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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Circuit Court

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2021-001400

IOS, LLC ..... Appellant-Respondent

v.

Lander University ..... Respondent-Appellant

INITIAL BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE CASE

On May 29, 2012, IOS, LLC brought suit alleging Lander University breached an oral contract to purchase the hotel known as the Inn on the Square, asking for specific performance of the alleged oral contract and in the alternative, damages under theories of: 1) promissory estoppel 2) negligent misrepresentation 3) negligence and 4) breach of a written commercial lease. Lander University, who leased the property for honors housing from August 15, 2009 – July 14, 2011, admitted that it had contracted for an option to purchase the property at the time the lease was negotiated, but denied that it had unequivocally promised to purchase the property as it did not have the authority to enter a contract of sale without S.C. Budget and Control Board approval. Additional defenses included: 1) the statute of frauds 2) lack of standing 3) failure to properly state a cause of action 4) doctrines of integration/merger 5) failure to plead the essential elements of a sales contract 6) statute of limitations and 7) frivolous lawsuit.

During briefing and argument of Lander University's Motion for Summary Judgment, IOS, LLC consented to withdraw causes of action predicated upon an alleged oral contract to purchase, indicating it would elect to pursue remedies for property damage. The parties subsequently consented to the dismissal with prejudice of the Lander Foundation, a defendant whose involvement in the matter was solely related to the alleged oral contract to purchase which IOS, LLC had elected not to pursue.

On November 2, 2021, Circuit Judge Frank R. Addy granted summary judgment to Lander University as to IOS, LLC's breach of oral sales contract and specific performance causes of action (as they'd been withdrawn), as well as claims for promissory estoppel, negligent misrepresentation and negligence, finding the only issue of fact to be determined was whether IOS, LLC could recover for alleged damage to the property occurring prior to IOS, LLC's foreclosure. On

November 12, 2021, IOS, LLC filed a S.C.R. Civ. P. 59 (e) Motion to Reconsider as to all causes of action dismissed, even those it had abandoned. Said motion was denied on December 2, 2021. IOS, LLC filed a Notice of Appeal and Petition Writ of Supersedeas on December 3, 2021 as trial in the matter was set to start on December 6, 2021. Lander University filed a Cross-Appeal on December 7, 2021, arguing the trial court erred in failing to grant summary judgment as to IOS, LLC's breach of lease agreement, as it lacked standing to pursue damages in light of an absolute assignment of leases and rents in favor of Business Carolina, the lender who was owed a deficiency judgment at the time IOS, LLC filed suit.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. S.C.R.Civ.P. Rule 56. When reviewing summary judgment, appellate courts apply the same standard applied by the trial court. Bluestein v. Town of Sullivan's Island, 429 S.C. 458, 839 S.E. 2d 879 (2020). When determining if any triable issues of fact exist, as would preclude summary judgment, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. S.C.R. Civ. P. 56(c). When a plaintiff is faced with defendant's motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying upon mere allegations of his complaint, but must disclose facts he intends to rely on by affidavit or other proof. Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994). One may not create a genuine issue of material fact and, thus, avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. Hoard ex rel. Hoard v. Roper Hospital, Inc. 287 SC 539, 694 S.E.2d 1 (2010).

FACTS

This case arises out of a dispute over a small hotel, restaurant and bar which Appellant-Respondent, IOS, LLC operated in Greenwood, SC from 2005-2009. According to hotel manager and real estate broker, John Huffman, IOS, LLC brought the hotel out of foreclosure in 2005 and turned it around, borrowing additional funds to upgrade and franchise the hotel through Clarion/Choice Hotels. (Deposition of John Huffman, Day 1, p. 20, ln. 9-25, p. 21, 1-12.) Though the lender's loan file reflects otherwise, Mr. Huffman claims that the hotel was profitable until the housing market crash of 2008 and subsequent economic downtown of 2009 which resulted in a decision to put the property up for sale. (Deposition of John Huffman, Day 1, p. 21, ln 5-6). Though no proof has ever been provided, Mr. Huffman testified that he was in negotiations with potential buyers from Charleston, SC and Charlotte, NC when he was approached by Lander University, who was experiencing a housing shortage for the 2009-2010 school year caused by a sudden increase in enrollment. As a result of this shortage, Lander had approached multiple entities, including IOS, LLC, about buying or leasing additional property for student housing.

After negotiations with Mr. Huffman, Diane Newton, Lander University's Vice President for Business and Administration wrote on July 31, 2009 to Lisa Catalanotto, Attorney for the Real Property Management of the SC Budget and Control Board to request approval of a lease for the hotel. Rent was to be $31,000 per month. She also indicated that Lander would "entertain the option to purchase this hotel." (Deposition of John Huffman, Day 1, Plaintiff's Ex. 5.) Her letter outlines the ten properties which Lander had investigated before choosing to negotiate with IOS, LLC for the Inn on the Square. Ms. Catalanotto authored the written commercial lease with option to purchase conforming to this proposal which was executed by the parties on August 12, 2009. (Depo. of John Huffman, Day 1, Ex. 10) The S.C. Budget and Control Board, who was the central

broker for the leasing of government property pursuant to former S.C. Code Ann. 1-11-55 and 1-11-56, (1976, as amended) gave consent to an initial ten month lease on August 17, 2009. (Id.) Following the execution of the lease and option to purchase, Lander subsequently requested and received approval for certain inspections and appraisals required by the Budget and Control Board before any request to exercise the option could be made.

John Huffman's deposition testimony tells and entirely different uncorroborated story than the complaint or the rest of the written evidence. According to Huffman, he was contacted by Diane Newton on behalf of Lander during the middle of July 2009 and asked if he would rent 48 rooms to house 100 students. He allegedly replied that he "absolutely would not be interested in that at all, that he was only interested in selling." (Depo. of John Huffman, Day 1, p. 26, ln. 21-25). He claims she met with him several times over the next few weeks, during which he advised her that the list price of the hotel was $3.3 million dollars (Id., p. 27, ln. 1-2). Though her affidavit submitted in support of Respondent-Appellant's Motion for Summary Judgment indicates she did not agree to a purchase price, Huffman claims she allegedly countered with a $2.3 million dollar purchase price, with the caveat that the University would not have federal funds available with which enter a contract until the following April. (Id., p.28, ln. 21-25.) Huffman claims Newton then proposed that he lease two floors of the property to Lander until the following April when the University could close. (Id. p. 29, ln. 2-5.) He concedes being open to a lease at that point, but says he demanded rent of $51,000.00 per month, which Mrs. Newton rejected. (Id., p. 29, ln. 7-9.) There is absolutely no written proof of any of Huffman's claims, including his assertion that he and Newton agreed to a compromise rent of $48.000.00 per month which he claims was approved by the LLC members and primary lender, Business Carolina. (Id., p. 30, ln. 7-9.) He asserts that on the date the lease was executed, Mrs. Newton promised him that Lander would add the deficit

of $17,000.00 rent ($48,000-$31,000.00) for each month and "put it on the back end" by including $170,000.00 in any purchase price reached. (Deposition of John Huffman, Day 1, p. 40, ln. 18-22.) He also claimed that, despite a written lease to the contrary, Mrs. Newton promised that Lander would reimburse IOS, LLC for any maintenance costs. This 'side deal' was allegedly struck despite Mr. Huffman's admission that Lisa Catalanotto, attorney for the S.C. Budget and Control Board indicated that no changes could be made to the document and excused herself, admonishing the parties that the deal was "take it or leave it." (Id. p. 39.)

These claims are in stark contrast to Mrs. Newton's letter written to the S.C. Budget and Control Board on July 29, 2009 which reflects a proposed rent of $31,000.00 per month, and the amount accepted by IOS during Lander's tenancy. His account is likewise far different the notes of Business Carolina bank representative, Todd Lucas, whose indicates on July 29, 2009 that Huffman requested a meeting with the bank to discuss the performance of the hotel as his line of credit had been canceled and he could not continue to fund the hotel any longer. (Respondent-Appellant's Reply Brief in Support of Summary Judgment Exhibit 28, Business Carolina Credit Notes.) According to Lucas's file, a meeting was set up for Monday, August 3, 2009 at 10:00 a.m. at which point Huffman was advised that the bank was in negotiations to sell the note. (Id.) At the meeting, Huffman advised the bank that the hotel was suffering and he was having to subsidize the facility every month. (Id.) He then requested approval to lease the facility to Lander University as student housing for one year at $20.00 per night per room, with a promise to purchase the hotel at the end of one year for $700,000.00. (Id.) Business Carolina's notes indicate this proposal was rejected, as the purchaser of the note did not want the lease or the hotel to close. (Id.) There is further documentation that Business Carolina requested their attorney file a lis pendens, foreclosure action and TRO in Greenwood County in order to keep the facility open, following

which Todd Lucas left a message for Huffman's counsel, Leonard Jordan, to discuss a "less litigious solution." (Id.)

On August 6, 2009, quotes from Huffman appear in an article from the Index Journal newspaper confirming he was in lease negotiations with Lander after the recession "sacked his ability to keep the Inn on the Square running as a hotel." (Exhibits to Respondent-Appellant's Motion for Summary Judgment, Article, From Inn to Dorm.) The article states that Huffman stressed that the plan for closing the Inn was contingent upon a **lease** agreement being struck with Lander, with no mention of a sale. (Id.)

At no time during the negotiation of the lease did Mr. Huffman fully disclose the true extent of the hotel's debt of its delinquency. In fact, the University only learned that Business Carolina had already agreed to the sale of the note during discovery. The extent of the debt, in addition to the inspection results and the potential cost of remediation would ultimately make further negotiations exercise of the option impossible and terminate the lease.

In stark contrast to Huffman's testimony that the hotel had ups and downs but did well for the most part until 2009, Business Carolina's loan file contains extensive documentation of ongoing late and missing payments. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 24, Business Carolina Palmetto Inns, Loan Transcript.). For example, in October and November of 2007, Business Carolina threatened foreclosure and filed a Lis Pendens against both Palmetto Inns and IOS, LLC (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 25, Greenwood County Public Index for IOS, LLC). A letter from Business Carolina indicates that foreclosure would only be deferred if IOS, LLC escrowed funds totaling $26,156.25, to be applied monthly to interest until March 1, 2008. In its November 2007 letter, Business Carolina indicated that if IOS, LLC successfully refinanced on or before March 1, 2008,

the amount escrowed would be applied to reduce principal. After that date, the payment would revert to principal and interest in the amount of $7,071.39 per month. There are two additional letters from 2007 demanding that IOS, LLC and Mr. Huffman attempt to refinance the property or face foreclosure. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 26, Letters of Todd Lucas to John Huffman, August 16, 2007 and November 8, 2007.) From the payment summary provided by Business Carolina, Inc. this never occurred and Palmetto Inns/IOS, LLC remained largely in arrears. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 24, Loan Transcript.)

During the meeting with bank representatives detailed above, Huffman apparently told Todd Lucas on August 5, 2009, that he would be forced to begin shutting the hotel down on August 8th, 2009 and would be completely closed by August 15, 2009, if Business Carolina did not agree to the lease. (Respondent-Appellant's Reply Brief in Support of Summary Judgment Exhibit 28, Business Carolina Credit Notes.) This matches the timeline Huffman provided to the Index Journal when he was interviewed about the prospective lease on the following day. According to the bank file, the purchaser of the note continued to object to the lease but Huffman refused to keep the hotel open. (Id.) Though Mr. Lucas's notes end in August 6, 2009, it is apparent from the conduct of the parties as well as the execution of subsequent Forbearance, Subordination, Non-Disturbance and Escrow Agreements that after Huffman insisted on closing the hotel, the sale fell through leaving Business Carolina forced to accept the lease or foreclose, though from Huffman's account they were probably not pleased with their choice. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 29, Forbearance Agreement, Subordination/Non-Disturbance and Escrow Agreement)

In his deposition on p. 58, ln. 13-14, Huffman acknowledged the enforceability of the written lease agreement, which Lander further asserts is clear and unambiguous. Despite this acknowledgement, he continues to assert that Lander 'promised' to buy the hotel. On the first day of his deposition, September 3, 2015, more than three years after suit was filed, Mr. Huffman claimed that the University made additional promises under what he called a 'side deal.' He claimed this 'side deal' was an inducement to sign the formal written lease, which he acknowledges the S.C. Budget and Control Board would not modify. (Deposition of John Huffman, Day 1, p. 38, ln. 14-17.) No 'side deal' is pled in the Plaintiff's complaint, nor has the Plaintiff sought amendment of the Complaint. The written lease, which the Appellant-Respondent's Complaint seeks to enforce, contains language in Section 19.1 which prohibits oral modification of the agreement, requiring instead a writing signed by the party "against whom the amendment is to be enforced." (Depo. of John Huffman, Day 1, Ex. 10) . Apart from the allegations of the complaint and Huffman's bare assertions, which varied from time to time, IOS, LLC produced no corresponding proof of a binding promise upon which IOS, LLC was entitled to rely or an oral "side deal' lease. Most importantly, conspicuously absent from the Plaintiff's complaint is any allegation of a 'side deal' lease.

There is likewise no evidence of any agreement regarding purchase price or other necessary sales terms, including a closing date. To the contrary, there is abundant evidence Huffman, who held an exclusive brokerage contract to sell the property for a commission, admits that he was repeatedly advised of the S.C. Budget and Control Board multi-phase assessment and approvals protocol which was necessary before any purchase could be considered. Huffman's testimony and emails he received from Diane Newton and others after the lease commenced, confirm that he was receiving updates on the status of the project, though he does not appear to be pleased with the

pace with which they were moving forward. Correspondence shows that while Huffman continued to express frustration with the pace of the inspection process, he also acknowledged, as he had since the beginning, that the transaction was subject to S.C. Budget and Control approval requirements which could not be avoided.

On November 16, Mr. Huffman emailed Diane Newton stating that his investors were getting nervous as they had not yet seen a contract from Lander. (Deposition of John Huffman, Day 1, Plaintiff's Ex. 14). He asked for an update on where things stood and when he might receive something from her in writing. (Id.)

Ms. Newton replied that she could understand about nervous investors but, as she'd already said, she had to wait until she received Phase I Budget and Control Board approval on December 13 before she could submit a proposal, subject to Phase II approval from the Budget and Control Board. Phase II apparently wouldn't happen until the next meeting, she said, which had not yet been set. She went on to tell him that the next meeting was typically held in March, but "things were very different" in Columbia these days. (Id.) Huffman replied that:

> "I did not get that understanding from you when we discussed this in August. I was my understanding a contract would be drawn up before the end of November to submit to your Board for first round approval in December and that final approval would go before your Board in March. Unfortunately, this new time frame leaves me not option other than to proceed with a backup contract. I have a group out of Charleston and another out of Columbia that are interested in the property and we will need to schedule them both in for inspections in the next few weeks prior to negotiating a contingency contract with them should your efforts to purchase the property prove unsuccessful. I'll get back with you on the dates."

In an email, Newton replies that the time frame is out of Lander's control. She had hoped the Budget and Control Board would have a meeting prior to December, which didn't happen. She advised him that the University was moving forward with a request for Phase I approval, which

would include a building condition assessment, appraisal, and Phase I environmental assessment following which the Budget and Control Board would again have to meet to approve a proposal. (Id.) On December 16, 2009 Mrs. Newton further stated:

> "John, yesterday, the Budget and Control Board approved Phase I of the purchase of IOS. We are scheduled to meet with the code officials to discuss changes that will be required of us in order to occupy the building. The purchase will initiate a zoning change and as a state building we will be required to meet the codes associated with the new occupancy. In addition, we are pursuing an appraisal and an environmental assessment. Once we know what the code changes will require, we will be in a better position to settle on the price." (Depo. of John Huffman, Plaintiff's. Ex. 17.)

According to the rest of the email chain, Mr. Huffman apparently forwarded this information to Todd Lucas at Business Carolina, stating that it appeared "we have passed the first hurdle with the state and are moving forward." (Id.)

Mrs. Newton subsequently left the University to take another position at the University of Arkansas following which Mr. Huffman continued correspond by email with Tom Covar, her replacement, and others. These emails indicate the University continuing to move through the feasibility protocol in good faith. An email from Carol Routh states,

> "Tom Covar and Jeff Beaver called me last week on the possibility of getting this acquisition on the Board's agenda for February based on Diane's parting request. I told them, as they had only ordered the building condition assessment, that it was virtually impossible to get this to February meeting. They understood and Tom called me this morning and asked for a time line on what it would take to get this approved as the seller is pushing them. Their attorney thought something in writing from someone other than the college would help and they plan to tell the seller that they would have to negotiate to lease further as the sale can't take place on the seller's time schedule. (Depo. of John Huffman, Plaintiff's Ex. 18)

Shortly thereafter, there was a discussion of extending the lease to provide for enough time required to complete the Budget and Control process. On February 9, 2010, Mr. Huffman's

attorney, Leonard Jordan, requested information on a 'contract of sale, or at least a generally acceptable offer from Lander' in order to initiate additional talks with Business Carolina and others. (Deposition of John Huffman, Day 1, Ex. 20) As had been previously stated, these discussions were premature until state inspections could be performed.

Following this exchange, the parties agreed in March 2010 to a one year extension of the lease until June 2011.

When asked in his deposition whether he had any concern about this, Huffman replied "Oh yes. We still didn't have a contract." It is clear from this and other testimony that Huffman never considered the University's interest in the property to be a binding sales contract upon which he could rely, as he kept pushing for one.

Following the renewal of the lease, Mr. Huffman's attention appears to have been directed toward exploring other options, such as his proposal for a long term lease (5 year lease with five year renewal) with a continued option to purchase the Inn, which was pitched to President Dan Ball and others during an April 21, 2010 meeting per the email of Tom Covar dated April 23, 2010 (Deposition of John Huffman, Day 1, Ex. 25.) During that meeting, the parties apparently discussed renegotiation of the monthly lease payment in light of a long term lease as well as the University's possible assumption of the maintenance of the property which IOS, LLC was committed to in the original written lease. As detailed in Mr. Covar's email, they also discussed certain safety issues, including wiring and the hotel sprinkler system, which would have to be approved by both the City of Greenwood and the S.C. State Engineer's Office. It is clear from this email that Mr. Huffman was again advised that the purchase option would remain conditioned on the outcome of the SC State Engineer's recommendations and approval by the five member Budget and Control Board. (Id.) In September of 2010, there is an email from Glenda Ridgely at Lander

which requests Mr. Huffman contact Lander's attorney Doug Bell concerning his plan to cover the cost of upgrading the fire safety systems and his proposed new lease terms. (Deposition of John Huffman, Day 1, Ex. 26). In a subsequent letter to Leonard Jordan dated February 24, 2011, Mr. Bell indicates that the City of Greenwood will not approve a new lease between IOS, LLC and Lander University for the Inn on the Square without the fire safety renovations which had been outlined by the Fire Safety Marshall. (Deposition of John Huffman, Day 1, Ex. 27) Mr. Bell states that IOS, LLC's inability to address fire safety issues for the City, as well as the parties inability to agree upon terms for a new lease brought the University to a decision to forego its option to purchase and vacate the building at the end of the lease term on June 14, 2011. (Id.) As noted above, it appears that at least one factor was the amount of income required for IOS, LLC to service its mountainous debt, which by then included seven junior lienholders and federal tax liens filed April 12, 2010 for unpaid employee withholding that had accrued between 2005 and 2009, totaling over $295,000.

Prior to their departure on June 14, 2011, Lander's engineering department reportedly inspected the property to ensure the fixtures were functioning properly. (Deposition of John Huffman, Day 1, Ex. 52, Email from Doug Bell.) After Lander vacated the property, Business Carolina refiled its foreclosure proceeding on July 22, 2011 and the property was sold at foreclosure, with a deficiency judgment in the amount of $425,218.84 entered on May 2, 2012. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 30 Foreclosure Order and Judgment.) This action was not filed until May 29, 2012.

During the interim, Huffman submitted a demand for 'damages' to the hotel of $339, 262.00 plus interim rent of $51,000.00 per month beginning on June 16, 2011 and ending when the funds demanded had been delivered in full, plus costs to be enumerated at a later date

which he claimed were necessary to place the hotel back in a "serviceable and operational condition." (Deposition of John Huffman, Day 1, Plaintiff's Exhibit 51) This demand increased at his deposition to $590,262.00 for lost, missing or damaged items, plus $300,000 lost equity, $600,000.00 lost profit at $120,000.00 per year (though he conceded the members of the LLC were having to fund the hotel's operation prior to the lease agreement) for a total of $1,490,262.00. (Id., Plaintiff's Exhibit 53.)

This demand requested exorbitant sums for the repair or replacement of equipment (e.g. $60,000.00 for a telephone system, $70,000.00 for HVAC and refrigeration repairs, $23,000.00 for a security system and $12,000.00 for a commercial dryer.) When compared to IOS, LLC asset depreciation schedules which were obtained during discovery, the procurement costs for the same equipment was far less (e.g. $1,500.00 for the dryer, $3,780.00 for the security system and $19,300 for the HVAC, which was put into service in 2006 and remained in service when Lander vacated the property.) No **bills, estimates purchase orders, or invoices were provided in discovery which supports the alleged figures.**

Contrary to Huffman's assertion, there was also evidence that many of the items were either sold to Lander at the beginning of the lease, or in storage on the property when it was foreclosed and sold to the subsequent purchaser. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 31,Bill of Sale from Business Carolina, Inc. to 104 East Court, LLP).

ARGUMENT

I. THE APPELLANT-RESPONDENT WITHDREW ITS CAUSES OF ACTION FOR BREACH OF ORAL CONTRACT TO PURCHASE AND ELECTED TO PURSUE ONLY ITS PROPERTY DAMAGE CLAIM PLED UNDER THE WRITTEN LEASE

A. The Appellant-Respondent notified the Trial Court via Email, it's Summary Judgment Brief and oral argument that it had elected to

> withdraw a claim for enforcement of an oral contract to purchase and pursue property damage under the written lease.

Respondent-Appellant would first note that Appellant-Respondent seems to be continuing to argue causes of action it formally waived at summary judgment. On November 16, 2017, an email was forwarded to Judge Frank R. Addy by then co-counsel Chris Moore, who was previously associated by Appellant-Respondent but has since been relieved. According to both his email and the attached brief, counsel notified the court of IOS's election to withdraw its cause of action for enforcement of the purported oral sales agreement and request for specific performance. According to the email and attached brief, the plaintiff "intends to pursue its remedies for (1) recovery for damage to the property during their possession under a lease agreement and (2) damages resulting from defendant's breach of the lease agreement." (Plaintiff's counsel's email dated November 16, 2017 with attached Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment and Exhibits.)

At the hearing held in Newberry the following day, Judge Addy inquired of Mr. Moore on the record whether "the Plaintiff in the case has agreed to go with just the pure property damage claim and not move forward with the lost business opportunity allegations. Is this accurate?" to which he replied, "That's correct, Your Honor." (Transcript of Summary Judgment Hearing, November 17, 2017, Newberry, SC.)

Despite this agreement, which was announced on the record, Mr. Moore's brief and oral argument maintained that summary judgment should not be granted on the issue of promissory estoppel and negligent misrepresentation, now predicated upon a new allegation of an oral 'side deal' lease rather than an oral contract for purchase. As counsel argued at summary judgment, this argument, by definition, requires the court to consider allegations of an oral contract to purchase. According to the testimony of Mr. Huffman, this alleged 'side deal' called for the Respondent-

Appellant to add reimbursement of maintenance costs and deferred rent "to the purchase price" at the "back end." The fact that a promise to purchase is integral to this argument makes the alleged 'oral lease' merely a restatement of the withdrawn "oral contract for purchase." Respondent-Appellant would therefore argue that Appellant-Respondent waived these claims and request that Judge Addy's Order granting Summary Judgment on the breach of oral contract to purchase, promissory estoppel and negligent misrepresentation be affirmed.

II. THE APPELLANT-RESPONDENT'S PLEADINGS ALLEGE ONLY A BREACH OF THE WRITTEN LEASE CONTRACT EXECUTED BY THE PARTIES. NO CAUSE OF ACTION PREDICATED UPON A 'SIDE DEAL' ORAL LEASE IS BEFORE THE COURT AS THE APPELLANT RESPONDENT HAS NOT MOVED TO AMEND ITS COMPLAINT

A. No oral lease was pled in the Appellant-Respondent's complaint nor has a Motion to Amend been filed.

Appellant-Respondent waived its causes of action for enforcement of the oral purchase agreement and specific performance, conceding the inability to prove the necessary elements of a contract, including purchase price. After agreeing to strike these allegations at Summary Judgment, counsel proceeded to argue for enforcement of an oral lease contract never mentioned in the pleadings. In his Brief, counsel argued the existence of two "lease agreements" (Appellant-Respondent's Initial Brief, p.12) though the testimony of Mr. Huffman, some three years after the Complaint was filed, is the only evidence presented in support.

There is no corresponding allegation of a second oral lease enumerated in the complaint. Appellant-Respondent's Sixth Cause of Action, Breach of Lease Agreement, beginning at paragraph fifty relies on the language of the written lease to assert a contractual duty on the Tenant to "surrender the Demise Premises to Landlord in good order and condition." Paragraph fifty-one goes on to outline the manner in which the written lease was breached, including "failing to restore

alterations to the Inn, abandoning the Inn; leaving it open and unsecure; failing to protect the Inn from damage and loss to furniture; rooms; facilities and equipment, and failing to surrender the Inn in good order and condition." There are no corresponding allegations of breach of an oral lease or demand for damages for unpaid maintenance costs or rent as referenced in Mr. Huffman's deposition. By Mr. Huffman's own testimony, these factors only come into play if a future purchase took place and not related to a 'separate' lease.

Respondent-Appellant would further argue that had Appellant-Respondent wished to pursue this new cause of action to survive summary judgment, it should have moved to amend its complaint. Having failed to do so, it is not properly before the court.

1. The written lease executed by the parties was valid, as was acknowledged by John Huffman during his deposition and could not be modified orally.

Both the Appellant-Respondent's Complaint, as well as Mr. Huffman's testimony assert that the written lease is valid. Mr. Huffman goes on to acknowledge that he was advised by the Budget and Control Board, the agency with final authority, that no modifications could be made. The Appellant-Respondent seeks to introduce parol evidence of a 'side deal' to the written agreement, while at the same time admitting its enforceability. Appellant-Respondent further states that "there is no dispute that a written lease agreement exists and that the parties performed under that written lease." (Appellant-Respondent's Brief in Opposition to Summary Judgment).

2. The written lease, which Mr. Huffman admits is enforceable, could not be modified orally pursuant to Section 19.1. Where the terms of written agreement are unambiguous, statements made contemporaneously with or prior to its execution are inadmissible to contradict its terms and parol evidence should not be admitted to contradict an unambiguous term.

According to the language of the written lease, it could not be modified orally per Section 19.1, which provides:

> This lease may not be amended, modified, terminated, nor may any obligation hereunder be waived orally, and no such amendment, modification, termination or waiver shall be effective for any purposes unless it is in writing and signed by the party against whom enforcement is sought.

Appellant-Respondent seeks to argue parol-evidence of an oral 'side deal' despite an unambiguous written instrument. Generally, a written contract is binding as against a claimed contemporaneous agreement which would modify or vary it. Biggs v. Moll, 463 S.W.2d 881 (Mo. 1971.) An ambiguous contract is one capable of being understood in more sense than one or being obscure in meaning. Proffit v. Sitton, 244 S.C. 206, 136 S.E.2d 257 (1964) the Respondent-Appellant would argue in this case that the written lease is absolutely clear in its prohibition of any oral modification.

It is well settled law that where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any parties to it, made contemporaneously with or prior to its execution, are inadmissible to contradict, add to, subtract from, vary of explain its terms in the absence of fraud, accident or mistake. Ray v. South Carolina National Bank, Inc., 281 S.C. 170, 314 S.E.2d 359 (Ct. App. 1984). Ray involved an action on a promissory note with a purported oral agreement between the bank and the maker of the note that the bank would look to the construction contracts of a third party for repayment of the loan. Id. The Plaintiff argued that the oral agreement was admissible, because the agreement induced the execution of the note. In upholding a grant of summary judgment, the Court held that the note was clear, unambiguous and properly executed and that parol evidence was not admissible to show the existence of an alleged oral collateral agreement.

Similarly, it is clear and unambiguous from the written lease in the case at bar that the parties explicitly agreed that no oral modification of the lease was permissible.

3. Per Mr. Huffman's testimony, he was also aware that Mrs. Newton did not have the apparent authority to agree to any modification of the lease without the approval of the S.C. Budget and Control Board.

Even had the written lease been modifiable orally, the individuals Mr. Huffman describes as having reached the alleged oral lease did not have the authority to bind the parties. As noted by the written lease agreement and Mr. Huffman during his deposition, the signatures of Louis Smith, managing member of IOS, LLC and Lisa Catalanotto, attorney for the S.C. Budget and Control Board, were required to bind the parties to the written lease. Appellant-Respondent, however, argues that an alleged conversation between Mr. Huffman, as manager of the hotel, and Diane Newton, was sufficient to create a second 'oral lease.' The Appellant-Respondent cannot side-step the written agreement by an alleged agreement between unauthorized agents.

The concept of apparent authority depends upon manifestation by the principal to the third party and a reasonable belief by the third party that the agent is authorized to bind the principal. Visual Graphics Leasing Corp., Inc. v. Lucia, 311 S.C. 484, 429 S.E. 2d 839 (Ct. App. 1993). As noted above, throughout Mr. Huffman's testimony he expressed actual knowledge from multiple sources that pursuant to former S.C. Code Ann. 1-11-55 and 1-11-56, (1976, as amended), any lease entered by Lander University required the approval of the S.C. Budget and Control Board. Not only was approval not given to the alleged oral lease, Mr. Huffman quotes Lisa Catalanotto as having admonished him that she could have 'no part' in any "illegal" attempt to modify the written agreement prior to leaving the room on the date of execution. (Depo. of John Huffman, Day 1, p. 39).

4. There are no material issues of fact which corroborate the Appellant-Respondent's late assertion of a separate oral lease agreement or 'side deal'

According to the deposition of Mr. Huffman, during negotiations for the written lease he asked Lander to maintain a tax escrow and maintenance escrow to cover high end items "because everyone knew he didn't have the money." (Deposition of John Huffman, p. 51, ln. 15-21.) On page 51, he indicates "they ended up screwing us on the taxes" conceding that despite his request Lander wouldn't agree to the tax escrow. During additional deposition testimony, Mr. Huffman's deposition claimed that he thought the written lease was with the Budget and Control Board, and that he had a separate agreement with Lander via Diane Newton, who he claimed had agreed for additional rent to be paid on the 'back end' of the deal as an increase in the purchase price. (Deposition of John Huffman, Day 3, p. 66, Ln 1-5)

Actual written documentation concerning negotiation of the lease terms include a letter from Diane Newton to Lisa Catalanotto on July 29, 2009 outlining the terms of the proposed lease and requesting approval. Per that request, as well as the formal written lease that followed, the Inn on the Square agreed to be responsible for maintenance and landscaping and Lander University agreed to rent of $31,000.00. In Article 16, there was a further provision for "Minor Repairs" which stated that

> If at any time during the initial term or the extended term, if any, Tenant shall find the Demised Premises items in need of repair or replacement, including but not limited to, torn or damaged carpet, improper or inadequate lighting, faulty workmanship or construction, inoperative door locks or other similar deficiencies which affect Tenant's use and enjoyment of the Demised Premises, Tenant shall give written notice thereof to the Landlord and Landlord shall, at its sole cost and expense, repair, replace or otherwise cure the deficiencies described by Tenant within thirty (30) days of the date of Tenant's notice thereof. In the event the Landlord shall fail or refuse to repair or replace or cure the deficiency within the aforesaid time and the cost of such repair,

> replacement or cure is less than $5,000.00, Tenant shall have the right, but not the obligation, to undertake such repair, replacement or cure and, in such event, shall have the right to deduct the costs thereof from the next due monthly installment of Basic Rent. In the event the Tenant does not undertake such repair, replacement or cure, irrespective of the cost thereof, and Landlord shall not have repaired, replaced or cured such deficiency within sixty (60) days of the date of Tenant's notice to the Landlord of such deficiency, Tenant may, at its option, terminate this Lease, whereupon the Basic Rent and all other charges payable hereunder by Tenant shall be apportioned as of such date of termination. (Deposition of John Huffman, Day 1, Exhibit 10.)

On August 4, 2009, there is an email from Diane Newton to Misty Huffman, stating that Lisa [Catalanotto] was not crazy about Lander having to pay for repairs or reducing the purchase price by whatever Lander was required to spend, indicating there was some discussion regarding the issue of maintenance, which was shot down by the S.C. Budget and Control Board. (Deposition of John Huffman, Day 1, Exhibit 7). In response to an email from Lisa Catalanotto, asking will the "Landlord will be responsible for any renovations to the building (painting, carpet cleaning, etc.)" Diane Newton replies that "We will ready the building," presumably indicating that Lander would prepare the building for students. (Deposition of John Huffman, Day 1, Exhibit 8) While it appears that there were emails back and forth during negotiations, the Appellant-Respondent conceded at summary judgment it has no additional physical evidence, such as a canceled check for reimbursement of maintenance costs it alleged that Lander paid as evidence of partial performed of an alleged terms of the 'side-deal.' (Transcript of Summary Judgment Hearing, p. 28, ln. 12-13. In fact, Lous Smith, the managing member of the LLC, testified in his deposition that he believed Business Carolina managed the payroll for IOS, LLC's maintenance man. Deposition of Louis Smith, p. 80, l. 21-22. Without any evidence apart from the testimony of Mr. Huffman, the Respondent-Appellant would ask that the trial court's grant of summary judgment be affirmed.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS A MATTER OF LAW AS TO APPELLANT-RESPONDENT'S REMAINING CAUSES OF ACTION FOR PROMISSORY ESTOPPEL, NEGLIGENT MISREPRESENTATION AND NEGLIGENCE AS THE UNDISPUTED FACTS DO NOT SUPPORT THESE THEORIES OF RECOVERY

A. There is not clear and convincing evidence of an unambiguous promise under any 'side deal' with definite terms that would support the Appellant-Respondent's alleged reliance and Summary Judgment was proper as to Promissory Estoppel

To establish a claim for promissory estoppel under South Carolina law, a plaintiff must demonstrate that: (1) a party made a promise unambiguous in its terms; (2) the party to whom the promise is made reasonably relied on the promise; (3) the reliance was expected and foreseeable by the party who made the promise; and (4) the party to whom the promise is made sustained injury in reliance on the promise. Anthony v. Atlantic Group, Inc., 909 F. Supp. 2d 455 (D.S.C. 2012). Under promissory estoppel, the promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor, particularly because promissory estoppel applies without a contract; the presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist. Barnes v. Johnson, 402 SC 458, 742 S.E.2d 6 (Ct. App. 2013). Because one may properly invoke promissory estoppel absent elements typically required for a contract, such a meeting of the minds or exchanged consideration, the doctrine requires, **by clear and convincing evidence**, a promise unambiguous in its terms (emphasis added) Id. An inability to clearly articulate the terms of an alleged oral contract, including how an existing capital contribution would be treated and specifically how the parties would settle up, renders an agreement ambiguous, and any loss is not recoverable under a theory of promissory estoppel. Id. Although the doctrine of promissory estoppel may be used to

avoid the statute of frauds' writing requirement in South Carolina, it may not be used to create a legally enforceable promise when it would not otherwise be binding under ordinary contract principles. Trident Construction Co., Inc. v. Austin Co., 272 F. Supp. 2d 566 (D.S.C. 2003). The doctrine of promissory estoppel, although equitable, has limitations. See e.g., Rushing v. McKinney, 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct.App. 2006) (holding absence of clearly articulated terms between parties precludes recovery in promissory estoppel). "Specifically, the doctrine's elements represent a balancing between affording a remedy where contract law cannot, and ensuring the doctrine's application is not, itself, an inequity against the party estopped." Barnes v. Johnson, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct.App. 2013).

Respondent-Appellant has already conceded that it has insufficient evidence to prove that the University promised to purchase the hotel for a specific price. Its fallback argument, as a matter of necessity, is that a separate "lease" was formed between Mr. Huffman and Mrs. Newton, without the approval of the Budget and Control Board, though its consent was necessary to any transaction between the parties. There is no proof of any such agreement, outside of the testimony of the hotel manager, who did not have the authority to enter such an agreement on behalf of the Respondent-Appellant. More specifically, there is no proof of an 'unambiguous promise' for a separate lease, and the argument itself is simply restatement of the terms of the Respondent-Appellant's failed promise to purchase argument. Mr. Huffman's testimony alone is not sufficient to create a genuine issue of material fact as to an (1) unambiguous promise (2) that the party to whom the promise is made reasonably relied on the promise (3) the reliance was expected and foreseeable and (4) the party to whom the promise was made sustained injury in reliance.

Mr. Huffman claims Louis Smith, the managing member with authority to enter an agreement on behalf of the LLC was present during meetings with Mrs. Newton when the alleged

'side deal' was struck and relied on the representations (Deposition of Louis Smith, p. 150, l. 14-25, p 151, l. 1-2. By contrast, Louis Smith's testimony was that he was "really not a part of those discussions" and only initiated the contact with Lander and showed up to "sign the lease." (Deposition of Louis Smith, p. 75, l. 12-16.) The only allegation of a separate promise which appears in the deposition of Mr. Smith, is the alleged promise to purchase, the cause of action for which has been withdrawn.

B. Summary Judgment was appropriate as to Negligent Misrepresentation as the Appellant Respondent cannot establish the six elements of this cause of action.

The doctrine of negligent misrepresentation is an equitable maxim that provides a duty for information negligently supplied for the guidance of others in business transactions. S.C. Elec. & Gas Co. v. Westinghouse Elec. Corp., 826 F. Supp. 1549, 1557 (D.S.C. 1993). The essential elements of this tort are: (1) that the Defendant made a false representation to the Plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a proximate result of his reliance on the representation. Gilliland v. Elmwood Properties, 301 SC 295, 391 S.E.2d 577 (1990) and AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992). To be actionable, the representation must relate to a present or pre-existing fact and be false when made. Fields v. Melrose, Ltd. Partnership, 312 SC 102, 439 S.E.2d 283 (Ct. App. 1993). The representation cannot ordinarily be based upon unfulfilled promises or statement as to future events. Id. "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." Winburn v. Insurance Co. of N. Am., 287 S.C. 435, 443, 339 S.E.2d 142, 147 (Ct. App. 1985).

Appellant-Respondent initially alleged in its complaint that Diane Newton made false representations to IOS, LLC regarding the intent and/or willingness to purchase the Inn. At summary judgment, those claims were withdrawn and assertions of an oral 'side lease' were substituted. There is no evidence of an alleged representation, other than the testimony of John Huffman. Leaving that fact aside, it is clear that Mr. Huffman was well aware that he did not have the right to rely solely on any employee of Lander University to create a binding lease agreement as the Budget and Control Board had exclusive statutory authority for approval of same. While issues of reliance may ordinarily resolved by the finder of fact, if the undisputed evidence clearly shows the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact to preclude summary judgment in an action for negligent misrepresentation. Quail Hill, LLC v. County of Richland, 692 S.E2d 499 (SC 2010). A party may not rely upon an alleged misstatement of fact when the truth is easily within his reach. King v. Oxford, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984).

Moreover, for the Appellant-Respondent's claim of negligent representation to be actionable, it would have to involve a present or preexisting fact that is false when made, not a future promise. Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E. 2d 283 (1993). The claimed negligent misrepresentation or inferred promise of a 'side deal' to pay maintenance costs or rent as part of a future purchase price would not be a pre-existing fact, as required by Fields.

C. Summary Judgment was proper as to Appellant-Respondent's cause of action for Negligence, as an action for tort will not arise out of an alleged breach of contract.

1. The duties of the parties were established by the Lease contract executed in August 2009. No duty of care has been shown to exist independent of the contract. Any duty imposed by S.C. Code Ann. 27-35-75 is identical to that which was outlined in the contract between the parties.

Under South Carolina law, an action for tort does not lie if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties.. Toney v. LaSalle Bank Nat. Ass'n, 896 F. Supp. 2d 455 (D.S.C. 2012). Generally a negligence action will not lie when parties are in privity of contract. Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding, Inc. 320 S.C. 49, 463 S.E.2d 85 (1995) Breach of a duty which arises under the provision of a contract between parties must be redressed under contract as a tort action will not lie, unless there is a breach of duty arising *independently of any contract duties between the parties*. State Ports Auth. V. Booz-Allen, 289 S.C. 373, 346 S.E. 2d 324 (1986) [emphasis added.]

Moreover, bare allegations of negligence cannot convert a breach of contract action into a tort. Seebaldt v. First Federal Savings and Loan Ass'n 269, S.C. 691, 239 S.E. 2d 726 (1977) When it is questionable whether an action is pled in contract or in tort, doubt is generally resolved in favor of regarding an action to be on contract. Id.

Appellant-Respondent's negligence claim is premised upon the allegation that Respondent-Appellant owed a special duty of care, in addition to those contractual duties in the written lease, under S.C. Code Ann. 27-35-75, which was not pled in the Complaint. This statute, provides that a lessee may not:

> "deliberately or negligently destroy, deface, damage, impair, abuse or remove any part of the premises or knowingly permit any person to do so who is on the premises with the lessee's permission or who is allowed access to the premises by the lessee.."

It is alleged by the Appellant-Respondent that this statue applies to all "commercial leases unless otherwise agreed to in a commercial lease agreement or security agreement." The Respondent-Appellant would show that the lease in question provided that the Tenant would:

> "Maintain the Demised Premises in a clean and good condition and return the Demised Premises in a clean and good condition at the termination of the Lease in accordance with Article 17 hereof. The Tenant **shall not** (emphasis added) be obligated to make any repairs arising out of or in any way caused by 1) settling 2) defects in labor workmanship, materials, fixtures or equipment employed, supplied or installed by or on behalf of the Landlord or 3) the negligence of the Landlord."

Respondent-Appellant would argue that Lander, as Tenant, previously agreed to a contractual duty in the written lease which makes the imposition of any statutory duty duplicative and therefore, moot.

CONCLUSION

For the reasons stated above, this Court should affirm the circuit court's grant of summary judgment to Lander University on IOS, LLC's causes of action for breach of oral sales contract and specific performance causes of action, promissory estoppel, negligent misrepresentation and negligence.

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Circuit Court

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2021-001400

IOS, LLC ..... Appellant-Respondent

v.

Lander University ..... Respondent-Appellant

PROOF OF SERVICE

I certify that I have served the Initial Response Brief of Respondent-Appellant by email and U.S. Mail postage prepaid, on September 30, 2022, addressed to Appellant-Respondent's attorney of record:

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September 30, 2022

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The Honorable Jenny Abbott Kitchings
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Re: IOS, LLC v. Lander University
Appellate Case No.: 2021-001400

Dear Ms. Kitchings:

Enclosed please find the Initial Response Brief of the Respondent-Appellant in the above-referenced case. By copy of this letter to Appellant- Respondent's counsel, I am hereby serving him with a copy of the same.

I would appreciate your assistance with filing the attached and returning clocked copies.

Sincerely,

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