2021. The Court has considered the record, the parties' respective memoranda, attachments and exhibits, written objections and rebuttals to objections, and considered the oral arguments of counsel and the applicable law. The matter is now ripe for disposition.

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<u>LEGAL STANDARD</u>

A. Summary Judgment Standard

Rule 56(c) of the South Carolina Rules of Civil Procedure provides for judgment as a matter of law where "there is no genuine issue as to any material fact." "A party against whom a claim, counterclaim, or cross-claim is asserted, or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Rule 56(b), SCRCP. Summary judgment is appropriate when "the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRP. "'The purpose of summary judgment is to expedite disposition of cases [that] do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (S.C. 2001).

B. Fraud Standard.

"Fraud will not be presumed, but who alleges it must prove it." *Shorb v. Shorb*, 372 S.C. 623, 633, 643 S.E.2d 124, 129 (S.C. Ct. App. 2007). It must be proved by clear, cogent, and convincing evidence. *Beneficial Fin. I, Inc. v. Windham*, 431 S.C. 256, 271, 847 S.E.2d 793, 801 (Ct. App. 2020). It is hornbook law that one who has actual notice of a material fact cannot later claim he was defrauded where he took no action to investigate further. *See generally King v. Oxford,* 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) ("It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests."); *Mobley v. Quattlebaum,* 101 S.C. 221, 85 S.E. 585 (1915) (A party must avail himself of the knowledge or means of knowledge open to him); *J.B. Colt Company v. Britt,* 129 S.C. 226, 123

S.E. 845 (1924) ("The court will not protect the person who, with full opportunity to do so, will not protect himself.").

To prove fraud, a plaintiff must allege and prove nine (9) elements by clear, cogent, and convincing evidence: (1) a representation of fact, (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. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (S.C. 2010). Failure to allege or prove any of the nine (9) elements is fatal to a plaintiff's fraud cause of action. *Id*.

Here, Plaintiff has failed to allege the eight (8th) element requiring proof of its right to rely upon the Center's alleged misrepresentation. For that reason alone, the fraud claims fail. Even if that allegation was alleged by Plaintiff, the clear, cogent, and convincing evidence does not prove fraud. Instead, it disproves Plaintiff's fraud claims.

ANALYSIS

The Center has moved for summary judgment as to every cause of action asserted by Maybank Holding's but breach of lease. For the reasons set forth herein, I hereby GRANT the Center's motion with regard to Maybank Holding's claims for (1) Breach of Lease Accompanied by Fraudulent Act, (2) Fraud, and (3) Fraud in the Inducement. I DENY the Center's motion with regard to Plaintiff's claims for (4) Negligent Misrepresentation, (5) Trespass, and (6) Unjust Enrichment/Restitution.

I. The Center is entitled to summary judgment as to Maybank Holding's fraud causes of action.

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Plaintiff has sued the Center for three (3) fraud causes of action, namely (1) Breach of Lease Accompanied by Fraudulent Act, (2) Fraud, and (3) Fraud in the Inducement. Plaintiff contends that the Center falsely represented or concealed that (1) the right to renew under the Original Lease had not been timely exercised, (2) the sewer system and the grinder pumps that serviced the premises were not defective, (3) the renovation to the anchor tenant grocery store would have a "minimal" impact on CURE, and (4) the premises were appropriate for a fine dining restaurant. (Maybank Holding's Mem. in Opp. at 21).

The common element required in order for Plaintiff to prove its causes of action for Breach of Contract Accompanied by Fraudulent Act,[3] Fraud,[4] and Fraud in the Inducement[5] is the existence of some sort of material misrepresentation, fraudulent act, or deceptive practice on the part of the Center, which must be proved by clear, cogent, and convincing evidence. *Beneficial Fin. I, Inc.*, 431 S.C. at 271, 847 S.E.2d at 801. Taking each of Plaintiff's allegations in turn, I find that Plaintiff cannot, as a matter of law, sustain its various fraud causes of action, because there is no evidence that there was any material misrepresentation, fraudulent act, or deceptive practice by the Center. Accordingly, I GRANT the Center's motion for summary judgment with respect to Maybank Holding's claims for (1) Breach of Contract Accompanied by Fraudulent Act, (2) Fraud, and (3) Fraud in the Inducement.

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[3] To recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) the contract was breached; (2) the breach was accomplished with a fraudulent intention; and (3) the breach was accompanied by a *fraudulent act*. *Minter v. GOCT, Inc*, 322 S.C. 525, 529–30, 473 S.E.2d 67, 70 (S.C. Ct. App. 1996).

[4] To establish a cause of action for fraud, the following elements must be proven by clear, cogent, and convincing evidence: (1) a representation of fact, (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. *Austin*, 387 S.C. at 50, 691 S.E.2d at 149.

[5] In order to establish a claim of fraud in the inducement, a party must prove, among other nine elements of the tort: (1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him. *See Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 36, 694 S.E.2d 43, 45 (S.C. Ct. App. 2010), *aff'd,* 395 S.C. 492, 719 S.E.2d 656 (S.C. 2011).

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A. The Center's representation that Maybank Holding's failed to timely exercise its right to extend the Original Lease was neither false nor fraudulent.

In its Memorandum in Opposition to the Center's Motions for Summary Judgment, Plaintiff raised—for the first time—the argument that the Center falsely represented that Plaintiff had missed the lease renewal deadline in order to induce it into entering the present Lease. (Maybank Holding's Mem. in Opp. at 25). The gravamen of this argument is that, prior to assigning the Original Lease to Plaintiff, Mr. Walker had exercised his first renewal option for an additional five (5) years. (Maybank Holding's Mem. in Opp. at 25). Plaintiff contends that this extension was included in the assignment to Plaintiff thus extending its lease renewal deadline by (5) years. (Maybank Holding's Mem. in Opp. at 25). Plaintiff contends that the Center fraudulently misrepresented that it had missed the lease renewal deadline and that the Original Lease remains in full force and effect. (Maybank Holding's Mem. in Opp. at 47). This contention omits uncontroverted evidence establishing that Plaintiff had been provided documentation discussing Mr. Walker's five (5) year renewal; that Plaintiff's proposed Second Lease Assignment included an initial lease term expiration of June 30, 2019; that the Lease Modification Agreement executed by Mr. Walker, Plaintiff and the Center expressly states that the initial lease term expires on April 14, 2016; and that Mr. Verner asked Mr. Hagar to "learn me something here," asking why the agreement submitted by Mr. Miller "has 4/14/16 as the expiration of the initial term. The lease clearly states the initial term ended 6/16/14".

In support of its argument, Plaintiff directs the Court to a string of emails between Mr. Walker, the Center's leasing agent, and Beatty Management Company's then-president, John Beatty, which it claims constituted an exercise of the first of the three (3) options to extend the lease term by five (5) years. (Maybank Holding's Mem. in Opp. at 25). Plaintiff claims that this extended lease term was then incorporated into the Lease Modification Agreement. (Maybank

Holding's Mem. in Opp. at 25). Plaintiff alleges that, despite knowing all of this, the Center falsely represented fifteen (15) months after the execution of the Lease Modification Agreement that Plaintiff had missed the lease renewal deadline in order to induce it into the new, less favorable present Lease. (Maybank Holding's Mem. in Opp. at 25).

Viewing the evidence in the light most favorable to Maybank Holding's, the Court finds that there is no dispute of material fact and that Plaintiff cannot prove its claim that the Center fraudulently misrepresented that Maybank Holding's missed the deadline to exercise its right to renew the Original Lease.

First, the question of whether Mr. Walker exercised his options under the Original Lease is irrelevant to whether Plaintiff missed the deadline to renew the Original Lease. As part of the assignment, the Original Lease was amended by the Lease Modification Agreement, which expressly states that in the event and to the extent that there is a conflict between the terms of Original Lease and Lease Modification Agreement, the terms of the Lease Modification Agreement shall control. In advancing its position, Plaintiff asks the Court to either ignore, disregard, or reinterpret the terms of the Lease Modification Agreement. Plaintiff had more than fourteen (14) months to exercise the first lease renewal based upon the mutually agreed termination date, which obviously was negotiated, because the document submitted by Mr. Verner to the Center contained an initial expiration date of June 30, 2019.

Plaintiff states that, if Mr. Walker executed his option to extend the lease term, then the extended lease term was incorporated into the Lease Modification Agreement because the Agreement "provided for the assignment of 'all of Assignor's right, title, interest, and claims in the Lease.'" (Maybank Holding's Mem. in Opp. at 33). This argument fails for two reasons. First, it ignores the terms of the Lease Modification Agreement, and second, it disregards

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Plaintiff's role in negotiating and agreeing to the terms it now claims that the Center fraudulently misrepresented.

The Court cannot disregard the clear, unequivocal terms of the the Lease Modification Agreement: "As used in this Agreement, the term 'Lease' shall mean the 'Lease' *as modified hereby*; unless context expressly requires it to mean the Original Lease and/or the First Assignment[.]" Exhibit K (emphasis added). Furthermore, the Lease Modification Agreement expressly states that "[i]n the event of an express conflict between the terms and conditions of this Amendment and the remainder of the Lease, this Amendment shall control." Exhibit K. Thus, even if Mr. Walker had exercised his option to extend the lease term, the controlling lease term, for purposes of Plaintiff's tenancy, became the lease term expressed in the Lease Modification Agreement, as the Lease being assigned by one party and assumed by the other is the Original Lease as modified by the Lease Modification Agreement,

Thus, the question of whether Mr. Walker exercised his option to extend the lease term is not material to the question of whether Plaintiff missed the deadline to renew the Original Lease since both the lease term and the deadline for exercising the option to renew the Original Lease are controlled by the Lease Modification Agreement. As such, Mr. Walker's discussions, negotiations, or communications with the Center are immaterial to interpreting Plaintiff's compliance with the renewal terms of the Lease Modification Agreement. The lease Mr. Walker assigned and the lease Plaintiff assumed was modified to state unequivocally that April 14, 2016, was the expiration date for the initial term, rather than the June 30, 2019 expiration date proposed by Plaintiff in its draft assignment submitted to the Center three (3) weeks prior to closing.

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Plaintiff cannot now claim that the Center committed fraud in order to escape the consequences of its own failure to comply with a contractual provision it accepted. A review of the record before me illustrates that the Lease Modification Agreement's April 14, 2016 deadline was explicitly contemplated and negotiated by the parties. In its proposed first draft of the Lease Modification Agreement, Plaintiff proposed that the lease term expire on June 30, 2019. Exhibit G. The Center rejected this modification leading Mr. Verner to inquire of Mr. Walker's broker as to why the Center "has 4/14/16 as the expiration of the initial term" and asking if Mr. Walker, the Center, or its agents had an agreement "explaining all of this?" Exhibit H. Despite this inquiry, Mr. Verner abandoned the issue of the lease expiration date and the remainder of his negotiations over the next two (2) days focused upon (1) the nature of CURE's rent following the Harris Teeter opening, (2) the removal and replacement of the term "tapas" in the Lease Modification Agreement, and (3) the inclusion of a fourth (4th) five (5) year option. Exhibit J. In his deposition, Mr. Verner agreed that Plaintiff failed to comply with the terms of Lease Modification Agreement:

> **Q.** So the lease clearly states that 180 days prior to April 14th, 2016, you-all were required to give written notice to the landlord of your intent to renew or the option was of no effect, right?
>
> **MR. NOVAK:** Objection.
>
> **A.** Right.
>
> **Q.** Whose job was it to know that and make sure it was complied with? Was that yours?
>
> **A.** There's no set job requirements amongst the partnership. I just -- it just didn't happen.

(Verner Dep. 117:13–24). Ultimately, he conceded that it was not the Center's fault that Plaintiff failed to renew the Original Lease:

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Q. And it wasn't my client's fault that you-all failed to read your existing lease and the assignment itself which says that the initial term of the lease is to set to expire on April 14th, 2016. You-all thought it was June of 2016, didn't you?

MR. NOVAK: Objection.

A. What I understood was not, in fact, the case.

(Verner Dep. 115:14–22).

Thus, the Court finds that the question of whether Mr. Walker exercised his option to extend the lease term prior to the execution of the Lease Modification Agreement is not material. Plaintiff missed the deadline to renew the Original Lease. Both the lease term and the deadline for exercising the option to renew the Original Lease are governed by the Lease Modification Agreement specifically negotiated and agreed to by Plaintiff. As such, Mr. Walker's discussions, negotiations, or communications with the Center are irrelevant to deciding whether the Center fraudulently represented that Plaintiff failed to timely exercise its right to renew the Original Lease.

Pursuant to the terms of the Lease Modification Agreement, Plaintiff was required to give the Center notice of its election to extend the Original Lease no less than one hundred eighty (180) days before the expiration of the lease term. Exhibit K. The lease term expired on April 14, 2016. Exhibit K. October 17, 2015 is one hundred and eighty (180) days before April 14, 2016, making it the deadline for Plaintiff to exercise its renewal option. There is no dispute of material fact that Plaintiff failed to give notice on or before this date and therefore missed the deadline. I find that the Center's representations that Plaintiff failed to timely exercise its renewal option were neither false nor fraudulent. Instead, the expiration date of the lease was negotiated and agreed upon in writing by Plaintiff.

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B. The Center did not fraudulently conceal any known issue with the Leased Premises.

The crux of Plaintiff's fraud claims rests on the allegation that it was fraudulently induced into entering both the Lease Modification Agreement and the 2016 Lease with the Center, because the Center "failed to disclose, and, in fact, concealed long-known defects in the Leased Premises, including defects that cause raw sewage to flow into the Leased Premises and common areas of the shopping center." (Pltf's Am. Cmpl. ¶ 12). Plaintiff further alleges that it "discovered latent defects that cause water damage to the Leased Premises and mold growth within the Leased Premises[.]" (Pltf's Am. Cmpl. ¶ 21). In fact, Plaintiff makes some form of these allegations no less than twenty-five (25) times in its Amended Complaint. The record before me establishes that the Center did not conceal any defects within the Leased Premises, because (1) Plaintiff was advised on numerous occasions of the 2012 grinder pump issue prior to entering the Lease Modification Agreement and the present Lease; (2) there was nothing for the Center to conceal, because no plumbing issues arose between the date Plaintiff assumed Mr. Walker's Lease and the August 2017 incident, three (3) years after Plaintiff assumed the Lease, and (3) there is no evidence establishing the existence of mold prior to Plaintiff's assumption of Mr. Walker's lease or entering into the present Lease. Accordingly, I find that there is no dispute of material fact and that the Center did not conceal any defects in the Leased Premises to Maybank Holding's.

In fact, the record before me establishes quite the opposite. First, there is no evidence that the 2012 sewer incident was concealed from Plaintiff, because it knew about the incident. The Center did not and could not conceal any mold issue with the Leased Premises, because there is no evidence to establish the existence of mold in the space prior to October 8, 2016, after the execution of both the Lease Modification Agreement and the present Lease. It is axiomatic that

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one cannot conceal a defect or condition which does not exist. Accordingly, I find that the Center is entitled to summary judgment, because there is no dispute of material fact establishing that it failed to disclose any known issue with the Leased Premises.

<u>*i.*</u> <u>*Maybank Holding's cannot sustain its fraud claims, because it was advised of Mr. Walker's grinder pump problems on numerous occasions prior to its assumption of the Lease.*</u>

In the light most favorable to Plaintiff, Mr. Walker and Mr. Miller informed it that the grinder pumps had been repaired and that there was maintenance contract in place. There is no evidence that either of those representations was false. Nor is there evidence of concealment of defects in the grinder pumps. I find that there is no dispute of material fact and that Plaintiff cannot prove those claims, because the record before me conclusively establishes that Plaintiff was informed on numerous occasions of Mr. Walker's 2012 sewer incident. Thus, there was neither a fraudulent representation nor concealment on the part of the Center. Even assuming there was, the record establishes that Plaintiff could not be ignorant of the truth.

There is no dispute of material fact that the 2012 sewer issue was not concealed but, rather, disclosed to Plaintiff. According to the Affidavit of Mr. Walker, he "had 4–5 conversations with Mr. Tuorto and explained to him in detail the issues [he] had with the sewage grinder pumps in 2012" prior to entering the Lease Modification Agreement. <u>Exhibit E</u>.

The record illustrates that Mr. Walker's testimony is supported by Mr. Tuorto's own testimony. When reviewing the statements within Mr. Walker's Affidavit during his deposition, Mr. Tuorto testified as follows:

Q. Prior to the August 1st, 2014, assignment I had four to five conversations with Mr. Tuorto and explained to him in detail the issues I had with the sewer grinder pumps in 2012. Do you deny that happened?

A. No.

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> **Q.** And these conversations occurred in the four months preceding the assignment period. During those discussions I explained to him in detail the actions we had taken to prevent a recurrence of the sewer backup problems that we experienced in 2012. Is that true?
>
> **A.** Yes.

(Tuorto Dep. 88:4–16).

Mr. Walker, however, did more than just tell Mr. Tuorto about the sewage back up issue. He testified that he met with Mr. Tuorto and representatives of the Center on-site at the Leased Premises prior to negotiating the Lease Modification Agreement in 2014 in order to discuss both the assignment and "the issues with the sewage grinder pumps in 2012." Exhibit E. Mr. Tuorto testified that this meeting occurred as described by Mr. Walker. (Tuorto Dep. at 88:17–89:8).

The record reflects that Mr. Walker provided further information to Mr. Tuorto and met him at the Leased Premises prior to the lease assignment in order to walk him through the sewage grinder pump system. He testified:

> I pointed out the location of the sewage grinder pumps and the warning lights and siren that indicate that the grinder pumps have failed. I further informed him that I believed that the sewage backup issued could be a problem in the future if he did not keep his eye on the grinder pumps.

Exhibit E. Again, Mr. Tuorto testified that Mr. Walker's recollection of the meeting was true. (Tuorto Dep. 89:22).

Finally, the record before me indicates that, in order to fully disclose the existence of the prior sewage issue to Plaintiff, Mr. Walker provided to Mr. Tuorto with string of emails between the Center's former property manager and himself spanning the period from September 1, 2012 through November 20, 2012. Exhibit E. This was done three (3) separate times from 2014–2017: first, prior to the signing of the Lease Modification Agreement; second, while the parties were negotiating the present Lease, and third, after the 2017 sewer incident. Exhibit F. Although Mr.

Tuorto does not recall getting the emails, he does not dispute Mr. Walker's testimony. (Tuorto Dep. 90:13; 92:24–93:2). He also confirmed the email address, rtuorto@O'brions.com, was the address on his business card. (Tuorto Dep. 93:23 – 94:10).

Mr. Tuorto is Plaintiff's majority owner. As such, I find that his knowledge is imputed to Plaintiff. *See generally Equitable Trust Co. of Columbia v. Columbia Nat'l Bank,* 145 S.C. 91, 115, 142 S.E. 811, 817 (S.C. 1928). Therefore, I find uncontroverted evidence establishes that Plaintiff had actual knowledge of the 2012 grinder pump incident and other sewer issues which it alleges the Center fraudulently misrepresented and concealed. Plaintiff was free to request any information, records, or documents to determine whatever information it believed to be material. There is no evidence to establish that it requested any such information. The testimony of Plaintiff other partners, namely Mr. Verner, Mr. Hibbits, and Mr. Frierson confirms that it was on notice of past, serious sewer backups and did nothing to investigate further. *See King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) ("It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests."); *Mobley v. Quattlebaum*, 101 S.C. 221, 85 S.E. 585 (1915) (A party must avail himself of the knowledge or means of knowledge open to him); *J.B. Colt Company v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924) ("The court will not protect the person who, with full opportunity to do so, will not protect himself.").

Mr. Verner testified as follows regarding Plaintiff's allegations that the Center fraudulently concealed the sewer issue:

Q. Your group is suing my client for fraud.

A. Sure.

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Q. And that's a pretty strong allegation. And what you're claiming essentially is that we knew that this condition existed and we didn't tell you-all about it. Are you aware that you-all are alleging that?

A. I am.

Q. And that's not true, is it? We did tell you-all that this had happened with Rob Walker and Rob Walker told you-all about that, didn't he?

A. He did.

Q. Yeah. And he showed you where it happened, right?

A. Correct.

Q. Yeah. So we didn't hide any of that information regarding our experience or Rob Walker's experience in 2012 from you-all to entice you-all into entering into the lease assumption, did we?

MR. NOVAK: Objection.

A. No.

(Verner Dep. 90:12–91:9). Mr. Verner further conceded that the allegedly concealed defects were, in fact, the very same issues disclosed by Mr. Walker:

Q. Paragraph 20 of the Complaint, Exhibit 1, Amended Complaint, says, In August 2017, plaintiff discovered that defendant had concealed the long-known defects in the leased premises, including the grinder pump servicing the shopping center fail and cause raw sewage to flow into the leased premises and shopping center common areas when raw sewage began backing up into the restaurant's drains and the shopping center common elements.
That's the same issue we've been talking about, right?

A. Yes.

Q. It's the same information that Rob Walker had given you-all, right? Right?

A. The broad strokes, yes.

Q. Right. Well, did -- you-all had every opportunity to ask him any detail you wanted about how that happened, what had happened, how long it lasted, everything, right?

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A.	Yes.

(Verner Dep. 96:12–97:6).

Like Mr. Tuorto and Mr. Verner, Mr. Hibbits similarly had no evidence to support Plaintiff's claims that the Center fraudulently misrepresented or concealed any sewer issues:

> **Q.** Now, let's go to the sewer issue, and that's going to take a while. What have you seen in connection with this lawsuit that leads you to believe that my client failed to disclose known problems with the sewer system?
>
> **A.** Nothing from -- you know, nothing but --again, between -- from your client or to Heath. I don't have any knowledge of that other than what has been shared during the course of this suit and other than my day -- the time I spent with Mr. Warren on-site.

(Hibbits Dep. 56:21–57:6).

Plaintiff's fourth and final partner and sole member is Mr. Frierson. He testified that he had no knowledge of any fraudulent misrepresentation or concealment on the part of the Center:

> **Q**. And do you have any evidence to offer to prove that my client failed to disclose and, in fact, concealed long-known defects of any type in the leased premise?
>
> **A**. I wasn't involved with that. So, no, sir, I do not.
>
> **Q**. Are you aware that your company, Maybank Holding's, LLC, is suing my client for fraud?
>
> **A**. Yes, sir.

(Frierson Dep. 45:16–23).

The record before me conclusively indicates that Plaintiff knew of the 2012 sewer incident and prior grinder pump issues. Accordingly, there is no dispute of material fact to establish that the Center fraudulently misrepresented or concealed any sewer or grinder pump failures as alleged by Plaintiff.

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ii. *Maybank Holding's cannot sustain its fraud causes of action, because it has admitted that there were neither latent defects nor evidence of any sewer issues between September of 2012 and August of 2017.*

As illustrated above, Plaintiff had knowledge of the alleged defects. Maybank Holding's describes these alleged defects as both "long-known" and "latent." (Pltf's Am. Cmpl. ¶12; ¶ 21). However, the record before me reflects that the Center repaired the sewer system following the 2012 incident and that there was no other sewer related issue until five (5) years later in 2017. A problem which did not reoccur for five (5) years certainly cannot be something which requires disclosure as it is not capable of being known until and unless it recurs. Mr. Walker warned Mr. Tuorto to watch the system closely, because if it happened again, he would never forget it. A known and disclosed condition is not, by definition a "latent" condition.

Again, the Court looks to the testimony of Plaintiff's Partners. First, Mr. Tuorto, acknowledge that he did not have any evidence to support Plaintiff's claims that the Center knew of a long-term, latent sewer defect:

> **Q.** Oh, God. Do you have any evidence to offer here today that my client ever knew that there was any sewer problem at CURE's location –
>
> **A.** I –
>
> **Q.** Hold on -- between August 1st, 2014, and August 2nd, 2017?
>
> **A.** I personally do not know that.

(Tuorto Dep. 127:10–16).

Similarly, Mr. Verner, testified that there were only two sewer incidents. The first in 2012 when Mr. Walker was the tenant, which was repaired by the Center, and the second, separate incident five (5) years later. Mr. Verner testified:

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Q. Are you aware of any -- can you offer any testimony here today to establish that that situation occurred between September 1st, 2012, when Mr. Walker experienced it on that -- during that occasion –

A. Right.

Q. -- and the time you-all assumed the lease on August 1st of 2014?

A. I'm not aware.

Q. I'm not either, and if you had any information in that regard, I just wanted to know.

A. That's fine.

Q. Are you aware, after August 1st, 2014, of that condition ever occurring between the time you-all assumed the lease and the occasion that led to this lawsuit, which was late July/early August of 2017?

A. I'm not aware, Ed.

Q. Okay. Essentially what I've seen is there was an episode in 2012 and an episode in 2017. Is that your knowledge as well?

A. Yes.

(Verner Dep. 89:4–90:1). Mr. Verner further agreed with the following:

Q. But the bottom line is, nothing happened between the time you-all assumed the lease in August of 2014 and July -- late July, early August of 2017 to where it was brought to your attention that the sewer was backing up, right?

MR. NOVAK: Objection.

A. Yes.

(Verner Dep. 89:4–90:1).

Finally, Mr. Frierson testified that he had no evidence that the alleged defect was anything more than two separate incidents:

Q. Do you have any evidence to offer to indicate that it ever occurred prior to July 29th, 2017?

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A. Besides the issues that Mr. Walker had?

Q. Yeah. That's right. That's right.

A. I personally don't have any other evidence, no, sir. Not me personally.

(Frierson Dep. 74:2–8).

The record before me establishes that there was a sewer backup issue in 2012, which the Center repaired, and that there was a separate sewer incident five (5) years later in 2017. The testimony of Plaintiff's Partners establishes that these were two separate and distinct events, and not the continuing, latent defect as alleged. Accordingly, I find that the Center is entitled to summary judgment, because there is no dispute of material fact that, following the Center's 2012 repair of the grinder pump, there was not a known or latent sewer or grinder pump defect for the Center to fraudulently misrepresent or conceal.

iii. *There is no evidence that the Center misrepresented, concealed, or failed to disclose the existence of mold at any time before Maybank Holding's signed the Lease Modification Agreement or at any time prior to entering a new lease in 2016, because mold did not exist.*

Plaintiff alleges that the Center fraudulently concealed or failed to disclose latent defects which caused mold to grow within the Leased Premises. (Pltf's Am. Cmpl. ¶ 43). However, the record before me is devoid of any evidence that the Center was aware of any mold issues prior to 2017, after Plaintiff had occupied the property for three (3) years. Emails and other documents between Mr. Verner and Mr. Fabie establish that Hurricane Matthew caused water intrusion, that Plaintiff made repairs and hired a mold remediation contractor, that Plaintiff continued to experience moisture issues, and that Plaintiff never informed the Center of that condition until nearly a year later in Mid-August of 2017. Accordingly, I find that the Center is entitled to summary judgment as to Plaintiff's various fraud allegations relating to the concealment and nondisclosure of mold because, the uncontroverted evidence establishes that there was no mold

or water intrusion prior to October 8, 2016, when Hurricane Matthew arrived. Because no mold or water intrusion existed prior to Plaintiff entering into the Lease Modification Agreement or the present Lease, there was nothing to disclose or conceal.

Mr. Tuorto testified that he had no evidence that the Leased Premises ever experienced mold prior to Plaintiff's assumption of the lease:

> **Q.** Do you have any evidence to offer here today that my client ever experienced any mold contamination prior to -- at that location, the CURE Restaurant space, prior to October -- August 1st, 2014?
>
> **A.** Not me personally.

(Tuorto Dep. 81:16–21). He further affirmed that the Leased Premises had not experienced any mold issues prior to the Maybank Holding's tenancy:

> **Q.** I have already done that. You don't have any testimony that you can offer that my client had ever experienced mold prior to you-all occupying the property, right?
>
> **A.** No, I do not.

(Tuorto Dep. 82:8–12).

Similarly, Mr. Verner testified that he too had no evidence that there had been any mold issue prior to the Maybank Holding's tenancy:

> **Q.** So prior to August of 2017, did you know that there had been a problem with mold at any time prior to that while you-all were in the property?
>
> **A.** I didn't, no.
>
> **Q.** Has anybody ever told you since that there was a problem, prior to your learning of it in August of '17?
>
> **A.** No.
>
> **Q.** Do you have any evidence to indicate –
>
> **A.** Can you –

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Q. -- that my client was aware of any mold condition in the property prior to you notifying Mr. Fabie about it?

A. I don't know.

(Verner Dep. 197:2–16). Mr. Verner further testified that he had no evidence indicating that the Center concealed any alleged mold condition:

Q. Okay. You don't have any evidence to indicate that my client hid or concealed from Maybank Holding's a known defect that was continuing to contaminate the property with mold?

A. I don't have any evidence of that.

Q. Have any of your partners ever told you they have any evidence of that?

A. Not that I'm aware of.

(Verner Dep. 198:10–13).

Mr. Hibbits testified that he too had no evidence establishing that the Center concealed the alleged mold issue:

Q. So you have no evidence to offer here today to establish that my client in any way failed to disclose mold contamination in the property before you-all agreed to assume the lease, correct?

MR. NOVAK: Objection. You can answer.

A. No. I don't.

(Hibbits Dep. 56:13–20).

Finally, Mr. Frierson testified that he, like his other three (3) Partners, also had no evidence indicating that there was a mold issue prior to Maybank Holding's tenancy:

Q. Do you have any evidence to indicate that there was ever any mold issue at the property where CURE was located, the leased premises where CURE was operating? Do you have any evidence that there was ever any condition leading to mold formation inside the restaurant prior to August of 2017?

A. I personally do not.

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Q. Do you have any evidence to indicate that my client was aware of any mold in the restaurant prior to August of 2017 when it was reported to my client by you-all?

A. I personally do not.

(Frierson Dep. 47:3–15).

Maybank Holding's has failed to produce any evidence supporting its allegations that the Center fraudulently concealed and failed to disclose a mold issue, because the record before me conclusively establishes that there was not a mold issue prior to Maybank Holding's tenancy. Therefore, I find that the Center is entitled to summary judgment as to Maybank Holding's various fraud causes of action pertaining to defects causing mold contamination.

C. The Center's representation that the Harris Teeter upfit would have a "minimal" impact does not establish a claim for fraud.

In its Memorandum, Plaintiff asserts that there is a question of fact as to whether the Center falsely represented that construction of the Harris Teeter would have a *minimal* impact on the operation of CURE. (Pltf's Mem. in Opp. at 28). Plaintiff alleges that this representation was made to induce Maybank Holding's to assume Mr. Walker's lease. Assuming that representation was made, such a statement regarding a future event cannot, as a matter of law, form the basis for a claim of fraud. *Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Ct. App. 1984).

Plaintiff cannot prove that the representation regarding future conditions at the Shopping Center was material, as Mr. Verner has testified that he had no idea what "minimal" means, either then or now. As a matter of law, such a statement cannot have been material.

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The allegedly fraudulent representation was made by the Center's then-leasing agent, Ms. Joyce Beach, to Mr. Verner. Accordingly, the Court looks to Mr. Verner's testimony to evaluate what the Center's representation that the impact would be "minimal" meant to Maybank Holding's:

Q. Well, you're making a big deal about the fact that my client supposedly told you, or somebody on behalf of my client supposedly told you that they were going to do all the staging for this renovation that was going to involve tearing the entire Piggly Wiggly building apart and completely rebuilding it and going vertical and doing the entire facade over on the -- redoing the entire facade on the entire shopping center and that they told you they were going to stage for that and not use any of the parking lot for that purpose. Is that what they told you?

A. That was my understanding, yes.

Q. From what?

A. From conversations with the property management entity that we were dealing with.

Q. With whom?

A. It started with Joyce Beach.

Q. What did Joyce Beach tell you, as best you can recall, about that?

A. That the impact on the parking lot would be minimal.

Q. What does that mean?

A. *I don't know.*

Q. You didn't know then either, did you?

A. *We did not have the understanding that the impact was going to be the extent that it was.*

Q. What does minimal mean back then when you heard that term? What did it mean? You don't have any way to speak to that either, do you?

MR. NOVAK: Objection.

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A. *I don't.*

Q. Did she tell you anything other than the impact to the parking lot would be minimal?

A. *I don't recall.*

Q. Did anybody else tell you anything about what the impact to the parking lot would be other than Ms. Beach?

A. There were conversations with Anne Marie Smallwood, I believe, became involved after Joyce. And when it grew in scope, that was the point of contact.

Q. When what grew in scope?

A. The laydown area, the construction project, the time that it took to complete.

Q. What were you told -- did Joyce Beach tell you anything -- by the time Anne Marie Smallwood came in, you-all were already in -- *you'd already assumed the lease, right?*

A. That is right.

Q. So the only agent, rental agent, or management agent that you ever dealt with prior to entering into the lease was Joyce Beach; isn't that right?

A. Correct. To my recollection.

Q. I think that's the way the timing worked. So what did Ms. Beach tell you, if anything, about the duration -- the beginning and end of the project?

A. *I don't recall specifically.*

Q. Do you recall anything in that regard?

A. It was our understanding that it was not -- it wouldn't take any more than a year.

Q. Okay. Do you know when it began?

A. *I don't. I don't recall.*

Q. Do you know when it ended?

A. *I don't recall those dates. I don't.*

(Verner Dep. 40:2–47:19).

From Mr. Verner's testimony the Court concludes that (1) the alleged misrepresentation concerned a future event, (2) Plaintiff did not know what "minimal" meant, (3) that Plaintiff did not have an understanding of what the impact was going to be, (4) that Plaintiff cannot identify any other representation regarding the Harris Teeter upfit, and (4) that it was Plaintiff's understanding that the up fit would take no more than a year. Plaintiff cannot identify either when the upfit started, nor when it ended. A claim for fraud requires a plaintiff to prove all nine (9) elements by clear, cogent, and convincing evidence. *Beneficial Fin. I, Inc.*, 431 S.C. at 271, 847 S.E.2d at 801. Here, Plaintiff states that the Center fraudulently misrepresented that the Harris Teeter up fit would have a minimal impact, yet Plaintiff cannot identify what it understood "minimal" to be. Plaintiff cannot prove that such a statement meets any of the following fraud elements: (1) a representation of present or preexisting fact, (2) its falsity, (3) its materiality, and (4) either knowledge of its falsity or a reckless disregard of its truth or falsity. Failure to prove any one of those elements is fatal to Plaintiff's fraud claim. *Austin*, 387 S.C. at 50, 691 S.E.2d at 149. Therefore, I find the Center is entitled to summary judgment as to any alleged fraudulent misrepresentation regarding the Harris Teeter upfit.

Furthermore, I find that the representation that the impact of the Harris Teeter up fit would be "minimal" cannot form a basis for fraud. An actionable fraud case requires there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that a deal would be satisfactory. *See Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 526-27, 455 S.E.2d 183, 187 (S.C. Ct. App. 1995). More specifically, "the fraudulent representation must relate to a present or pre-existing fact and it

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cannot ordinarily be based upon an unfulfilled promise to perform in the future or *statements as to future events*." *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) *(*quoting *Emerson*, 283 S.C. at 296, 321 S.E.2d at 631. Here, there is no dispute of material fact that the representation that the up fit would have a "minimal impact" is nothing more than a statement as to anticipated future events. On April 6, 2016, Mr. Verner executed a Tenant Estoppel Certificate for Bank of North Carolina in which he swore under oath that the Center had fully performed its obligations under the Lease. At that time, the Harris Teeter up fit had been completed approximately six (6) months earlier, yet Mr. Verner did not object to the Estoppel presented to him by the Center's mortgage lender.

D. The Center's representation that the Leased Premises were suitable for a "fine dining restaurant" is an unfulfilled promises or statement as to future events, which cannot, as a matter of law, be a basis for fraud.

The last of Plaintiff's fraud allegations asserts that the Center "falsely represented to Plaintiff that the subject premises were suitable for the operation of a fine dining restaurant and that Defendant would maintain the Leased Premises in a condition suitable for Plaintiff's intended use of the Premises." (Pltf's Am. Cmpl. ¶ 49; ¶ 56; and ¶ 64). I find that the Center is entitled to summary judgment as to this claim, because any alleged representation regarding the suitability of the Leased Premises for a fine dining restaurant constitutes, at most, an unfulfilled promise or statement as to future events, which is not an actionable basis for fraud under South Carolina law. Further, the Lease Modification Agreement was revised at Plaintiff's request, to provide that the only permissible use of the premises was a "traditional restaurant and bar."

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As noted *infra*, in order to maintain an actionable fraud claim, the fraudulent misrepresentation cannot be based upon an *unfulfilled promise* to perform in the future or *statements as to future events*. *Emerson*, 283 S.C. at 296, 321 S.E.2d at 631. Further, "[e]vidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform." *Woods v. State*, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993).

Plaintiff claims that the Center fraudulently represented that the Leased Premises would be suitable for a fine dining restaurant. There is no proof this representation was false when made. Plaintiff had the right to rely upon it, because the Leased Premises had never been a fine dining restaurant, and because the Lease Modification Agreement states–at Plaintiff's own request—that the Leased Premises would contain a "traditional restaurant and bar." This representation is nothing more than a representation regarding a future event; the future event being the eventual operation of a restaurant in the Leased Premises. Moreover, Plaintiff's allegation that the Center represented that it would maintain the Leased Premises in a condition suitable for the operation of a fine dining restaurant is nothing more than a promise to perform in the future. This is not a basis for a fraud cause of action, and Plaintiff is pursuing a claim based on the Center's allegedly unfulfilled promises—breach of lease. Accordingly, I find that Plaintiff cannot, as a matter of law, sustain a claim for fraud based on an *unfulfilled promise* to perform in the future or a *statement as to a future event.* As such, the Center is entitled to judgment as a matter of law.

Finally, Plaintiff's claim that the Center fraudulently represented that the Leased Premises were suitable as a fine dining restraint is undermined by the April 6, 2016 Tenant

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Estoppel Certificate executed under oath by Mr. Verner on behalf of Plaintiff. In signing the Estoppel Certificate, Plaintiff attested:

> 12. Landlord has fully performed its obligations of Landlord under the Lease and the Lease is in full force and effect.
>
> 13. Tenant has no offsets or outstanding claims against the Landlord in connection with the Lease. There has occurred no event of default under the Lease nor has there occurred any event which with the passage of time or the giving of notice or both would constitute an event of default.

(Exhibit N). Mr. Verner's signing of the Estoppel Certificate took place one (1) year and eight (8) months after Plaintiff signed the Lease Modification Agreement, over a year after it received its certificate of occupancy, and five (5) months after it finally opened in November of 2015. Plaintiff swore in the Estoppel Certificate that it had no outstanding claims against the Center. That sworn statement necessarily included potential claims that the Center fraudulently represented that the Leased Premises were suitable for a fine dining restraint. After all, Plaintiff had been operating CURE for five (5) months when the Estoppel Certificate was executed.

E. Maybank Holding's has not alleged the eighth element of fraud: that it had a right to rely, nor did it have a right to rely.

All nine (9) elements of fraud must be proved by clear, cogent, and convincing evidence. *Austin*, 387 S.C. at 50, 691 S.E.2d at 149. Failure to allege or prove any of the nine (9) elements is fatal to a plaintiff's fraud cause of action. *Id*. Here, Plaintiff has not alleged the eighth (8th) element of fraud: that it had a right to rely. On this basis alone, summary judgment is proper as to Plaintiff's claim for fraud. Moreover, an examination of the record before me indicates that even if Plaintiff had alleged the requisite eighth (8th) element, summary judgment is proper, because Plaintiff did not, as a matter of law, have a right to rely on any representation made by the Center.

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The right to rely is a necessary element that must be proved in a fraud action." *Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 386-87, 339 S.E.2d 112, 114 (1985). "The absence of this element alone is enough to defeat the claim of fraud." *Id.* Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people or sophisticated entities is involved, there is no right to rely. *See generally Id.* "This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interest." *Id.*; *Thomas v. American Workman,* 197 S.C. 178, 14 S.E.2d 886 (1941); *King v. Oxford,* 282 S.C. 307, 318 S.E.2d 125 (S.C. App. 1984). "One cannot rely upon misstatement of facts, if the truth is easily within his reach." *See Mobley v. Quattlebaum,* 1. 101 S.C. 221, 85 S.E., 585 (S.C. 1915).

Plaintiff and the Center are both highly-sophisticated business entities. During the course of their relationship, both have utilized experienced attorneys and restaurant brokers to negotiate the Lease Modification Agreement and the terms of the Present Lease. Additionally, Plaintiff's partners have extensive experience opening and operating restaurants.

It is indisputable that Plaintiff and the Center did not have a confidential or fiduciary relationship which would give rise to a right to rely. *See Ardis v. Cox,* 314. S.C. 512, 518, 431 S.E.2d 267, 270 (Ct. App. 1993) (upholding trial court finding that purchaser and seller of underground storage tanks did not have a confidential or fiduciary relationship and therefore no right to rely). As such, Plaintiff had the duty to conduct its own investigation of the location, layout and physical condition of the Lease Premises in order to evaluate the potential viability of its restaurant and the meaning and effect of the terms of both the Lease Modification Agreement and the present Lease. "[T]he court [can] not protect the person, who, with full opportunity to do so, will not protect himself". *Poco-Grande Investments v. C & S Family Credit, Inc.*, 301 S.C.

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323, 325, 91 S.E.2d 735, 736 (Ct. App. 1990). Therefore, I find that Plaintiff has failed to allege that it had a right to rely on any representation made by the Center and cannot prove, as a matter of law, that it had a right to rely.

Here, Maybank Holding's various fraud claims share the common element of requiring a fraudulent act. Based on my review of the record, I find that Maybank Holding's cannot sustain its fraud causes of action, because it cannot prove by clear, cogent, and convincing evidence that there was *any* fraudulent act by the Center. The record before me is unequivocal that the Center (1) did not fraudulently misrepresent that Maybank Holding's had timely exercised its right to renewal under the Lease Modification Agreement, (2) did not fraudulently conceal any defects related to the Leased Premise's sewer system and grinder pumps or mold, (3) did not fraudulently induce Maybank Holding's into assuming Mr. Walker's lease by representing that the Harris Teeter upfit would have a "minimal" impact. Finally, any representation that the Leased Premises would be suitable for a fine dining restaurant cannot, as a matter of law, constitute an actionable basis for fraud.

For the reasons set forth herein, I GRANT the Defendant James Island Center's motion for summary judgment with respect to Maybank Holding's claims for (1) Breach of Contract Accompanied by a Fraudulent Act, (2) Fraud, and (3) Fraud in the Inducement.

II. This Court Denies Defendant's Motion for Partial Summary Judgment as to Plaintiff's Causes of Action for Negligent Misrepresentation, Trespass, and Unjust Enrichment and Restitution.

As the court finds there are some genuine issues of material fact, in particular regarding whether Defendant's cancellation of the preventative maintenance agreement resulted in the failure of the grinder pumps, which resulted in sewage flowing onto the restaurant's premises,

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the Court hereby denies Defendant's motion for partial summary judgment as to Plaintiff's claims for negligent misrepresentation, trespass, and unjust enrichment and restitution.

CONCLUSION

For the reasons set forth above, this Court GRANTS partial summary judgment in favor of Defendant James Island Center, LLC, on Plaintiff's causes of action for (1) Breach of Contract Accompanied by a Fraudulent Act, (2) Fraud, and (3) Fraud in the Inducement. However, the Court DENIES Defendant James Island Center, LLC's remaining motions for partial summary judgment, including as to the causes of action for (4) Negligent Misrepresentation; (5) Trespass; (6) Unjust Enrichment; and (7) Restitution and further DENIES Defendant James Island Center, LLC's Motion for Partial Summary Judgment as to Plaintiff's Claim for Damages.

IT IS SO ORDERED.

____
The Honorable Mikell R. Scarborough
Master-In-Equity

Dated: ______________

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Charleston Common Pleas

Case Caption: Maybank Holdings LLC VS James Island Center LLC

Case Number: 2017CP1006111

Type: Order/Other

So Ordered

s/Mikell R. Scarborough 3062