

oral arguments of counsel, and the applicable law, I hereby GRANT the Center's motion as to Maybank Holding's claims for Breach of Implied Covenant of Good Faith and Fair Dealing, Nuisance, Constructive Eviction, and Unfair Trade Practices.

BACKGROUND

The Center owns and operates the James Island Shopping Center located at the corner of Maybank Highway and Folly Road in Charleston, South Carolina. Maybank Holding's was a tenant of the Center and operated CURE restaurant located in the Shopping Center's outparcel (the "Leased Premises"). Four (4) partners, Richard Tuorto, Heath Verner, John Hibbits, and Chandler Frierson (collectively, the "Partners"), own Maybank Holding's along with several other entities which operate restaurants in the Charleston area.¹

In early 2014, the partners of Maybank Holding's approached the Center's then-tenant, Robert Walker, seeking to purchase his restaurant, J. Paulz, which he had operated since 2009. Prior to the formation of Maybank Holding's and prior to any communication or contact with the Center, one of Plaintiff's related companies, I'On Holdings, LLC entered into a contract to purchase the assets of J. Paulz in April of 2014.

Eventually, Maybank Holding's interacted with the Center through two (2) of its partners, Richard Tuorto and Heath Verner, because Maybank Holding's assumption of Mr. Walker's lease required the written consent of the Center. During this same time period, Maybank Holding's was created on or about July 7, 2014, for the purpose of assuming the lease and purchasing Mr. Walker's business. The lease assumption was closed on August 1, 2014. At closing, the Plaintiff executed an Assignment and Assumption Agreement and Lease

¹ Because this Order pertains only to Maybank Holding's claims for Breach of Implied Covenant of Good Faith and Fair Dealing, Nuisance, Constructive Eviction, and Unfair Trade Practices, the Court will forgo an extensive recitation of the facts.

Modification Agreement, which sets forth the terms and conditions of the Lease being assigned and assumed. In Paragraph 8, the first sentence states that the initial term of the Lease was set to expire on April 14, 2016. Maybank Holding's executed that document on August 1, 2014.

Maybank Holding's opened in November 2015. The same month, the Center notified Maybank Holding's that it had missed its deadline to exercise an option to renew its lease for an additional five (5) year term. Maybank Holding's, through Geoffrey Smith, Esquire, challenged the Center's position but ultimately conceded that the deadline had been missed and that the lease would terminate on April 14, 2016. Maybank Holding's and the Center began negotiating a new lease in 2016. The present lease was executed on June 1, 2016 (the "Lease").

The outparcel containing the CURE restaurant and the Muddy Waters Coffee Shop share a sewage lift system which serves only those two (2) spaces within the stand alone building. Sewage from each business flows into a pit where grinder pumps macerate the solids and pump the waste by forced main to the municipal sewer system.

On or about July 29, 2017, there was a grinder pump stoppage which resulted in sewage backup from a manhole cover near the entrance to CURE and Muddy Waters. The sewer 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. He arranged for the grinder pump pit to be pumped while he was awaiting troubleshooting and repairs by a local plumbing contractor. Thereafter, on or about August 14, 2017, Mr. Verner, a partner in Maybank Holding's, reported to Mr. Fabie for the first time a mold condition along an exterior wall on the Maybank Highway side of the building. After learning of the mold/water intrusion, the Center arranged for the inspection and repair of the

water intrusion and the mold. The water intrusion apparently was initiated by Hurricane Matthew which impacted the Charleston area on October 8, 2016.

On September 25, 2017, Maybank Holding's listed the restaurant for sale with National Restaurant Properties for \$499,000.00. The September rent check was returned for non-sufficient funds. Maybank Holding's 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 Maybank Holding's.

Maybank Holding's 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. Maybank Holding's, through its broker, continued marketing the restaurant for sale through much of 2018 without paying rent. Maybank Holding's refused to vacate the premises and return possession of the premises to the Center. In August of 2018, Maybank Holding's amended its Complaint to add various fraud causes of action, a SCUTPA claim, and claims for trespass, nuisance and unjust enrichment/restitution.

Maybank Holding's opposed the Center's efforts to regain possession of the premises in both the Magistrate's Court and in the Court of Common Pleas based upon jurisdictional or venue grounds. Maybank Holding's continued its refusal to surrender the premises through September of 2018. This Court ordered on September 19, 2018 that it pay all back rent, or before September 30, 2018, and pay future rent as required under the Lease. Maybank Holding's

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, and considered the oral arguments of counsel and the applicable law. The matter is now ripe for disposition. This order reflects the court's oral ruling granting summary judgment upon Maybank Holding's claims for Breach of Covenant of Good Faith and Fair Dealing, Constructive Eviction, Nuisance and Unfair Trade Practices. The Court took under advisement the remainder of the Center's summary judgment motion, and the court will address the Plaintiff's remaining causes of action by separate order.

APPLICABLE LAW

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), SCRPC. 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), SCRPC. "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).

LEGAL ANALYSIS

For the reasons set forth herein and at the hearing before me, I hereby GRANT the Center's motion with regard to Maybank Holding's claims for (1) Breach of Implied Covenant of Good Faith and Fair Dealing, (2) Constructive Eviction, (3) Nuisance, and (4) Unfair Trade Practices.

A. The Center is entitled to summary judgment as to Maybank Holding's Second Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing

Maybank Holding's alleges in its second cause of action that the Center breached the implied covenant of good faith and fair dealing implied in the Lease. The Center is entitled to judgment as a matter of law as to this claim, because Breach of the Implied Covenant of Good Faith and Fair dealing "is not an independent cause of action separate from the claim for breach of contract." *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 597 S.E.2d 881, 884 (2004). "Under South Carolina law, there exists in every contract an implied covenant of good faith and fair dealing; however, the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract, but should be viewed as merely another term of the contract at issue." *King v. Carolina First Bank*, 26 F. Supp. 3d 510 (D.S.C. 2014). Because a claim for Breach of Implied Covenant of Good Faith and Fair dealing is not recognized as a standalone cause of action under South Carolina law, I hereby GRANT the Center's motion for summary judgment as to Maybank Holding's second cause of action.

B. The Center is entitled to summary judgment as to Maybank Holding's Seventh Cause of Action for Nuisance.

Maybank Holding's alleges in its seventh cause of action that defects in the Leased Premises caused a nuisance. The law of nuisance contemplates interference from the property of one landowner with the property of another. *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152,

159, 130 S.E.2d 363, 367 (1963); 66 C.J.S. Nuisances § 10. Here, Maybank Holding's claim for nuisance is based on interference from the Leased Premises into Leased Premises. Specifically, Maybank Holding's alleges that:

[D]efects in the Leased Premises caused raw sewage to flow into the Leased Premises and common areas of the shopping center, water damage to the Leased Premises, and mold growth within the Leases Premises, which causes noxious odors and other unsanitary and noxious effects that unreasonably interfered with Plaintiff's right to use and enjoy the Leased Premises and gain the benefits of the remainder of the lease purchased by Plaintiff and the Lease.

(Pltf's Am. Cmpl. ¶ 76). This is not a proper claim for nuisance, and Maybank Holding's cannot cloak a claim for defects in the Leased Premises which caused damage to the Leased Premises as a claim for nuisance. Accordingly, I hereby GRANT the Center's motion for summary judgment as to Maybank Holding's Seventh Cause of Action for Nuisance.

C. The Center is entitled to summary judgment as to Maybank Holding's Ninth Cause of Action for Constructive Eviction

Maybank Holding's ninth cause of action alleges that the Center constructively evicted it from the Leased Premises. That claim fails as a matter of law, because Maybank Holding's cannot meet all of the requisite elements necessary to prove a cause of action for constructive eviction. It was never deprived of possession of the Lease Premises and did not vacate the premises because of some act or omission of the Center. Instead, Maybank Holding's refused to vacate the Leased Premises until ordered by this Court to do so.

The necessary elements of a cause of action for constructive eviction are (1) that by some intentional act or omission of the landlord the tenant is deprived of possession or that by some intentional act or omission the landlord substantially interferes with the tenant's beneficial use or enjoyment of the leased premises, and (2) as a result of the act or omission by the landlord, the tenant *abandons* the premises. *Pleasantburg Warehouse Co. v. Glob. Distribution, Inc.*, 287 S.C.

422, 423, 339 S.E.2d 135, 136 (S.C. Ct. App. 1985). Abandonment of the premises is essential to maintaining a claim for constructive eviction:

There is no “constructive eviction” if the tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment. To establish a constructive eviction of the premises, in order to avoid liability for rent, the tenant must surrender or abandon the premises within a reasonable time after the landlord's wrongful act.

49 Am. Jur. 2d Landlord and Tenant § 576.

I find that Maybank Holding’s cause of action for constructive eviction fails as a matter of law, because it remained in possession of the premises long after the filing of this action, did not abandon the Leased Premises within a reasonable amount of time, and did not vacate the Leased Premises due to some act or omission of the Center. Instead, it refused to surrender possession of the premises while it marketed CURE restaurant for sale,

Maybank Holding’s first asserted its claim for constructive eviction in its initial complaint filed on November 29, 2017. It reasserted this claim in its amended complaint filed on August 8, 2018. However, Maybank Holding’s refused to surrender the Leased Premises and was still in possession of the Leased Premises when both complaints were filed. Indeed, the impetus for Maybank Holding’s finally vacating the Leased Premises was not the alleged “intentional acts and/or omissions” of the Center, but rather this Court’s order based upon Maybank Holding’s *own* intentional act and omission of failing to pay rent. On September 19, 2018—nearly a year after Maybank Holding’s first asserted its claim for constructive eviction—this Court ordered it to pay back rent for an entire year from October 2017 to September 2018 and required it to continue paying rent according to the terms of the Lease. Maybank Holding’s relinquished possession of the Leased Premises following that order, having paid none of the rent which this Court ordered it to pay.

This Court's September 17, 2018 Order is now the law of the case. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E. 2d 470, 472 (S.C. 1997) ("There was no appeal of the master's ruling This unappealed ruling is the law of the case."). As such, Maybank Holding's is barred from re-litigating the issue of whether or not it timely vacated the Leased Premises. Accordingly, the law of this case is that Maybank Holding's remained in possession of the Leased Premises and withheld rent in violation of the Lease. I find that, because Maybank Holding's did not vacate the premises in a reasonable amount of time, its claim for constructive eviction fails as a matter of law.

Additionally, I find that any alleged act or omission on the part of the Center was not the reason for Maybank Holding's surrender of the Leased Premises. Faced with this Court's order, Maybank Holding's chose not to comply with it and finally vacated the Leased Premises and surrendered possession to the Center. Accordingly, the basis for Maybank Holding's vacating the Leased Premises nearly a year after it first claimed constructive eviction was not any action or omission on the part of the Center but, rather, this Court's order compelling Maybank Holding's to pay past and future rent. On this basis, I find that the Center is entitled to judgment as a matter of law and GRANT its motion for summary judgment as to Maybank Holding's ninth cause of action. *See Pleasantburg Warehouse Co. v. Glob. Distribution, Inc.*, 287 S.C. 422, 424, 339 S.E.2d 135, 136 (S.C. Ct. App. 1985) ("The record before us establishes that the tenant vacated the leased premises upon receiving a lawful order of ejectment by the magistrate. We hold that the trial judge properly found that the tenant vacated the premises as a result of the ejectment order and not as a result of the leakage problem.").

D. The Center is entitled to summary judgment as to Maybank Holding's Tenth Cause of Action for Unfair Trade Practices.

Maybank Holding's tenth cause of action alleges that the Center violated the South Carolina Unfair Trade Practices Act. I find that the Center is entitled to summary judgment as to this claim, because there are no issues of fact in dispute, and it is clear that Maybank Holding's has not met its burden of proof to establish a prima facie case under the Act.

An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive. "The legislature intended in enacting the UTPA to control and eliminate 'the large scale use of unfair and deceptive trade practices within the state of South Carolina.'" *Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986.) To be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906 (1989). The Act is not intended to redress private wrongs. An unfair or deceptive act or practice has an impact upon the public interest if the act or practice has the potential for repetition. *Noack*, 290 S.C. at 480, 351 S.E.2d at 350. There are two general ways to demonstrate the potential for repetition: (1) by showing the same kind of actions occurred in the past, thus making it likely the actions will continue absent some deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts. *Daisy Outdoor Advertising*, 322 S.C. 489, 496-97, 473 S.E.2d 47, 51 (1996).

In response to the Center's motion for summary judgment, Maybank Holding's asserts that there is a question of fact as to whether the Center violated the SCUTPA by "engaging in a pattern of unfair and deceptive acts in the conduct of the operations of James Island Shopping Center." (Pltf's Mem. In Opp. at 37.) According to Maybank Holding's, these acts include

“repeatedly making false and negligent misrepresentations to tenants regarding the condition and maintenance of the leased premises” and failing “to provide its property managers, leasing agents, and other agents with the information and documentation required to inform tenants accurately about landlord and tenant obligations and the condition and maintenance of the leased premises.” (Pltf’s Mem. In Opp. at 37.)

In opposing the Center’s motion for summary judgment, Maybank Holding’s has failed to provide any evidence either that (1) the alleged acts are deceptive, or (2) showing an impact on the public interest. Instead, Maybank Holding’s simply asserts that its allegations alone create a dispute of material fact. A party opposing summary judgment must do more than rely on mere allegations. *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985).

Maybank Holding’s cannot meet the public impact requirement of its SCUTPA Claim, because this is a private dispute between two parties, and the SCUTPA is “not available to redress a purely private wrong.” *Noack*, 290 S.C. 479, 351 S.E.2d at 350. This is a dispute between the parties arising out of Maybank Holding’s lease of the premises from the Center. Its SCUTPA allegations are nearly word-for-word exactly the same as Plaintiff’s Breach of Lease allegations. *Compare* (Pltf’s Am. Cmpl. ¶ 91) *with* (Pltf’s Am. Cmpl. ¶ 34). Maybank Holding’s SCUTPA claim is essentially a recapitulation of its Breach of Lease Claim. A breach of contract, even if intentional, does not constitute a violation of the SCUPTA. *Key Co. Inc. v. Fameco Distributors, Inc.*, 292 S.C. 524, 357 S.E.2d 476 (1987), nor does proof of negligence or ineptitude establish a SCUPTA claim. *Clarkson v. Orkin Exterminating Co.*, 768 F.2d 189, 191 (4th Cir. 1985). There is no evidence that the wrongs Maybank Holding’s alleges, i.e. defects causing sewer backup and mold contamination, within the subject outparcel building have an impact on the public interest. Accordingly, I find that the Center is entitled to judgment as a

matter of law and GRANT Defendant's motion for summary judgment as to Maybank Holding's tenth cause of action for violation of the SCUPTA.

CONCLUSION

Accordingly, it is

ORDERED ADJUDGED AND DECREED that

- (1) Defendant's motion for summary judgment is GRANTED as to Maybank Holding's Second Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing;
- (2) Defendant's motion for summary judgment is GRANTED as to Maybank Holding's Seventh Cause of Action for Nuisance;
- (3) Defendant's motion for summary judgment is GRANTED as to Maybank Holding's Ninth Cause of Action for Constructive Eviction, and
- (4) Defendant's motion for summary judgment is GRANTED as to Maybank Holding's Tenth Cause of Action for Unfair Trade Practices.

IT IS SO ORDERED.

December __, 2021

The Honorable Mikell R. Scarborough
Master-In-Equity



Charleston Common Pleas

Case Caption: Maybank Holdings LLC VS James Island Center LLC

Case Number: 2017CP1006111

Type: Order/Summary Judgment

So Ordered

s/Mikell R. Scarborough 3062