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.)	
)	
JAMES ISLAND CENTER, LLC,)	
)	
Defendant)	
)	
JAMES ISLAND CENTER, LLC,)	
)	
Plaintiff,)	
)	
vs.)	
)	
RICHARD D. TUORTO, CHANDLER FRIERSON, NATALIE MYERS, JOHN R. HIBBITS, JR., and ELIZABETH A. HIBBITS,)	
)	
Defendants.)	

ORDER OF JUDGMENT AGAINST MAYBANK HOLDING'S, LLC, RICHARD D. TUORTO, JR., CHANDLER FRIERSON, NATALIE MYERS n/k/a NATALIE FRIERSON, JOHN HIBBITS, JR. and ELIZABETH A. HIBBITS

This commercial lease dispute came before me for trial on February 23-25, 2022, resumed on April 14–15, 2022, and concluded after two (2) final trial days on May 9 and 10, 2022. Present at trial were M. Dawes Cooke, Jr., Esquire, Justin P. Novak, Esquire, and E. Merritt Farmer, Esquire, as counsel for Plaintiff, and Edward D. Buckley, Esquire, and W. Cole Shannon, Esquire, as counsel for Defendant.

The Plaintiff, Maybank Holding's, LLC ("Maybank") is the tenant under a Lease dated June 1, 2016, (the "Lease") in an outparcel building at James Island Center (the "Center") on Maybank Highway on James Island, South Carolina. The landlord and owner of the premises is

James Island Center, LLC ("JIC"). Maybank leased Space V in the outbuilding (the "Premises"), while Space W has been occupied by Muddy Waters Coffee Shop at all times relevant to this dispute. Maybank operated a restaurant in the premises called CURE until the fall of 2017 when it ceased operations.

Maybank has sued JIC for breach of the lease, contending that the Premises was unsuitable for use as a restaurant, and alleging that the Premises suffered from sewer backups caused by grinder pump failures in its sewage lift station and from water intrusion and mold. Maybank seeks to recover actual and consequential damages. JIC denies Maybank's allegations and has counterclaimed against Maybank for breach of the Lease, contending that it failed to pay rent when due, failed to remain in continuous operation, removed furniture, fixtures, equipment and other property from the Premises in violation of the Lease, and that it wrongfully refused to surrender the Premises for approximately a year without paying rent, while attempting to sell the restaurant and the Lease for as much as $500,000.00. JIC also alleges that Maybank permitted or caused waste, damage or injury to the premises and its equipment and concealed from JIC damage related to water intrusion, grease-filled plumbing pipes and grease trap, broken glass sidelights and disabling the walk-in cooler by removing the condensing unit for that cooler.

JIC has sued Richard D. Tuorto, Jr., Chandler Frierson, Natalie Myers a/k/a Natalie Frierson, John R. Hibbits, Jr. and Elizabeth A. Hibbits ("Guarantors") to enforce their payment obligations under their Absolute Unconditional Guaranty Agreements ("Guaranty"). The Guaranty is attached to the Lease as EXHIBIT D and is signed by each of the Guarantors and acknowledged before E. Merritt Farmer, Esq., one of Maybank's counsel of record. The two cases were consolidated for purposes of discovery and trial by Order dated July 16, 2020. This

case is before me pursuant to the provisions in the Lease and Guaranty wherein the parties agreed that all claims shall be referred to and decided by the Master-In-Equity.

I have considered the testimony of the parties' respective witnesses, the extent of their knowledge and involvement in the issues material to this dispute, their training, knowledge and experience, and their demeanor and credibility while testifying. I have studied and considered the exhibits in evidence, the arguments of counsel, and the deposition excerpts submitted by the parties containing the testimony of Ken Miller, John Beatty, Anne Marie Smallwood, Chandler ("Chad") Frierson, Natalie Myers, John R. ("Jack") Hibbits, Jr., Elizabeth Hibbits, and Susi Beatty. I hereby make the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

The outbuilding which is the subject of this dispute consists of two (2) retail parcels, Space V and Space W. Maybank acquired its leasehold interest in Space V on August 1, 2014, pursuant to an agreement with the former tenant who owned and operated J. Paulz Restaurant, R. J. Walker, V, LLC ("Walker"). Maybank paid Walker the sum of $385,000.00 to assume his lease pursuant to a contract entitled Assignment and Assumption Agreement and Modification to Lease Agreement ("Lease Modification Agreement"). That lease dated June 1, 2004, ("Prior Lease") required landlord approval for any assignment, and, JIC, through its managing agent, Beatty Management Company, Inc. ("BMC"), negotiated the terms of the Lease Modification Agreement with P. Heath Verner, a licensed real estate agent, acting on behalf of Maybank. Walker had assumed the lease from the initial tenant, Z & Snap, Inc., in late 2009.

The Prior Lease included an initial ten (10) year term and three (3) five (5) year renewal options. Under the terms of the Prior Lease, the commencement date was to be the date upon which construction of the building containing Spaces V and W was completed. By way of a

Tenant Estoppel, the original tenant and JIC agreed that the lease commencement date was April 15, 2006, and the expiration date would be April 14, 2016. The Lease Modification Agreement, executed by Walker as assignor, Maybank as assignee and JIC as landlord states that the initial Lease term expires on the same day of April 14, 2016.

Walker operated J. Paulz as a tapas restaurant from December 2009 through Spring 2014, when he decided to convert his business to a pub concept which had proven to be very successful in Mount Pleasant, South Carolina, namely My Father's Moustache. Coincidentally, at the same time Walker was in discussions with JIC regarding conversion of his restaurant to a pub concept, Richard Tuorto approached him seeking to purchase his lease and the restaurant equipment. Mr. Tuorto, Heath Verner, Jack Hibbits, and Chad Frierson are co-owners of O'Brion's Pub in Merchant Village on Folly Road, less than a mile from Walker's planned pub, which would have competed directly with O'Brion's.

Maybank planned to open an Italian restaurant, but JIC would not allow that use of the Premises, because another tenant, Amalfi's, had the exclusive right to operate an Italian restaurant in the Center. Maybank was unhappy with JIC's refusal to permit its Italian concept and attempted to purchase Amalfi's lease to remove that impediment. When that failed, Maybank proposed a restaurant called The Tavern and proposed a menu for that concept. Ultimately, it settled upon CURE, which was a "white tablecloth" steakhouse restaurant.

A. Maybank Holdings, LLC and Partnership

Maybank is a single member limited liability company. Chad Frierson is the sole member of Maybank; however, four (4) persons actually operated Maybank as a general partnership, agreeing to share profits and losses in the following proportions: Richard Tuorto (75%); Chad Frierson (15%); Heath Verner (5%), and Jack Hibbits (5%). These four (4) persons

also owned, at one time or another, five (5) additional restaurants, namely, Fratello's Italian Restaurant in North Charleston, Fratello's at I'on in Mount Pleasant, O'Brion's Pub at Rivertowne, O'Brion's Pub in I'on, and O'Brion's Pub at James Island. The purchase of Walker's leasehold interest and equipment and the financial operational shortfall incurred by Maybank Holdings was funded by the other restaurants, such that by the end of 2017, Maybank Holdings' current liabilities equaled $1,198,931.00. (Defendant's Ex 54, Form 1065, Sched L.)

Mr. Verner testified that he handled the negotiations of the assumption of the Prior Lease on behalf of Maybank. He admitted that he never disclosed his ownership interest in Maybank, because "no one ever asked." As a licensed realtor, he was required to disclose in writing his ownership interest in Maybank Holdings pursuant to S.C. Code Ann. § 40–57–135 (G). During the course of negotiations with JIC, he described Maybank as a partnership while he was requesting revisions or additions to the Lease Modification Agreement, writing on one occasion on July 25, 2014, "the partnership would like…" certain revisions in the draft document. (Defendant's Ex 76). Later, in April 2016, Mr. Verner executed a Tenant Estoppel Certificate and a Subordination, Non-Disturbance and Attornment Agreement on behalf of Maybank, signing both documents as "Partner." (Defendant's Exs. 14 and 15).

The tax returns produced by Maybank are prepared on partnership forms; they reflect each of the four (4) partners' ownership interest in the partnership and contain K-1 forms reflecting that the losses sustained by Maybank each year were passed through to the four (4) partners in proportion to their ownership interests even though the limited liability company had only a single member, Mr. Frierson. (Defendant's Exs. 51, 52, 53 and 54). Those tax returns reflect each partner's capital account each year. Mr. Verner testified initially that he was a member of Maybank Holdings, LLC but later admitted that he was not a member, was instead a

partner, and had referred to himself as a partner in the "O'Brion's Restaurant Group." Mr. Frierson testified that he was unaware that he was the sole member of Maybank, even though he signed the following documents as "sole member" on behalf of Maybank at the closing of the assignment and assumption: buyer's affidavit, purchase closing agreement, a $270,000.00 promissory note, and a purchaser's settlement statement. (Defendant's Ex. 214). He admitted that he had practically no involvement in the operation of CURE, preferring instead to stay in Mt. Pleasant where he is the general manager of O'Brion's at I'on. He readily admitted that Maybank operated as a general partnership as did the remaining "O'Brion's Group" restaurants, with each partner sharing the profits and losses in proportion to his respective partnership interest. Management decisions regarding Maybank Holdings and CURE were made by the partners through group discussions.

Although he was sole member of Maybank and a 15% general partner, Mr. Frierson was unaware that after assuming the Prior Lease, Maybank had initially proposed operating as "The Tavern." He was unaware that a proposed Tavern menu had been submitted to JIC for approval, even though he testified that menus were one of his responsibilities within the partnership. He was generally uninvolved in this litigation and admitted that he had not reviewed any depositions in this case other than his own and had reviewed few or no documents in preparation for his testimony at trial, relying instead on his partners, whom he trusted.

1. Notice of prior Grinder Pump Failure

Richard Tuorto, the 75% partner, readily admitted that he has a horrible memory. He did not recall receiving from Mr. Walker, a week prior to closing, a long string of email communications spanning from August 1, 2012–November 20, 2012 wherein Mr. Walker discussed with Anne Marie Smallwood, JIC's former property manager, a sewer back up problem he experienced due

to grinder pump failures in the lift station which collects waste products from the two (2) tenants in the outparcel building. The lift station is a pit 8-10 feet deep where waste is collected until it reaches a level where floats activate two (2) grinder pumps, one at a time, to grind the solids and send the resulting slurry through a 1½ inch forced main approximately five hundred (500) feet to a manhole which is connected to the City of Charleston's sewer system.

Mr. Walker forwarded those emails to Mr. Tuorto at the email address Mr. Tuorto provided to him, richard@obrions.com, on July 24, 2014, some eight (8) days prior to closing the assignment/assumption of Walker's lease. (Defendant's Ex. 10). Mr. Tuorto did not provide those e-mails to any of his partners prior to closing. Mr. Tuorto testified that he did not recall receiving them and that he had ceased using that email address years earlier. However, JIC proved that testimony regarding his use of that email address to be false, presenting more than a dozen emails to that address, including emails from Mr. Walker, Mr. Verner and Mike Spinelli, Director of Operations for O'Brion's Restaurant Group, to Mr. Tuorto after July 24, 2014, and continuing into January 2017. (Defendant's Ex. 213.). For example, on May 6, 2016, Mr. Tuorto responded to a meeting inquiry from Mr. Walker using that email address. The partnership information worksheets for Maybank Holding's tax returns show Mr. Tuorto as the partner who signed them, and that email address, richard@obrions.com, is listed for tax years 2014, 2015, and 2016. Mr. Walker, at Mr. Tuorto's request, forwarded for the second time the same 2012 email string on February 4, 2016, when Maybank was negotiating a new lease. (Defendant's Ex. 10). The fact that Mr. Tuorto requested those emails establishes that he had received them previously. Mr. Walker testified that at the closing on August 1, 2014, Mr. Tuorto mentioned receiving them. I find that Mr. Tuorto received the emails prior to closing.

Mr. Tuorto wrongly testified that he did not attend the closing with Mr. Walker. He also incoorectly testified that he was a member of Maybank Holding's, LLC and that he has seen documents reflecting that he, along with Heath Verner, Jack Hibbits, and Chad Frierson are all members. No such documents were produced by Maybank in discovery or at trial, and I find that such LLC documents do not exist, nor did they ever exist.

Mr. Tuorto was unfamiliar with key facts in this case. One of Maybank's central claims in this case involves failure of grinder pumps in August 2017, similar to Mr. Walker's experience in 2012. Mr. Walker testified that, on more than one occasion prior to closing the sale to Maybank, he had verbally explained the grinder pump operation, the alarm system in the event of an operational interruption, and personally showed Mr. Tuorto the grinder pumps and the alarm system, all of which are located toward the rear of the west (or left) exterior wall of the Premises. Mr. Walker testified that he fully explained the failure of the pumps in 2012 and warned Mr. Tuorto that, if he did not pay attention to the lift station and the grinder pumps, he would absolutely regret it.

At trial, Mr. Tuorto could not identify the location of the lift station containing the grinder pumps. As required by law for all restaurants which produce grease, there is a grease trap which services Space V. Mr. Tuorto incorrectly identified and labeled the grease trap as the grinder pump location on Plaintiff's Ex. 71. He was mistaken. The grease trap which he identified as the grinder pumps is located at the front of the restaurant in a landscaped area to the right of the front door, nowhere near the location of the lift station at the rear of the restaurant which contains the grinder pumps. In preparing for trial, Mr. Tuorto did not re-orient himself to the location of the lift station and the grease trap, both of which are—and have always been—central to this dispute.

Mr. Walker testified that he forwarded the same 2012 email string to Mr. Tuorto at his request on two (2) occasions after CURE had opened for business: February 4, 2016 and August 1, 2017. Those dates are significant because Maybank was negotiating terms of a new lease in February 2016, having missed the deadline to exercise the first renewal option of the Prior Lease it had assumed. The second date of July 31, 2017 is significant, because Maybank had experienced a grinder pump failure and sewer backup around that time. When Mr. Tuorto presented the 2012 email chain to Heath Verner on August 1, 2017, he implied that he had only recently seen these emails. (Defendant's Ex. 40.). Mr. Tuorto knew of that prior 2012 failure and the Walker email string, having received it from Mr. Walker on two (2) prior occasions but apparently never shared this knowledge with anyone else within the Maybank partnership until August 2017. Mr. Hibbits and Mr. Frierson first received the Walker emails from Mr. Verner on April 18, 2018, months after this case was filed on November 29, 2017. (Defendant's Ex. 40.). It is clear that Mr. Tuorto obtained extensive oral and written information regarding the grinder pumps from Mr. Walker before closing and in February 2016, some eighteen (18) months before the sewer backup incident at the end of July 2017. He chose not to share that information with his partners until he forwarded the Walker email string only to Mr. Verner on August 1, 2017. The other two (2) partners remained uninformed until Mr. Verner sent them the Walker emails on April 18, 2018.

2. The Lease and Guarantee Agreement

As referenced above, Maybank missed the deadline to exercise its first renewal option under the Prior Lease. Having missed the deadline to exercise the first renewal option, Maybank was faced with three (3) choices: 1) vacate the premises on April 14, 2016, the Lease expiration date; 2) continue to occupy the Premises as a holdover tenant and pay two times the rent as provided

in the Prior Lease; or 3) negotiate a new lease. Mr. Verner was the partner responsible for exercising the option, and he admitted that he has never made a more significant mistake in his real estate career than when he missed that deadline on behalf of the partnership. I find Mr. Varner credible on this issue. His real estate experience includes negotiation of as many as 1,000 leases on behalf of various landlords and tenants - he simply missed the option deadline. Maybank elected to negotiate a new lease, as it had invested significant resources to upfit the Premises as a steakhouse.

During the Lease negotiations, both parties were represented by counsel. JIC was represented by Shawn Willis, Esq. Initially, Maybank was represented by Geoffrey Smith, Esq. Mr. Smith and Mr. Willis exchanged proposed lease terms and JIC eventually submitted a draft lease proposal to Mr. Smith. After the draft lease was submitted to Maybank, it chose to change counsel, and E. Merritt Farmer, Jr., Esq., and John C. Johnson, Esq., were engaged to review and revise the draft lease to Maybank's desires. Eventually, on April 15, 2016, Mr. Farmer submitted to a redlined, revised version of the new lease. (Defendant's Ex 103). The terms of the lease were negotiated with some revisions accepted by JIC, and others rejected. The parties entered into the present Lease on June 1, 2016, agreeing to a new ten (10) year term with three (3) five (5) year renewal options.

The Guarantors agreed to guarantee the obligations of Maybank in order to induce JIC to enter into the Lease. The Guaranty is one of payment and not of collection, and the Guarantors jointly and severally, absolutely, unconditionally and irrevocably guaranteed the prompt and complete payment of all amounts due as rent, additional rent or otherwise. The Guarantors agreed to reimburse JIC for all costs and expenses including reasonable attorneys' fees incurred by JIC in connection with JIC's enforcement of the terms of the Guaranty.

The Guarantors each acknowledged and agreed that prior to signing the Guaranty they had a fair opportunity to have their attorney review the agreement. Each Guarantor's signature is acknowledged by E. Merritt Farmer, Jr., Esq., counsel of record in this civil action.

3. Broken Glass at Front Door

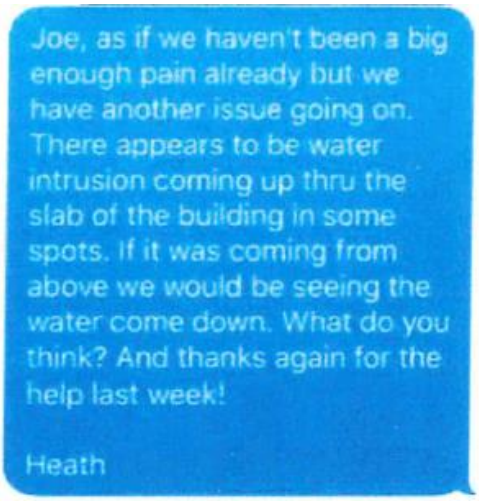
Under the terms of both the Lease and the Prior Lease, Maybank was responsible for replacement of all broken glass. During the course of its upfit, Maybank altered the configuration of the front entrance. During Mr. Walker's tenancy, it consisted of glass doors with hurricane glass sidelights. Maybank installed light fixtures and covered the sidelights inside and out with wood panels such that no glass was visible. It installed an arched, heavy wooden rustic door to replace the more contemporary glass door. Mr. Walker has recently re-leased the premises to operate My Father's Moustache as he had planned to do in 2014. He is presently in the process of renovating Space V to operate his new pub. When he removed the wooden door and panels, it revealed that the mullions between the sidelight sections had been damaged and drilled, that the hurricane glass behind the panels was shattered, and that the light fixtures installed by Maybank were energized by extension cords which had been concealed behind the wood panels installed by Maybank. I find that, during its tenancy, Maybank damaged the mullions, shattered the glass and installed permanent light fixtures which were dangerously powered by extension cords (instead of hard wiring them) within the closed space behind the wood panels during its upfit. Those conditions were concealed from view by the wood panels installed by Maybank on the interior and exterior of the wooden door sometime prior to the opening of CURE in November 2015. (See Defendant's Exs. 206 and 217, P.000118).

4. Water Intrusion

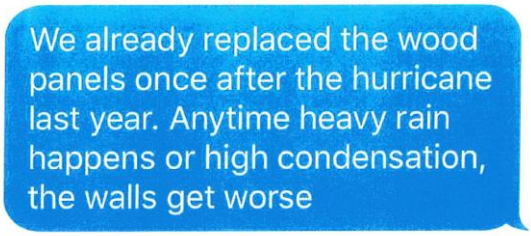
After operating for almost one year, Maybank discovered water intrusion within the Premises after Hurricane Matthew struck Charleston on October 8, 2016. Rather than reporting the water intrusion to JIC as required by the Lease, Maybank commissioned repairs to be performed by Rick Rheam and mold remediation by 911 Restoration in March 2017. The Lease required all work done on the premises by Tenant must be performed by licensed contractors approved by landlord. (See Defendant's Ex.12, Exhibit C-1, paragraph D.4). Mr. Rheam is not licensed, nor was JIC aware that his work was being performed until Maybank revealed it months later. Maybank wrote a check to 911 Restoration for mold remediation but stopped payment on the check and never paid for that work. Photographs taken by Mr. Rheam date-stamped March 9, 2017, establish that Mr. Rheam removed the plywood panels and insulation beneath them along the exterior walls to address water intrusion along those walls. (Defendant's Ex. 220). The 911 Restoration invoice to CURE is dated March 8, 2017. (Defendant's Ex. 16).

It is not clear what Mr. Rheam did, if anything, to find the source of the water intrusion and repair or correct it in order to prevent it from recurring. Instead, it appears that he replaced the water damaged insulation and wood interior panels, while 911 Restoration performed microbial remediation. Maybank neither called Mr. Rheam nor anyone affiliated with 911 Restoration to testify. Maybank never reported the water leaks to JIC when they were detected, never advised JIC that it was engaging someone to perform work to address the water intrusion and resulting mold, and did not use a licensed contractor, as Mr. Rheam holds no contractor's or specialty subcontractor's license.

Whatever Mr. Rheam did to correct the source of water intrusion, he failed. In mid-to-late August 2017, Maybank, through Mr. Verner, first informed JIC's local property manager, Joe Fabie, via tex that there had been a water intrusion problem for nearly a year.



Mr. Verner and Mr. Fabie exchanged written communications, as Mr. Fabie sought to learn and understand the nature, extent and duration of the problem. During the course of those communications, Mr. Verner wrote the following text message in response to Mr. Fabie's inquiries regarding the duration of the water intrusion:



Hurricane Matthew struck Charleston on October 8, 2016, ten (10) months prior to Maybank's first report of water intrusion to JIC. Maybank did not call a single witness who actually worked at CURE, nor did Maybank call any witnesses who performed work to correct the water intrusion or sewer backups. I find that Maybank allowed water intrusion to recur over a

period of many months, thereby allowing waste, damage or injury to the Premises prior to the sewer backup incident it reported in August 2017.

5. Sewer Backup

No photographs were produced to support Maybank's claims that sewer water backed up into floor drains, toilets or sinks. Photographs of a toilet depict a brown stain in a toilet bowl. That same toilet is depicted in the same condition in two (2) photographs, the first having been taken on June 5, 2018 by Mr. Fabie and the second having been taken on September 7, 2018 by Mr. Fabie's successor property manager, Tyler Potepan. (Defendant's Exs. 178 & 184). In both photographs the commode tank lid is laying across the seat, and the stain remains unchanged. Notably, those photographs were taken by JIC, not Maybank. If the toilet had backed up or overflowed, Maybank's managers or staff likely would have photographed that condition. Maybank did not call any witnesses to testify that they had removed sewage from the floor. I find that Maybank has failed to convince me that the grinder pump failures caused sewage to overflow its toilets, drains or sinks.

On or about August 1, 2017, Maybank reported a sewer backup to Joe Fabie. Mr. Fabie promptly investigated and arranged for the lift station to be pumped until plumbing contractors could perform repair or replacement of grinder pumps which had failed. The pumps had been covered by a quarterly service contract with Cullum Services. The last service by Cullum was performed in late February 2017, and billed to Mr. Fabie on March 9, 2017. Apparently, Cullum did not return to service the pumps after that visit. The Cullum contract requires 30 days written notice prior to cancellation. There is no evidence that any cancellation notice was ever sent or received by either Cullum or JIC. Mr. Fabie was never advised that Cullum had stopped servicing the pumps. He denied cancelling the Cullum contract. He denied being informed that

Cullum was cancelling the contract, and he assumed Cullum was continuing to service the pumps after March 2017. Consequently, I find that JIC did not cancel the Cullum contract.

a. Grinder Pumps

I find that there is no requirement in the Lease for Landlord to contract for the inspection or maintenance of the lift station or its grinder pumps. The Lease contains a provision in Article 13.2 requiring Tenant to contract with an HVAC service provider satisfactory to Landlord for the servicing and preventive maintenance of the HVAC units and to provide to Landlord a copy of that service contract. There is no similar requirement in the Lease for Landlord to contract for the inspection or maintenance of the lift station or grinder pumps or the roof or any other component or equipment. Maybank could have negotiated such a requirement within the Lease, but there is no evidence it attempted to do so. Exhibit C-1 to the Lease, Defendant's Ex. 12, page 47, paragraph C.12 clearly states that the Tenant is responsible for all plumbing work, including connections to utility systems.

Regardless, I find that the proximate cause of the grinder pump failures had nothing to do with Cullum or its cessation of service. I find the pumps failed, because grease generated by the kitchen at CURE filled the 1,000-gallon grease trap, eventually entering and occluding the four inch (4") pipe from the discharge side of the grease trap, blocking virtually all flow through that pipe for a distance of more than ninety (90) feet to the lift station containing the grinder pumps. Grease destroys pumps, and I find Maybank's grease destroyed the pumps in the lift station.

After the grinder pump failure in 2012, JIC's property manager, Anne Marie Smallwood, informed Mr. Walker that he was responsible for maintaining the grease trap, that grease had caused the pumps to fail, and that he needed to jet the plumbing line leading from the grease trap to the lift station. Mr. Walker did so. The tenant in Space W, Muddy Waters Coffee Shop, does

not cook food and does not produce grease. Its kitchen plumbing does not discharge into the Space V grease trap. Therefore, the grease within the grease trap and the discharge pipe leading from the trap to the lift station was generated solely by Maybank.

Unlike residential plumbing configurations, commercial restaurants contain separate, dedicated plumbing systems for the kitchen and the restrooms. That separation is done for one reason: to remove the grease and solids from the effluent generated by the kitchen. Grease clogs plumbing and destroys pumps. The kitchen plumbing runs beneath the slab at Space V from the kitchen at the rear or north side of the Premises to the inflow side of the grease trap located in a landscaped area at the right side of the front entrance to CURE. The grease trap at CURE is constructed as a standard, two (2) chambered rectangular concrete tank. The two chambers are separated by a wall or baffle, creating an inflow or grease collection side and a discharge side where the grey water free of grease is discharged by gravity through a discharge pipe beneath the slab to the lift station. The kitchen plumbing from Muddy Waters joins that pipe some distance beyond that grease trap. Witnesses described the grease trap as "pancaked" in grease.

b. The Grease Trap

The grease trap is designed to separate the grease and trap it on the inflow side of the baffle, so that grease-free water is discharged from the outflow side of the trap to the plumbing serving both CURE and Muddy Waters. Maybank produced no witnesses to refute or challenge the testimony of two (2) knowledgeable and very credible witnesses, Jack Frye and Tyler Potepan, who had investigated the conditions within the lift station, the grease trap and the plumbing pipes between the two structures.

Mr. Frye is a master electrician and plumber with forty-one (41) years of experience in a broad range of applications. He has done plumbing work his entire adult life in a number of

states, and he became licensed as a plumbing contractor in South Carolina in 2007 and was the owner of a Charleston-based "Rooter Now" franchise, having sold that business and retired to Florida in September 2021. In late August or early September 2018, Mr. Frye, his workers, and Tyler Potepan began investigating the source of grease discovered in the lift station. Mr. Frye wanted to examine and video the inflow pipe into the lift station and the discharge pipe from the grease trap. The inflow pipe into the lift station was almost completely clogged with grease.

The access to both the inflow side and the outflow side of the grease trap is covered with two (2) standard manhole covers, one atop each side or chamber of the trap. Mr. Frye and Mr. Potepan had difficulty locating the cover for the discharge side, because it was buried beneath dirt, leaves and plant debris. They used a 5/8" metal grounding rod to locate the cover. They opened the lid with a tool designed for that purpose and were astounded by what they saw. The trap was full of hardened "pancaked" grease. They removed the other cover on the inflow side and found the same condition. The trap contained so much hardened grease that Mr. Frye could not access the pipe leading from the discharge chamber of the trap. Mr. Frye's crew had to use a spade shovel to break up the hardened grease and scoop it from the trap. In total, they removed twenty-one (21) partially filled fifty-five (55) gallon contractor trash bags to haul off the hardened grease. Mr. Frye testified he has serviced grease traps serving many restaurants in his career and testified that he had never seen anything as bad as this grease trap.

Mr. Frye planned to scope the discharge pipe with a camera designed for that purpose. After he removed the hardened grease to expose the pipe where it exits the trap, he discovered the four (4") inch pipe was so badly occluded with grease that he could not insert the camera which is approximately 1 ¼" in diameter into the pipe. During this time, Maybank had refused to surrender possession of the Premises.

6. Maybank's Refusal to Surrender Possession

Since October 2017, Maybank refused to surrender possession of the Premises to JIC, refused to pay rent, and marketed the restaurant and the Lease for sale. Maybank opposed JIC's ejectment efforts in three (3) separate hearings in various venues. This court, by Order filed September 19, 2018, ordered that Maybank pay all back rent due under the Lease on or before September 30, 2018 or face ejectment from the Premises. Following this Court's Order, Maybank paid no further rent and surrendered possession of the Premises on October 5, 2018. (See Defendant's Ex. 225). Maybank's allegations regarding the unsuitability of the Premises, juxtaposed against its listing agreement with local restaurant broker Tim Hagar and his attractive brochure present irreconcilable positions taken by Maybank simultaneously. On the one hand, the Premises is alleged to be un-tenantable; while, on the other, Maybank projects to the market that a potential restaurant tenant should pay Maybank $500,000.00 for its used equipment and its Lease.

7. Power Shut Off to Unit V

When JIC inspected the Premises on September 7, 2018, Tyler Potepan described the conditions inside as unbearably hot, humid, and contaminated with mold. The air conditioning and power were shut off, and he described how everyone in attendance was perspiring heavily. He testified that Mr. Farmer was so drenched with sweat that he looked like he had just gotten out of the shower with his clothes on. He described the irritation from mold and the stench of garbage as unbearable and wished he had worn his respirator. Uncapped electrical wires were dangling from the ceiling, electrical junction boxes were open to expose electrical connections within them, and the kitchen vent hood and floor were covered in grease. Maybank had gutted the Premises, removing the kitchen equipment, shelves, mirrors, tile, chandeliers, and

mechanical equipment on the roof, including two (2) Rinnai water heaters and the condensing unit for the walk-in cooler. All the specification placards on three (3) rooftop HVAC units had been removed. Each of these actions violate the terms of the Lease. (Art. 18.4 and Art. 23.1.)

8. Removal of Grease in the Plumbing Lines

At a later date, Mr. Frye and Mr. Potepan returned to remove the grease in the plumbing, so that they could inspect it visually with the remote camera. Mr. Frye had to use a high pressure, high volume hydro jet to remove enough of the hardened grease to allow him to begin his visual inspection of the pipe. The court has examined the videos taken by Mr. Frye on October 3, 2018. (Defendant's Ex. 211). The October 2018 video was made by Mr. Frye while he was in the process of clearing the line between the trap and the lift station. The amount of grease in that pipe is shocking. Mr. Frye testified that he has never seen the amount of grease he found in the grease trap and the outfall pipe in his entire career, including the Kentucky Fried Chicken restaurants he formerly serviced under contract. He repeatedly compared the occluded pipes to his clogged heart arteries. He used a hydro jet system with a three (3) nozzle jet to break up the hardened grease and a "warthog" attachment with a spinning head to clean the remaining grease from the walls of the pipe after the hydro jet had removed sufficient grease to provide access for the warthog.

Both Mr. Frye and Mr. Potepan testified that they found a fifty-five (55) gallon drum and two (2) five (5) gallon buckets full of grease in a storage space outside the CURE exit door nearest to the lift station. (Defendant's Ex. 167). The drum and buckets were located approximately ten (10) feet from the lift station lid. Both Mr. Frye and Mr. Potepan testified that when JIC regained possession of the premises in October 2018, they observed a trail of grease stains leading from that storage space to the lid of the grinder pit; they saw grease on the top of

the lid to the pit; they saw grease on the inside of the lid to the pit; and they saw grease in the pit itself. The area where the drums and buckets were located was cordoned off by a wooden enclosure which latched from the inside. The only access to that area was through Space V, where the enclosure's gate could be unlatched from within the enclosure.

In Maybank's Answers to Defendant's Second Set of Interrogatories dated March 15, 2019, (Defendant's Ex. 197), Interrogatory No. 10, when asked to identify the persons or entities who performed pumping or other maintenance on the grease trap, responded as follows:

> In addition to those individuals and entities retained by Defendant, those employees identified in response to Interrogatory No. 9 may have assisted the following individuals who also performed pumping or other maintenance on the grease trap serving the restaurant:
>
> Peter Crockett
> Evan S. Rose
> A-1 Septic Tank Service.

Mr. Crockett was executive chef at CURE, and Mr. Rose served as a sous chef. A-1 Septic Tank Service does not service grease traps. Accordingly, Maybank, through its discovery responses, admitted its employee chefs performed pumping or maintenance on the grease trap.

Mr. Frye testified that the practice of hand removal of grease from grease traps is known as "hot dipping," and he has seen it in many Chinese restaurants. He clearly and convincingly described the reason the grinder pumps failed while CURE was in business and on occasions after CURE closed. CURE's grease created thermal overloads which destroyed the pumps. Even though CURE was not generating any grease in its kitchen after 2017, there was the near-total occlusion of the pipe which transports the grey water discharge from Muddy Waters to the lift station. According to Mr. Frye, each time Muddy Waters ran its sinks or dishwasher, the warm water would melt some of the Maybank grease and deliver it to the grinder pit. Mr. Frye convincingly testified that grease is the worst enemy of sewer pumps and that the direct cause of

the repeated failures of the pumps in July or August 2017 and thereafter, was grease previously generated by Maybank which continued to enter the lift station through the grease-filled pipe leading into that station. Mr. Frye testified he removed the grease from the grease trap, from the plumbing and from the lift station, thereby solving the grinder pump problem.

The court has reviewed photographs and a video depicting the results of a grinder pump inspection in March 2018. (Defendant's Ex. 165). The failed pump which had been removed has visible, hardened grease on it, and a video (Defendant's Ex. 165(A)) depicts workers removing a pipe-sized plug of grease from the grinder pit.

There is some dispute regarding when, if ever, Maybank serviced its grease trap. That dispute is merely academic, because the evidence establishes that the prior tenant, Mr. Walker, jetted the discharge line from the grease trap to the lift station after his difficulties in late 2012; that the grease trap served only Maybank; that Muddy Waters does not generate grease; that the grease trap was full of grease in August 2018; that the discharge pipe from the grease trap to the lift station was almost completely blocked with grease; that Maybank had sole responsibility for maintenance of the grease trap and its plumbing and that Maybank had exclusive possession of the premises for fifty (50) months from August 1, 2014 – October 5, 2018. Whatever grease trap service Maybank may have performed, it was inadequate, and its grease clogged JIC's sewer pipes and damaged the grinder pumps.

A January 2019 sewer backup reported by Muddy Waters to Burr Ault of BMC was not the result of a grinder pump failure. Instead, it was the result of someone switching off all the electrical breakers in Space V. Two 30-amp breakers within the breaker panel serve the two grinder pumps. Without power, the pumps would not operate. Mr. Frye flipped on all the

breakers and solved the problem. The pumps have operated continuously since without a problem, now that the grease generated by Maybank has been cleared and removed.

Maybank never presented a single witness at trial who actually worked at its restaurant. Although it contends that water intrusion and sewer backup prevented it from operating the restaurant, it did not produce any photographs or video recordings to establish that sewer ever backed up into the restaurant. The photographs and video utilized at trial by JIC clearly demonstrate that the sewer backup resulted in a narrow stream of liquid which flowed from the grease trap to the right or east of CURE's entrance, flowed across the sidewalk, collected and channeled into the curb between the edge of the sidewalk and the parking lot asphalt and flowed toward Muddy Waters where it pooled in a low spot in the parking lot. It did not cross CURE's entrance. Notably, even though the overflow passes in front of and pooled near the entrance to Muddy Waters, the uncontroverted testimony establishes that Muddy Waters never closed due to any sewage backup incidents, and Muddy Waters has always paid its rent on time.

B. Breaches of the Lease

I find that Maybank breached the Prior Lease when it shattered the front entrance sidelights and mullions while reconfiguring that entrance. It breached the present Lease from its inception by failing to replace or repair the damage which was concealed beneath the wooden panels installed by Maybank. Maybank breached the Lease's prohibition against permitting waste, damage or injury to the Premises by failing to report water intrusion within the Premises for nearly a year. Maybank used an unlicensed individual to perform remedial work in violation of the Lease's express requirement that all work performed by Maybank must be performed by licensed contractors approved by JIC.

1. **Failure to Pay Rent**

Maybank paid no rent after it paid the September 2017 rent late during the month of October. The rent check for September, dated August 23, 2017, was charged back for insufficient funds on September 7, 2017. When JIC was working to address the water intrusion, Mr. Verner and Mr. Fabie discussed a rent abatement while CURE was closed during the remediation process. Mr. Fabie advised Mr. Verner that he would go to bat for Maybank to get them a rent abatement. Mr. Fabie had no authority to authorize a rent abatement, and JIC never agreed to do so.

The court finds that JIC was entirely within its rights to deny the request for an abatement for several reasons: first, the water intrusion was known to and unreported by Maybank for many months. It is most probable that the scope of the remediation would have been smaller if the repair had been undertaken when Maybank first noticed the problem. Secondly, the evidence establishes that Maybank's sales during the month of March 2017, when it performed repairs and mold remediation without informing JIC, were actually higher than the six (6) months of January, February, April, May, June, and July, 2017. Thus, Maybank apparently remained open while it attempted repairs on its own. A comparison of the photographs taken by Rick Rheam on March 9, 2017, with photographs forwarded by CURE's employee, James Nease, on October 26, 2017, reveals that they are remarkably similar. (*Compare* Defendant's Ex. 220 with Defendant's Ex. 27 & 28). Mr. Fabie had never seen the photographs or CURE's mold remediation invoice from March 2017, before trial as he was never informed that CURE had attempted repairs before reporting the condition to him. After viewing at trial those photographs and Maybank's profit and loss statement for 2017, Mr. Fabie testified that CURE probably did not need to close during the October 2017 repairs, because they obviously remained open during the March 2017 repairs which appeared to include very similar interior repairs.

2. Maybank's Lack of Proof of Damages

Maybank presented no witnesses to establish damages proximately caused by JIC. On the other hand, JIC presented Leroy E. Strickland, a licensed Certified Public Accountant and certified fraud investigator to evaluate and opine upon Maybank's damages claims. Mr. Strickland is a very well qualified, well-prepared, and credible witness. He studied voluminous financial records produced by Maybank and has compared them with the categories and dollar amounts of the damages alleged in the Amended Complaint and in Answers to Interrogatories. Mr. Strickland testified that Maybank funded its entire operation with borrowed funds provided by the O'Brion Restaurant Group's related companies. The total amount of that debt was never reduced and, instead, grew to more than $1,000,000.00 by the time Maybank ceased operations. Mr. Strickland observed that the fixed and variable costs of the restaurant required more than $130,000.00 in revenue each month to break even. Maybank rarely reached that threshold, and Maybank was losing, on average, more than $20,000.00 per month. Those losses are not the result of anything JIC either did or failed to do.

Mr. Strickland testified convincingly that Maybank actually saved money by preventing further inevitable losses when it closed its doors in October 2017. Even if I were to find that JIC breached the Lease, which I do not, I find that Maybank has failed to prove damages proximately caused by JIC. Like many start-up ventures generally and restaurant ventures in particular, Maybank was a losing business proposition from the day it assumed the Prior Lease, through the execution of the present Lease and continuing until it ceased operations and ceased paying rent.

Mr. Strickland's testimony is bolstered by additional evidence of record. The court is convinced that Maybank was in financial trouble throughout its existence. In June, 2017, after only twenty (20) months of operations, Mr. Verner sent email correspondence to a number of

persons involved in the Charleston area restaurant industry informing them "This needs to go fast. $500k is not the number. Get someone to make an offer." (Defendant's Ex. 33). "Our group needs to sell this and quick." (Defendant's Ex.34). "We need to sell CURE and fast. If you have anyone that might have an interest please let me know." (Defendant's Ex. 35). "CURE lease attached. This needs to go. And fast. SELL it!" (Defendant's Ex. 36). Maybank was desperate to sell its restaurant and its lease more than a month **prior to** the sewer backup at the end of July 2017. (emphasis added).

I find that the restaurant was losing more than $20,000.00 per month, and the thirteen (13) day repair effort by JIC in October 2017, provided CURE with an excuse to close its doors. Mr. Verner was informed by Mr. Fabie on October 26, 2017 that the repairs were being completed that day, so that CURE could get back up and running. (Defendant's Ex. 29). Mr. Verner inspected the Premises on November 1, 2017 and the next day confirmed to Tim Hagar, the broker listing the restaurant for sale, that "I was by the restaurant yesterday. It actually looks good in there and smells normal. No must or anything like that." (Defendant's Ex. 148). Mr. Fabie testified that the marketing photographs taken by Mr. Hagar on August 14, 2017, (Defendant's Ex. 217), fairly and accurately depict the condition of the Premises after the repairs had been completed on October 26, 2017. Nevertheless, Maybank made no effort to reopen. Instead, it attempted to sell its Lease through Mr. Hagar, listing it initially for $499,000.00 on September 25, 2017. (Defendant's Ex. 38). Using some of the photographs he had taken on August 14, 2017, Mr. Hagar prepared and disseminated to thousands of e-Blast recipients a brochure or profile depicting CURE as a beautiful and operating restaurant. (Defendant's Ex. 39). Within a month, Mr. Hagar suggested that the price be dropped to the $350k range, advising, "If we had 6 months or so to get this done, I would be suggesting this."

Obviously, Mr. Verner's multiple emails in June advising the restaurant community that CURE needed to sell fast did not improve the prospects for sale. Instead, the opposite was true. No offers were forthcoming as it made no financial sense for a prospective tenant to pay Maybank for its Lease when the failing restaurant would soon default on the Lease, enabling any interested tenant to negotiate a new lease without paying Maybank.

C. Notice of Default

On October 11, 2017, JIC provided to Maybank a notice of default for nonpayment of rent. On October 20, 2017, JIC sent a second default notice advising that the nonpayment default had not been cured and that Maybank's failure to remain in continuous operation violated Article 6.1 of the Lease. (Defendant's Exs. 129 and 140). Both notices were delivered to Richard D. Tuorto at his home address by certified mail as required under the terms of the Lease. On or about October 18, 2017, JIC delivered the initial default notice to each of the guarantors by certified mail. (Defendant's Ex. 134, 135 and 136). The second default notice was copied to each of the Guarantors as well.

The Lease contains several key provisions regarding "Notice." Article 1.1(s) contains addresses for notice to Landlord and to Tenant. Article 25.3(a) requires that notice, demand, request, approval, consent or other instrument which may be required under the Lease shall be in writing and shall be delivered personally or sent by certified mail, return receipt requested or overnight courier at the address set forth in Section 1.1 (As to Landlord, in McLean, Virginia). Article 25.3(b) states that no notice to be given to Landlord shall be effective for any purpose unless and until a true copy is given to Landlord's mortgagee, provided Tenant previously has been given written notice of the name and address of the mortgagee. On April 6, 2016, Maybank executed and delivered to JIC's mortgagee, Bank of North Carolina, two (2) documents which

provided that information to Maybank, a Tenant Estoppel Certificate and a Subordination, Non-Disturbance and Attornment Agreement. (Defendant's Exs. 14 and 15).

In Paragraph 19 of the Estoppel Certificate, Maybank agreed to deliver to Lender by registered mail, a copy of any notice of default served upon Landlord. The Lease contains rights to cure any alleged defaults, and Maybank also agreed in the Estoppel Certificate that if JIC failed to cure any default within the time provided in the Lease, the Lender shall have an additional sixty (60) day period within which to cure the default. Maybank did not make any effort to comply with the notice provisions to JIC or Bank of North Carolina as required in the Lease or the Estoppel Certificate.

JIC sought to promptly address and correct the water intrusion conditions. Scheduling the work was complicated by the arrival of Hurricane Irma on September 11, 2017. Once the work commenced, it was completed in less than two (2) weeks. The grinder pump failures were addressed promptly as well. The grinder pump failures were caused by Maybank's failure to maintain or service the grease trap in a manner sufficient to prevent grease contamination of JIC's plumbing pipes and the grinder pumps. I find that the pumps failed because Maybank allowed its grease to flow into the lift station where it contaminated and damaged the pumps, ultimately resulting in their failure.[1]

Maybank remained open during August 2017 while JIC was addressing the pump failure. Just as Maybank remained open in March while Mr. Rheam and 911 Restoration worked to address water intrusion and mold, a review of the 2017 profit and loss statement reveals that

[1] While the grinder pumps are a common element which are the Landlord's duty to maintain (Article 13.1), because their failure was directly attributable to the failure to maintain the grease trap which was the Tenant's duty (Article 13.2), I find this breach of the Agreement is the fault of Maybank Holdings. In either event, under the Lease, JIC would not be liable to Maybank unless it was given written notice and an opportunity to investigate and effect the repairs. Art.13.2.

sales for the month of August were better than the months of June or July, when there was no sewer backup at the Premises.

I find that JIC did not breach the Lease. I further find that if JIC had been in default under the terms of the Lease, Maybank failed to provide notice to JIC and its mortgagee as required under the terms of the Lease.

On the other hand, I find that Maybank breached the lease in the following instances:

1. It shattered hurricane glass sidelights, damaged mullions supporting that glass and wired permanent lighting fixtures with extension cords inside a wall, concealing each of those conditions by installing wood panels on the interior and exterior of the glass (Article 13.2);

2. It permitted waste, damage or injury to the property by failing to report the water intrusion condition it observed for nearly a year (Article 13.2);

3. It utilized an unlicensed worker, Rick Rheam, to investigate the mold issue and perform remedial work (Ex. C-1, paragraph D-4 Tenant's work);

4. It failed to service its grease trap in a manner sufficient to prevent grease from clogging the plumbing and damaging the grinder pumps;

5. It failed to pay rent and refused to surrender possession of the Premises for a year, all the while trying to sell the restaurant and its Lease which was in default;

6. It failed to continuously operate as required in Article 6.1;

7. It removed from the Premises its furniture, fixtures and equipment in violation of Article 18.4 and in disregard of JIC's lien rights under Article 28;

8. It removed the two operable Rinnai tankless water heaters from the wooden equipment rack on the roof;

9. It left the rack in a toppled condition, causing penetrations into the roof membrane;

10. It removed the rooftop condensing unit for the walk-in cooler, rendering the cooler inoperable;

11. It left open electrical junction boxes and uncapped electrical wires in the Premises and on the roof;

12. It failed to maintain and service the HVAC units as required under the terms of the Lease, thereby necessitating their replacement by JIC;

13. It damaged the tile in the men's restroom by removing a mirror affixed to the wall;

14. It trashed the premises in violation of Articles 13.2 and 23.1 of the Lease;

15. It turned off the power and HVAC units, causing the Premises to become contaminated with mold and mildew.

II. APPLICABLE LAW AND CONCLUSIONS

The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 413 S.E.2d 866 (Ct. App. 1992). An action for breach of contract seeking money damages is an action at law. Sterling Development Co. v. Collins, 309 S.C. 237, 421 S.E.2d 402 (1992). Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009).

The terms of an unambiguous contract are to be given their plain, ordinary and popular meaning. C.A.N. Enterprises, Inc. v. S.C. Health and Human Services Finance Commission, 296 S.C. 373, 373, S.E.2d 584 (1988). The court has no authority to alter a contract by construction or to make a new contract for the parties. The court's duty is limited to the interpretation of the contract made by the parties themselves, regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully. Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445 (1984). Where the language of the contract is clear and unambiguous, the question is not one of fact but one of law. J.T.M. Co., Inc. v. Vane, 283 S.C. 512, 323 S.E.2d

794 (Ct. App. 1984). The intention of the parties must be inferred from the whole agreement. Columbia East Assocs. V. Bi-Lo, Inc., 209 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989).

Although Maybank is a single member limited liability company, I conclude that Maybank Holdings operated as a general partnership consisting of four (4) partners. The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business. S.C. Code Ann. § 33–41–220(4). A partnership may be found to exist by implication from the parties' conduct, and a partnership agreement may be implied without express intention. Cordray v. Ott, 326 S.C. 89, 485 S.E.2d 97 (1997). A partnership is an association of two or more persons to carry on as co-owners a business for profit. The appropriate tests to determine whether a partnership exists include: (1) the sharing of profits and losses; (2) community of interest in capital or property; and (3) community of interest in control and management. Halbersberg v. Berry, 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990). The testimony of Richard Tuorto, Jr., Heath Verner and Chad Frierson, as well as numerous documents admitted into evidence, establish that four (4) persons shared profits and losses; they shared in the capital of the business; and they shared in the control and management of Maybank as a partnership. They viewed themselves as partners and held themselves out as partners consisting of Richard D. Tuorto, Jr. (75%); Chandler "Chad" Frierson (15%); P. Heath Verner (5%) and John "Jack" R. Hibbits, Jr. (5%).

The Lease clearly and unambiguously sets forth the parties' rights and obligations. Article 13.1 states that Landlord shall not in any way be liable to Tenant on account of Landlord's failure to make required repairs unless Tenant shall have given Landlord written notice and afforded Landlord a reasonable opportunity to investigate and effect the same after notice. Articles 11.1 and 11.7 clearly state that Landlord shall not be liable to Tenant for any

damage, injury or loss resulting from the use or operation of the sewage or plumbing equipment or apparatus and/or leakage in any part of the Premises or the Property from water or rain that may leak into, or flow from any part of the Premises or the Property or from drains, pipes or plumbing fixtures. The parties expressly agreed that any failure or inability to furnish any required service shall not entitle Tenant to an abatement of rent, and that Landlord shall never have any liability with respect to claims for interruption of or loss to the business being conducted in the Premises. Article 19.1(a) states that Tenant shall have no right of offset or abatement in the event of Landlord's default, and further, in Article 19.1(b) Tenant shall have no right to terminate the Lease.

Article 11.7 provides that unless a matter or occurrence is both not covered by the Tenant's insurance and is attributable to the gross negligence or willful misconduct of Landlord, Landlord shall not, without limiting Section 11.1 hereof, be responsible or liable to Tenant for any loss or damage resulting to Tenant from bursting, stoppage or leaking of water or sewer pipes or for any damage caused by water leakage from any part of the premises or from the pipes, appliances, or plumbing works or from the roof, street, subsurface or from any other places or damages or by any other cause of whatsoever nature.

Landlord's remedies for Tenant's breach are set forth in Article 18.2, 18.3, 18.4, and 18.5. Article 18.2 provides that whether or not the Lease is terminated, Tenant shall remain liable for Minimum Rent, Additional Rent, all costs, fees, expenses (including, but not limited to, attorney's fees, brokerage fees, expenses incurred in placing the Premises in first-class rentable condition, advertising expenses, concessions to the successor tenant such as rental abatement or an improvements allowance) incurred in pursuit of its remedies hereunder and in renting the Premises to others. Tenant shall also be liable for additional damages which, at Landlord's

election, shall be either: (a) an amount equal to Minimum Rent, … and Additional Rent which would have become due during the remainder of the Lease Term, less the amount of rental, if any, which Landlord receives during such period from others to whom the Premises may be rented…OR (b) an amount equal to the present value of the …sums which would have become due under this Lease through the end of the scheduled Lease Term. Article 18.2(b) states that all rights and remedies of Landlord set forth in the Lease are cumulative and in addition to all other rights and remedies available to Landlord at law or in equity. JIC did not terminate the Lease, and it has rented the Premises to Robert Walker's company in an effort to mitigate its damages.

BMC's chief financial officer, Jeff Bates, presented JIC's damages claim and calculations at trial. Mr. Bates is a certified public accountant and a certified fraud examiner. He has a total of 14 years of experience as chief financial officer for BMC. Mr. Bates testified that the damages sustained by JIC were calculated by applying the Lease provisions regarding Minimum Rent, Late Charges, Additional Rent and Default Rate in the Lease. The total of these charges is set forth on the first page of Defendant's Ex 207, equal to $1,286,164.90. Mr. Bates testified that total does not include attorney's fees it has paid to its counsel of record in this litigation, or $75,000.00 it incurred in replacing the three (3) HVAC systems serving the Premises and electrical work required to repair electrical problems created by Maybank. Those expenses should be added to the damages sustained by JIC. The award of attorney's fees to trial counsel shall be determined at a later date.

The Court finds that Mr. Bates applied the Lease terms as written and that he was a very credible witness. He included late charges and the contractual default interest rate, on a simple interest basis as the Lease stipulates. His calculations ran through February 25, 2022, the final day of testimony during the first trial session. Mr. Bates included within Defendant Ex 207 a

separate schedule calculating additional rent due through June 2022, explaining that the new tenant, My Father's Moustache, anticipates that its tenant upfit will be completed by the end of June, triggering the new tenant's obligation to begin its rental payments July 1, 2022. The final schedule prepared by Mr. Bates includes attorney's fees paid to Reed Smith for lease preparation and negotiation, commissions to NAI Charleston, LLC, and tenant improvement allowance to My Father's Moustache, all totaling $232,929.08. The sums set forth upon the various schedules are included within the $1,286,164.90 total on the first page of Defendant's Ex. 207.[2]

I find that the damages claimed by JIC for Maybank's breach of lease are reasonable and are the damages and charges agreed to by the parties within the Lease. Based upon the terms of the Lease, and the facts as I have found them, the Defendant, JIC is entitled to recover the sum of $1,361,164.90 against Maybank upon its counterclaim and against the Guarantors upon its direct action against them.

As a general rule, one who is injured by the acts of another is required to do those things an ordinary prudent person would do under similar circumstances to avoid damages which are reasonably avoidable. However, the law does not require him to unreasonably exert himself or to incur substantial expense to avoid damages. Tri-Continental v. Stevens, Stevens & Thames, 287 S.C. 338, 338 S.E.2d 343 (Ct. App. 1985). The party who claims damages should have been minimized has the burden of proving they could have been avoided or reduced. Id.

Article 23.1 requires the Tenant surrender to Landlord possession of the Premises broom clean, free of debris, in good order, condition and state of repair. Maybank's breach of this requirement was clearly both egregious and intentional. When Maybank finally surrendered possession to JIC, the HVAC units had not been maintained; the manufacturer's labels

[2] The court's review of these damages establish they are provided for in the terms of the Lease as they include past due Rent with interest at the contract rate of 18% plus future rent to the date of mitigation, remediation services and

containing the make, model and serial numbers as well as the coolant specifications, voltage, amperage and other key information had been removed from each of the three (3) units serving the Premises. The removal of those labels made it much more difficult for technicians to service the units. There were house-made dressings and concoctions left to spoil within the Premises, at least one of which contains a label indicating it was made March 30, 2017, all of which had long ago spoiled; the stench was described by Mr. Potepan who said it was as if he opened the lid to a trash can containing rotting fish and stuck his head inside. The photographs taken by Mr. Potepan on September 7, 2018, Defendant's Ex. 184, clearly show some of the conditions described by Mr. Potepan. The condition of the HVAC units, the water heater rack on the roof, the missing condenser unit for the walk-in cooler, loose electrical wires and extension cords, and the two (2) missing operational Rinnai water heaters are depicted in the photographs within Defendant's Ex. 181.

The absence of air conditioning in the Lowcountry heat and humidity, while Maybank retained exclusive possession of the Premises, led to mold contamination within the Premises, in the duct work, the walk-in cooler, and in the framing above the drop ceiling. As a result, JIC was forced to perform an extensive and expensive mold remediation which was not complete until the clearance testing was completed on or about June 1, 2019. Until that work was complete, the Premises could not be marketed for lease. Mr. Potepan further testified that Maybank apparently sabotaged the Premises before surrendering possession – the court finds this a fair characterization based upon the evidence, testimony and photographs, presented at trial.

Mr. Walker testified that he never experienced any water intrusion or mold while he operated J. Paulz in Space V. He also testified that he has closely examined the Premises during the course of the upfit for My Father's Moustache, and he has seen no signs of water intrusion

re-leasing costs.

and mold. Thus, the only tenant to experience water intrusion and mold is Maybank. I find that the mold contamination discovered when the property was surrendered to the Landlord in October, 2018 was caused by Maybank when they closed up the unventilated space, with the air-conditioner equipment removed.

Here, Maybank contends that JIC failed to mitigate its damages, because it did not lease the property to My Father's Moustache when the opportunity arose during the fall of 2019. As described above, JIC eventually entered into a lease with Mr. Walker's limited liability company late in 2021.

JIC, through the testimony of its Senior Vice President, Burr Ault, presented credible evidence describing the numerous potential tenants who were interested in leasing the premises during late 2019, some at more favorable terms than those proposed by Mr. Walker and others, such as Chase Bank and Xfinity, more credit-worthy than Mr. Walker's pub concept. One of those national tenants even went so far as to develop a modified and expanded floor plan which included enclosing the patio to increase the rentable square footage of Space V. JIC acted reasonably in seeking out the best tenant and best terms for Space V during late 2019. As is normal during the holiday season in commercial leasing, the negotiations stopped during the busiest retail period of the year.

Negotiations resumed in early 2020 but the commercial retail world came to a halt in March, 2020, due to the COVID-19 pandemic. Retailers and restauranteurs were not interested in opening new stores for the rest of 2020 and well into the summer of 2021. When the economy resumed, JIC, through its leasing agent, reached out to potential tenants, including Mr. Walker. As a result of Maybank's damage to the Premises before surrendering possession, JIC was forced to gut the interior, replace the duct work and HVAC units and remove the walk-in cooler which

was disabled by Maybank and contaminated with mold. As a result of Maybank's conduct, Space V was no longer equipped and upfit as a restaurant. Instead, it was "vanilla" commercial space.

Mr. Walker negotiated a substantial tenant build-out allowance and JIC anticipates he will open for business on July 1, 2022. I conclude that Maybank failed to prove that JIC's mitigation efforts were unreasonable. To the contrary, JIC made reasonable efforts to secure the best available tenant at the best terms for that space. Nobody could predict in late 2019 that the world economy would be threatened by a global pandemic months later.

Based upon the above FINDINGS OF FACT and CONCLUSIONS OF LAW, I HEREBY ORDER AS FOLLOWS:

1. Judgment is granted in favor of Defendant James Island Center, LLC upon the Plaintiff's breach of Lease claims;

2. Judgment is granted and shall be entered in favor of James Island Center, LLC upon its counterclaim against Maybank Holdings, LLC in the amount of $1,361,164.90;

3. Judgment is granted and shall be entered in favor of James Island Center, LLC upon its complaint against Richard D. Tuorto, Jr., Chandler Frierson, Natalie Myers n/k/a Natalie Frierson, John R. Hibbits, Jr. and Elizabeth Hibbits, in the amount of $1,361,164.90, jointly and severally;

4. Counsel for James Island Center, LLC shall submit an affidavit in support of its claim for attorney's fees, costs and expenses within fifteen (15) days of the date of this Order.

IT IS SO ORDERED.

Dated:_____

_____
Mikell R. Scarborough
Master-In-Equity
Charleston County

Charleston Common Pleas

Case Caption:	Maybank Holdings LLC , plaintiff, et al VS James Island Center LLC , defendant, et al
Case Number:	2017CP1006111
Type:	Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062