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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Oconee County
Court of Common Pleas

Hon. Steven C. Kirven, Master-in-Equity
2019CP3700687 and 2020CP3700188

Appellate Case No. 2022-001189

Montgomery Holdings, LLC d/b/a IBI Builders……..…….…….…….Respondent,

Versus

Christopher J. Merlo and GrandSouth Bank…….Defendants.

AND

Christopher J. Merlo……..Appellant,

Versus

Gregory K. Grissinger, Jr., and John Montgomery……..Respondents.

INITIAL BRIEF OF RESPONDENTS

JASON M. TAROKH
S. CAROLINA BAR # 72837
TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510
jason@tarokhlaw.com
Attorney for Respondents

May 23, 2023
Tampa, Florida

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STATEMENT OF THE CASE

On November 8, 2019, Montgomery Holdings, LLC d/b/a IBI Builders (herein "IBI") filed its Complaint in the main action, *Montgomery Holdings, LLC v. Christopher J. Merlo, et. al.* (Oconee County Court of Common Pleas Case # 2019CP3700687), and therein alleged the following claims against Christopher J. Mero (herein "Merlo"): foreclosure of its mechanic's lien, breach of contract, unjust enrichment and quantum meruit. IBI had also named Bank of Travelers Rest and GrandSouth Bank as defendants to the foreclosure claim. (IBI's Complaint in 2019CP3700687).

On November 21, 2019, Merlo filed his Answer, Counterclaim and Third Party Complaint in the main action. Merlo's Third Party Complaint named Gregory K. Grissinger, Jr. (herein "Grissinger), and John Montgomery (herein "Montgomery") as third party defendant. (Merlo's Answer, Counterclaim and Third Party Complaint in 2019CP3700687). The Counterclaim alleged breach of contract, negligence, negligence misrepresentation, fraud, violation of the South Carolina Unfair Trade Practices Act, and breach of fiduciary duty against IBI. The Third Party Complaint alleged those same claims against Grissinger and Montgomery except for breach of contract. On December 20, 2019, IBI filed its Answer and Affirmative Defense to Defendant's Counterclaims. (Plaintiff's Answer and Affirmative Defenses to Defendant's Counterclaims in 2019CP3700687).

On February 18, 2020, the circuit court ordered the Third-Party Complaint to be separated into another cause of action. (Order Granting Plaintiff's Motion to Compel Answers to Interrogatories and Responses and Documents to Requests for Production and Granting Third Party Defendants' Motion to Strike/Dismiss Third Party Complaint in its Entirety in 2019CP3700687). Consequently, on March 6, 2020, Merlo filed a separate action, *Christopher*

J. Merlo v. Gregory K. Grissinger, Jr., and John Montgomery (Oconee County Court of Common Pleas Case # 2020CP3700188), and therein asserted claims for negligence, negligent misrepresentation, fraud, violation of the South Carolina Unfair Trade Practices Act, and breach of fiduciary duty. (Melro's Complaint in 2020CP3700188). Montgomery and Grissinger filed their Answer and Affirmative Defenses on March 23, 2020 (Answer and Affirmative Defenses filed in 2020CP3700188). On August 30, 2021, the trial court entered a consent order for consolidation, which consolidated case # 2020CP3700188 with the main action, case # 2019CP3700687. (Consent Order for Consolidation in 2020CP3700188, which was also filed in 2019CP3700687). Also, on August 30, 2021, the circuit court entered a consent order for order of reference to the master-in-equity in 2019CP3700687. (Consent Order for Order of Reference to Master-in-Equity in 2019CP3700687).

Subsequently, the consolidated cases were tried before the master-in-equity over the course of consecutive days, from May 24, 2022 through and including May 27, 2022. On July 20, 2022, the master-in-equity entered its Master-in-Equity's Order and Judgment of Foreclosure and Sale (herein "Judgment"). (Master-in-Equity's Order and Judgment of Foreclosure and Sale).

The Judgment, which was granted in favor of IBI on its breach of contract and mechanic's lien foreclosure claims, found that the total debt due to IBI was $402,861.66, and ordered that the subject real property be sold to satisfy the indebtedness owed to IBI. The Judgment found IBI's claims for quantum meruit and unjust enrichment were moot because a valid and enforceable contract existed between IBI and Merlo. In addition, the Judgment dismissed with prejudice Merlo's counterclaims for fraud, negligent misrepresentation, violation of SCUTPA and breach of fiduciary duty against IBI in case # 2019CP3700687 by directed

verdict. The Judgment also dismissed with prejudice Merlo's claims against Grissinger and Montgomery for negligence, fraud, negligent misrepresentation, violation of SCUTPA and breach of fiduciary duty in case # 2020CP3700188. (Master-in-Equity's Order and Judgment of Foreclosure and Sale).

Subsequently, on July 28, 2022, the Oconee County Clerk of Court filed a Notice of Sale, which scheduled a foreclosure sale of the subject real property for September 6, 2022. (Notice of Sale in 2019CP3700687). On July 29, 2022, Merlo filed his Motion to Alter or Amend. (Merlo's Motion to Alter or Amend in 2019CP3700687). On August 9, 2022, IBI, Grissinger and Montgomery file their response in opposition. (IBI's, Grissinger's, and Montgomery's Response in Opposition to Merlo's Motion to Alter or Amend in 2019CP3700687). Subsequently, the Court entered an order on August 17, 2022 denying Merlo's Motion to Alter or Amend. (Order Denying Motion to Alter or Amend in 2019CP3700687). Thereafter, on August 22, 2022, Merlo filed his Notice of Appeal in 2019CP3700687 and 2020CP3700188. (Merlo's Notice of Appeal in 2019CP3700687 and 2020CP3700188).

Thereafter, on August 23, 2022, Merlo filed a motion and proposed order pursuant to South Carolina Code Ann. § 18-9-130(2)[sic]. (This motion is not reflected on the docket in 2019CP3700687, only the NEF). After multiple filings in support and opposition thereof, on August 26, 2022, the master-in-equity filed its order denying the motion and ruled that IBI shall not be required to post any bond to proceed with the foreclosure sale citing to *Cartsen v. Wilson*, 241 S.C. 516 (1963) and South Carolina Code Ann. § 18-9-170. (Order Denying Merlo's Motion and [Proposed] Order Pursuant to South Carolina Code Ann. § 18-9-130(2)).

Subsequently, on August 29, 2022, while this appeal was pending, IBI filed a Satisfaction

of Judgment, which provided in part that "that the judgment entered against Defendant, CHRISTOPHER J. MERLO, on July 20, 2022, has been satisfied in full as to all damages, costs, and charges", because Merlo satisfied the judgment. (Satisfaction of Judgment). On that same day, August 29, 2022, IBI filed Plaintiff's Motion and Order Cancelling the Foreclosure Sale Scheduled for September 6, 2022, which was entered by the master-in-equity on the same day and resulted in the foreclosure sale being withdrawn from the Clerk's September 6, 2022 foreclosure sale roster. (Plaintiff's Motion and Order Cancelling the Foreclosure Sale Scheduled for September 6, 2022).

STATEMENT OF THE FACTS

IBI and Merlo entered into a written contract dated November 17, 2017 (herein "Contract"), for the construction of a custom home on Merlo's real property for the base price of $625,000 plus any change orders and allowance overages. (Plaintiff' Ex. 2). IBI was to be paid by period loan draws based upon the bank's draw inspection schedule pursuant to the Contract. (Plaintiff's Ex. 2). The Contract was a turnkey contract (Tr. 30:8; 27:18-28:3).

IBI's Balance Sheets

Throughout the course of the Merlo project, IBI would periodically send Merlo its balance sheet, which is a document, an Excel spreadsheet, prepared and kept by IBI in the normal and usual course of its business, that keeps track of its accounting, including add-ons, change orders, payments, credits, and things of that nature. (Tr. 32:18-33:16, 69:71-1). Plaintiff's Ex. 4, 6, 8, 10, 12, 15, 17, 19, 22, 24, 26, 28 and 39). The balance sheets are made at or near the time of the event by someone with knowledge and it is the regular practice of IBI to create, maintain and rely upon the balance sheets. (Tr. 35:10-18). Instead of invoicing their clients, IBI works off its balance sheet. (Tr. 109:10-11; 321:7-8).

The April 30, 2019 balance sheet showed three items as "pending": "Haul Dirt", "Staining Each Door $45 each" and "Making Theater room larger". (Plaintiff's Ex. 28). The August 9, 2019 balance sheet kept the same pending items as reflected on the April 30, 2019 balance sheet and added "Landscape Overage (Landscape Lights)" and "Deck extension Flooring and Rail" items. (Plaintiff's Ex. 26; Tr. 46:9-47:21).

The final balance sheet included the same items reflected on the April 30, 2019 and August 9, 2019 balance sheets and added "2 extra floor recepticals" as an additional item. (Plaintiff's Ex. 39). The final balance sheet reflected $14,075.00 for "Haul Dirt, $1,305.00 for "Staining Each Door $45 Each 29 Doors", $7,975.00 for "Making Theatre room larger", $30,945.00 for "Landscape Overage (Landscape lights)", $6,415.00 for "Deck extension Flooring and Rail Not on Plan", $550.00 for "2 extra floor recepticals". (Plaintiff's Ex. 39). Montgomery testified that Merlo had known about and approved each of these specific items. (Tr. 209:14-18).

Regarding the "Haul Dirt" item, Montgomery testified that haul dirt was on the balance sheet from the beginning of the project and was pending when Merlo signed the Guaranty and that $14,075.00 figure was based on the cost to haul dirt. (Tr. 99:1-104:11; 253:15-254:9).

Regarding the "Staining Each Door $45 each" item, Montgomery testified that on final balance sheet (Plaintiff's Ex. 39), the $7,975.00 figure was calculated by multiplying 45 times the 29 doors, to which Merlo had acquiesced. (Tr. 104:12-23; 207:18-209:13; Plaintiff's Ex. 52).

Regarding the "Making Theater room larger" item, Montgomery testified that Merlo was charged $7,974.00, which was calculated by Grissinger based upon the work performed. (Tr. 104:24-111:19; 217:4-22; 246:13-24). Grissinger testified that IBI came up with the price for

making the theater room larger by square footage, extra materials, extra door, and extra labor, which IBI paid for and for which IBI had documentation to support. (Tr. 319:18-322:25).

Regarding the "Landscape Overage (Landscape Lights)" item, Montgomery testified that the total charge was $44,945 less the $15,000 allowance, which equals $29,945. (Tr. 117:11-119:19). The $1,000 difference was the cost of the landscape lights, four at $250 a piece. (Tr. 209:22-211:5; Plaintiff's Ex. 53).

Regarding the "Deck extension Flooring and Rail Not on Plan" item, Montgomery testified that Grissinger calculated the $6,415.00 figure based on railing, deck flooring and decking, which was calculated with the deck, the decking and railing. (Tr. 119:20-120:12).

Regarding the "2 extra floor recepticals" items, Montgomery testified that he believed the $550.00 figure was generated by the costs of outlets and an electrician's services (Tr. 120:22-121:16).

The Guaranty

The Contract was supplemented and modified by that certain instrument dated May 3, 2019, which was referred to as the "Guaranty". (Plaintiff's Ex. 33). Pursuant to the Guaranty, Merlo agreed that the balance sheet as of April 30, 2019, consisted of a total balance owed to IBI in the amount of $183,382, agreed to pay IBI for all past and pending change orders that were reflected on the April 30, 2019 balance sheet, in addition to agreeing, among other things set forth therein, that all future change orders and allowance overages would be added to the balance sheet prior to "move in completion of home and or Certificate of Occupancy request". (Tr. 52:10-56:21; Plaintiff's Ex. 33). Pursuant to the Guaranty, Merlo also specifically waived the defense of lack of consideration and other defenses. (Plaintiff's Ex. 33).

Merlo's Re-work Lists

Throughout the course of the project, Merlo would periodically send IBI re-work lists, which were comprised of pictures (photographs) of items still under construction, punch list items, items that had not yet been completed, or already acknowledged by IBI. (Tr. 66:19-68:5). Shortly before Merlo terminated IBI on October 12, 2019, he had commended IBI from reducing the re-work list from four pages to one page in August 2019. (Tr. 46:9-22, 68:6-11; Plaintiff's Ex. 25, 26). After listening to Merlo's testimony as to alleged various issues with the house, IBI's expert as to quality of construction, Laplante, an architect, testified that in his opinion, that IBI performed under the contract in compliance with the standard of care and that the construction of the project was performed in a good workman like manner per industry standards, that a custom home can take 18 to 26 months, that a home taking 23 months to construct is not a big issue, and that there were no indications that IBI's management of the construction of the project and supervision were not adequate. (Tr. 736:13-738:18). Laplante testified the quality of construction performed by IBI is "a very well-built home". (Tr. 735:2-11). Laplante also opined that the "crazy" volume of photographs taken by Merlo during the course of the project was "a bad faith procedure" on the part of Merlo during the construction process and that there was not anything in Merlo's photographs presented at trial that indicated any issues with construction that would rise to the level of breaching the standard of care. (Tr. 736:18-737:20). Merlo testified that he has "4,500 pictures". (Tr. 566:25-567-2).

Basement Ceiling Height

Pursuant to the Contract, IBI agreed to construct the home "per plans and scope". (Plaintiff's Ex. 2). The Contract's "Spec Sheet", which was "based off plans", called for ten-foot ceilings to be constructed in the basement. (Plaintiff's Ex. 2). Grissinger testified at trial that the

plans show the first floor ceiling height 11'3 and when a 16" I-joist and half inch drywall is added, it brings the basement ceiling height to 9'8", which was built pursuant to the plans. (Tr. 279:1-281:7). Grissinger testified that he and Merlo "had a conversation about it and it was never brought up again because he understood why it was like it was, you know, it was built to plan." (Tr. 280:20-23). Grissinger testified that Merlo, "asked why and I explained to him that it was like the plan and this is how you get those measurements, and then it was never brought up again." (Tr. 314:2-5). When Grissinger brought the basement ceiling height to Merlo's attention "that we did it per plan, that subject was dropped." (Tr. 314:16-19). Grissinger testified that Merlo "fully understood the ceiling heights and he was fine with it because we built it per plan." (Tr. 319:15-17).

IBI's expert, Laplante, testified that there was a conflict between the Contract and plans: "If I built per the drawings precisely which is what the contract says to do, you can't get 10 feet. And if I do the 10 feet, then I can't do it per the drawings so that should've been resolved." (Tr. 741:16-20). Laplante further testified, "you cannot build a house with beams, et cetera to achieve a 10 foot ceiling height per those plans, period." (Tr. 742:20-22).

Merlo's "Sandy Creek" Site Plan

The Sandy Creek site plan was a standard plan that was purchased by Merlo as the starting point of the discussions between IBI and Merlo, which Merlo had later modified significantly. (Tr. 245:5-246:2). The Merlo project was based off the modified Sandy Creek site plan. (Tr. 150:1-7; Defendant's Ex. 6). Montgomery testified that there were two sets of plans and Merlo had modified his original Sandy Creek site plan by adding a theater room, workout room, secondary kitchen in the basement, and more square footage that he could recall. (Tr. 139:3-17; 105:6-18). Montgomery testified that he received Merlo's original Sandy Creek site

plan and electronically filed it in IBI's electronic file that contained miscellaneous and generic plans over years knowing that Merlo would be sending IBI modifications. (Tr. 134:16-23). Around that same time, IBI was building another house (herein "Riverstone project") and IBI had used the Sandy Creek site plan for the Riverstone project. (Tr. 135:4-15). IBI discovered the Sandy Creek site plan mistake when it realized that there was no architectural plan cost associated with the Riverstone project while working with its accountant for year-end bookwork and then immediately purchased a license to use the plan. (Tr. 135:15-136-16).

During the course of the Merlo project, IBI was oblivious that the original Sandy Creek site plan was used for the Riverstone project because it had sent Merlo to the Riverstone project to look at retaining walls. (Tr. 142:19-25). Montgomery further testified that "I did not testify that I took his personal plans because they're not his personal plans, they're still available online. I took the Sandy Creek Plan. If anything that you're painting a picture of me about I did it in error, I should have not have put it in the file…But at the end of the day we built a different plan than his house, we bought the license to it and it's a plan that's still being reproduced today…I made a simple mistake by filing a very reproducible set of plans into a file that I shouldn't have and that's my mistake…And it's a different plan than what he redesigned". (Tr. 152:15-25; 154:8-10; 14-15). For the Riverstone project, IBI "built the Sandy Creek plan, the original one that was purchased on the internet that is available this day, a reproducible set, a factory mill set, it's there like a pair of socks, anybody can get them." (Tr. 150:15-19).

Merlo's Termination of IBI

GrandSouth Bank held the construction loan that primarily funded the project. (Tr. 325:4-328:20; Plaintiff's Ex. 61). Lee Matthew West, III (herein "West"), was called by IBI as a witness. West performed construction loan draw inspections for the Merlo project on behalf of

GrandSouth Bank (Tr. 161:7-174:2; Plaintiff's Ex. 43, 44, 45, 46, 47, 48, 49, 50, 51). West inspected the Merlo project on August 26, 2019, and found that it was 93% complete.

Merlo terminated IBI on October 12, 2019. (Plaintiff's Ex. 37). Before termination, on June 4, 2019, Merlo sent IBI an e-mail that thanked it for getting the project "to the finish line." (Tr. 658:20-659:70; Plaintiff's Ex. 89). Merlo terminated IBI three days after Merlo attempted to put theater equipment on IBI' account with a supplier, to which IBI objected, and also being told by IBI that a certificate of occupancy would not be requested until full payment was made and sending IBI an e-mail the day before termination agreeing to meet to discuss payment. (Tr. 60:4-66:15, 75:10-77:16, 626:7-631:18; Plaintiff's Ex. 37, 41). IBI was at the subject property the day before termination working on the project "getting ready to finish up the house." (Tr. 265:16-266:13).

Ronald Fred Marchant, III (herein "Marchant"), was called by IBI as a witness. Marchant was a senior vice president of GrandSouth Bank who was familiar with the Merlo project. (Tr. 342:10-:343:25). On November 12, 2019, Marchant visited the subject property and found it had "matched up with what our inspection records said". (Tr. 344:10-11). Marchant testified "I walked in and observed the completion level of the house. It was, I thought, right on with what our inspection had said. It was nearing completion, almost to the punch list, you know, the appliances were on site and not in…It looked, to me it looked to be at the level of completion it should be and it looked presentable." (Tr. 344:16-24). Marchant had sent an e-mail to his boss at the bank after Mr. Marchant's visit and stated in part therein, "I visited the home yesterday and it looks good. Needs to be punched out and appliances installed. Other than that, it is ready to go." (Tr. 345:17-346:23; Plaintiff's Ex. 69). Mr. Marchant testified that he did not find anything wrong with the house during his visit. (Tr. 347:16-21).

Mr. Marchant also testified that he had inspected hundreds of residential homes in his career in the banking industry. (Tr. 347:24-348:6).

Dustin Rampy and Joy Construction

Merlo hired Dustin Rampy (herein "Rampy") with Joy Construction after terminating IBI and credits Rampy as the "savior" of the Merlo project. (Tr. 405:14-20; 565:7-8). However, Merlo called the police on Rampy and sent an e-mail to him on April 8, 2020, that stated in part, "When figuring the refund amount, consider the EZ Breeze was not installed, the kitchen tile needs re-worked, the grill exhaust must be 10" & you installed 8" (see below), the framing for the EZ Breeze is incorrect, grill & hood not installed, the house failed inspection miserably on electrical, structural, there is a $500/fine for personal items inside residence, inspector was shocked onsite, floors never got finished…This project now has my undivided attention and that may not be a good thing. In the interest of full disclosure, be advised I have spoken to a governmental agency & a criminal complaint is being considered. The ball is now in your court, proceed with caution." (Tr. 556:2-5; 559:22-561:4; Tr. 557:11-17; Plaintiff's Ex. 76). Subsequently, Merlo and Rampy/Joy Construction enter into a certain Settlement Agreement and Mutual Release of Claims, which states in part on the first page thereof, "WHEREAS, disputes have arisen between Merlo, Joy Construction and Rampy related to the work performed, the project management associated therewith and the amounts due and owing Joy Construction for their work". (Plaintiff's Ex. 73). Melro sent Rampy an e-mail dated March 21, 2021, entitled "Builder Referrals" during the course of the litigation. (Tr. 562:7-567:19; Plaintiff's Ex. 77). The e-mail states in part, "Fast forward last week and IBI's attorney is accusing you of convincing me to fire them. He insisted the house was in perfect condition & no work needed done. He insinuated IBI was a model builder & together we were trying to defraud them. I don't

agree with him & I don't think you do either. Without your factual testimony, my attorney told me we will surely lose the case…I would like to confirm those details because the least I can do is channel clients in your direction." (Plaintiff's Ex. 77). At trial, although Merlo testified that he did not feel like he was trying to bribe Rampy to testify with that e-mail, Merlo testified that "I was trying to solicit his testimony", and in response to the question, "In exchange for business, correct?", Merlo testified, "Well, perhaps, yeah, I mean if I told him I had builder referrals perhaps." (Tr. 562:7-567:19; Plaintiff's Ex. 77). In reference to the e-mail, Merlo admitted "that was just me trying to convince him to testify on my behalf". (Tr. 563:22-3). Rampy did not testify at the trial.

ARGUMENT

I. THIS APPEAL IS MOOT AND SHOULD BE DISMISSED BECAUSE MERLO SATISIFIED THE JUDGMENT DURING THE PENDENCY OF THIS APPEAL, BEFORE THE FORECLOSURE SALE AFTER THE TRIAL COURT RULED THAT IBI WAS NOT REQUIRED TO POST BOND FOR THE FORECLOSURE SALE TO PROCEED.

Merlo satisfied the judgment during the pendency of this appeal before the foreclosure sale and after the trial court ruled that IBI was not required to post a bond for the foreclosure sale to proceed. (Satisfaction of Judgment, Aug. 29, 2022; Order Denying Merlo's Motion and [Proposed] Order Pursuant to South Carolina Code Ann. §18-9-130(2), Aug. 26, 2022; Notice of Appeal, Aug. 22, 2022). Therefore, this appeal is now moot and should be dismissed.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346 (1973). "In civil cases, there are three exceptions to the mootness doctrine: (1) an appellate court can retain jurisdiction if the issue is capable of repetition yet evading review, (2) an appellate court

can decide cases of urgency to establish a rule for future conduct in matters of important public interest, and (3) if the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction." *Collins Music Co., Inc., v. IGT*, 365 S.C. 544, 549 (Ct. App. 2005) (internal citations omitted). In *Collins*, this Court found the third exception applicable to decide an issue regarding post-judgment interest even though the party had not yet incurred post-judgment interest because it would be "nonsensical" to require a party to incur post-judgment interest prior to being permitted to raise the issue on appeal. *Id*. However, in the instant case, there has been no issue raised relative to post-judgment interest in the Appellant's Initial Brief. Furthermore, none of the above enumerated exceptions to mootness applies. Accordingly, this appeal should be dismissed on the ground of mootness. "Appellate court[s] will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Linda Mc Co., Inc., v. Shore*, 390 S.C. 543, 558 (2010). Because Merlo satisfied the judgment, the issues raised by Merlo in this appeal are moot and nothing more than academic.

II. THIS APPEAL SHOULD BE DISMISSED BASED UPON THE DOCTRINES OF WAIVER AND ESTOPPEL BECAUSE MERLO ELECTED TO SATISIFY THE JUDGMENT INSTEAD OF POSTING BOND TO STAY THE FORECLOSURE SALE PURSUANT TO SOUTH CAROLINA CODE ANN. § 18-9-170.

Merlo satisfied the judgment during the pendency of this appeal before the foreclosure sale and after the trial court ruled that IBI was not required to post bond for the foreclosure sale to proceed. Therefore, this appeal should be dismissed based upon the doctrines of waiver and estoppel because Merlo elected to satisfy the judgment during the pendency of the appeal instead of posting bond to stay the foreclosure sale pursuant to South Carolina Code Ann. § 18-9-170, which states in relevant part:

> If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344 (1992). Merlo waived his right to maintain this appeal when he elected to satisfy the judgment instead executing a written undertaking with sureties to stop the foreclosure sale during the pendency of this appeal South Carolina Code Ann. § 18-9-170. (Satisfaction of Judgment, Aug. 29, 2022; Order Denying Merlo's Motion and [Proposed] Order Pursuant to South Carolina Code Ann. §18-9-130(2), Aug. 26, 2022; Notice of Appeal, Aug. 22, 2022). "Equitable estoppel is the inhibition to assert such right by reason of mischief following one's own fault and may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right. Prejudice to the other party is an essential element of equitable estoppel." *Id*. Merlo should be estopped from maintaining this appeal because he elected to satisfy the judgment instead executing a written undertaking with sureties to stop the foreclosure sale during the pendency of this appeal pursuant to South Carolina Code Ann. § 18-9-170. (Satisfaction of Judgment, Aug. 29, 2022; Order Denying Merlo's Motion and [Proposed] Order Pursuant to South Carolina Code Ann. §18-9-130(2), Aug. 26, 2022; Notice of Appeal, Aug. 22, 2022).

Merlo elected to satisfy the judgment rather than file a written undertaking with two sureties as required by South Carolina Code Ann. § 18-9-170, to stop the foreclosure sale after the trial court denied Merlo's motion to require IBI to file a written undertaking with two sureties.

(Order Denying Merlo's Motion and [Proposed] Order Pursuant to South Carolina Code Ann. §18-9-130(2)). In so doing, Merlo has waived his right to continue to maintain this appeal and should be estopped from maintaining this appeal because he elected not to comply with South Carolina Code Ann. § 18-9-170. IBI is obviously prejudiced by Merlo's continued maintenance of this appeal after Merlo satisfied the judgment. "[T]here can be only one satisfaction for an injury or wrong." *Stoneledge v. IMK Development Co*., 435, S.C. 109, 133 (2021). Merlo's act of satisfying the judgment caused IBI to file a satisfaction of judgment. (Satisfaction of Judgment, Aug. 29, 2022). During the pendency of this appeal, and before scheduled foreclosure sale, Merlo could have filed a written undertaking with two sureties as required by the subject statute to stay the foreclosure sale, but instead he elected to make IBI whole by satisfying the judgment. Therefore, this appeal should be dismissed based upon the doctrines of waiver and estoppel.

III. AN ADDITIONAL SUSTAINING GROUND FOR AFFIRMANCE EXISTS IN THE RECORD.

Pursuant to Rule 208(b)(2), SCACR, and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406 (2000), as an additional sustaining ground appearing in the record for this Court's to affirm the trial court, Melro sent Rampy an e-mail dated March 21, 2021, entitled "Builder Referrals" during the course of the litigation. (Tr. 562:7-567:19; Plaintiff's Ex. 77). The e-mail states in part, "Fast forward last week and IBI's attorney is accusing you of convincing me to fire them. He insisted the house was in perfect condition & no work needed done. He insinuated IBI was a model builder & together we were trying to defraud them. I don't agree with him & I don't think you do either. Without your factual testimony, my attorney told me we will surely lose the case…I would like to confirm those details because the least I can do is channel clients in your direction." (Plaintiff's Ex. 77). At trial, although Merlo testified that he did not feel like he was trying to bribe

Rampy to testify with that e-mail, Merlo testified that "I was trying to solicit his testimony", and in response to the question, "In exchange for business, correct?", Merlo testified, "Well, perhaps, yeah, I mean if I told him I had builder referrals perhaps." (Tr. 562:7-567:19; Plaintiff's Ex. 77). In reference to the e-mail, Merlo admitted "that was just me trying to convince him to testify on my behalf". (Tr. 563:22-3). Such conduct is an egregious affront to the justice system and should not be tolerated.

Additionally, pursuant to Rule 220(c), SCACR, this Court may affirm the trial court for any reason appearing in the record. "An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-2 (2000). An order on appeal "comes to the appellate court with a presumption of correctness". *McCall v. IKON*, 380 S.C. 649, 659 (Ct. App. 2008).

IV. THE TRIAL COURT PROPERLY DENIED MERLO'S MOTION FOR DIRECTED VERDICT.

The trial court properly denied Merlo's motion for directed verdict at the trial. (Tr. 351:22-360:15, 813:21-814:10). "In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." *Swinton Creek Nursey v. Edisto Farm Credit*, 334 S.C. 469, 476 (1999) (internal citations omitted). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Id*. "The trial court can only be reversed by this Court when there is not evidence to support the ruling below." *Id*. at 477 (internal citation omitted).

In the instant case, there is more than sufficient evidence to support the trial court's denial of Merlo's motion for directed verdict relative to the basement ceiling height issue. For example and without limitation, Merlo's brief states that Merlo advised IBI of the 9'8" basement

ceiling in December 2018 (Merlo's Initial Brief p. 8). However, Merlo entered into the Guaranty in April 2019 and then later terminated IBI on October 12, 2019, with no mention of the basement ceiling height issue (Plaintiff's Ex. 33, 37). Furthermore, on three separate occasions starting in January 2019 and to and including August 2019, Merlo told the bank with whom he had the construction loan to pay IBI, how "the end-product should be exceptional", "I am satisfied with the project", and "The house now exceeds are [sic] initial expectations though." (Plaintiff's Ex. 62, 63, 68).

Pursuant to the Contract, IBI agreed to construct the home "per plans and scope". (Plaintiff's Ex. 2). The Contract's "Spec Sheet", which was "based off plans", called for ten-foot ceilings to be constructed in the basement. (Plaintiff's Ex. 2). Grissinger testified at trial that the plans show the first floor ceiling height 11'3 and when a 16" I-joist and half inch drywall is added, it brings the basement ceiling height to 9'8", which was built pursuant to the plans. (Tr. 279:1-281:7). Moreover, Grissinger testified that he and Merlo had "had a conversation about [the basement ceiling height] and it was never brought up again because he understood why it was like it was, you know, it was built to plan." (Tr. 280:20-23). Grissinger testified that Merlo, "asked why and I explained to him that [the basement ceiling height] was like the plan and this is how you get those measurements, and then it was never brought up again." (Tr. 314:2-5). When Grissinger brought the basement ceiling height to Merlo's attention "that we did it per plan, that subject was dropped." (Tr. 314:16-19). Grissinger testified that Merlo "fully understood the ceiling heights and he was fine with it because we built it per plan." (Tr. 319:15-17).

Additionally, IBI's expert, Laplante, testified that there was a conflict between the Contract and plans: "If I built per the drawings precisely which is what the contract says to do, you can't get 10 feet. And if I do the 10 feet, then I can't do it per the drawings so that should've

been resolved." (Tr. 741:16-20). Laplante further testified, "you cannot build a house with beams, et cetera to achieve a 10 foot ceiling height per those plans, period." (Tr. 742:20-22). Thus, it was impossible for IBI to construct 10' basement ceilings and conform with the requirements of Merlo's plans. Laplante also testified that, "It's not a universally accepted term what a ceiling height is. There's variations in ceiling heights for beams, soffits or whatever". (Tr. 760:11-14).

Furthermore, there was no evidence to demonstrate how Merlo was damaged because of the basement ceiling height. Cleary, there was no breach of the contract relative to the basement ceiling height because it was impossible for IBI to construct 10' basement ceilings pursuant to Merlo's own plans and IBI built the basement ceilings pursuant to those plans. Assuming arguendo that constructing the basement ceilings to a height less than 10' was a breach (it was not a breach), then the doctrines of equitable estoppel, estoppel by silence and waiver bar Merlo's claims relative to the 10' basement ceiling issue for the reasons stated above. "Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *Southern Development Land and Golf Company, Ltd., v. South Carolina Public Service Authority*, 426 S.E.2d 748, 751 (Ct. App. 1993) (internal citation omitted). "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344 (1992).

In the instant case, there is more than sufficient evidence to support the trial court's denial of Merlo's motion for directed verdict relative to the Guaranty. The Contract was supplemented and modified by that certain instrument dated May 3, 2019, which was referred to

as the "Guaranty". (Plaintiff's Ex. 33). Pursuant to the Guaranty, Merlo agreed that the balance sheet as of April 30, 2019, consisted of a total balance owed to IBI in the amount of $183,382, agreed to pay IBI for all past and pending change orders that were reflected on the April 30, 2019 balance sheet, in addition to agreeing, among other things set forth therein, that all future change orders and allowance overages would be added to the balance sheet prior to "move in completion of home and or Certificate of Occupancy request". (Tr. 52:10-56:21; Plaintiff's Ex. 33). Pursuant to the Guaranty, Merlo also specifically waived the defense of lack of consideration and other defenses. (Plaintiff's Ex. 33).

"[T]he slightest consideration is sufficient to support the most onerous obligation....". *First National Bank of South Carolina v. Wade*, 245 S.C. 426, 431 (1965). "Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *McPeters v. Yeargin Construction Company, Inc*., 290 S.C. 327, 331 (Ct. App. 1986). In essence, the Guaranty was the vehicle for Merlo to delay payment of change orders to the end of project, instead at the time they were incurred. By virtue of the Guaranty, Merlo effectively promised to pay IBI for everything at completion and before moving in even though Contract stated that "[w]hen change orders are requested and agreed upon, payment may be required for the added cost at time of work." (Plaintiff's Ex. 2). A promise is valid consideration. *See, Smalls v. Springs Industries, Inc*., 292 S.C. 481, 484 (1987) ("Small's action or forbearance in reliance on Spring's promise was sufficient consideration to make the promise legally binding."). In like manner, IBI's forbearance of its right to require payment of change orders at the time they were incurred in reliance upon Merlo's promise to pay for everything after completion and before moving in the home was sufficient consideration to make the Guaranty legally binding. The Contract gave IBI the right to require

payment for change orders at the time they were incurred ("at time of work"). The Guaranty was essentially Merlo's promise to pay for "additional items" (change orders and allowance overages) at the completion of the project in exchange for IBI's agreement to forbear from enforcing its right to payment for change orders at the time they were incurred until the home was completed ("move in completion of home and or Certificate of Occupancy request"). "Undoubtedly, a forbearance to exercise legal rights is a sufficient consideration for a promise made on account of it in the general law of contracts." *General Electrical Company v. Gate*, 273 S.C. 88, 91 (1979). The evidence demonstrated that the Guaranty arose from IBI's concern over the significant unpaid balance owed by Merlo and Merlo's request to add the very significant cost of the boulder wall to the balance sheet. (Plaintiff's Ex. 27, 28; Tr. 48:4-49:8). The evidence sufficiently establishes that Guaranty together with the Contract, constituted the entire agreement between the parties. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Regions Bank v. Schmauch*, 354 S.C. 648, 660 (Ct. App. 2003). "Where instruments entered into by the same parties at different times relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. If the provisions of one instrument limit, explain, or otherwise affect the provisions of the other, they will be given effect to accomplish the entire agreement between the parties." *Bishop Realty and Rentals, Inc., v. Perk, Inc*., 292 S.C. 182, 185 (Ct. App. 1987) (internal citations omitted). Furthermore, the Guaranty itself states that it "remains enforceable regardless of any defenses that [Merlo] may assert...including...failure of consideration." Therefore, Merlo expressly waived the defense of failure of consideration by entering into the Guaranty. Moreover, by virtue of entering into the Guaranty and IBI's performance, forbearance and detrimental reliance thereunder, Merlo should be estopped from denying its validity and enforceability.

In the instant case, there is more than sufficient evidence to support the trial court's denial of Merlo's motion for directed verdict relative to Merlo's causes of action for negligent misrepresentation, fraud, Unfair Trade Practices Act violation and breach of fiduciary duty. Merlo argues that because IBI did not have documentation to support $14,075.00 for "Haul Dirt, $7,975.00 to support "Making Theater room larger, $30,945.00 for "Landscape Overage (Landscape Lights)", $6,415.00 for "Deck extension Flooring and Railing" category, and $550.00 for "2 extra floor receiptcals", that somehow constituted negligent misrepresentation, fraud, Unfair Trade Practices Act violation and breach of fiduciary duty. (Merlo's Initial Brief p. 9-10). However, throughout the course of the Merlo project, IBI would periodically send Merlo its balance sheet, which is a document, an Excel spreadsheet, prepared and kept by IBI in the normal and usual course of its business, that keeps track of its accounting, including add-ons, change orders, payments, credits, and things of that nature. (Tr. 32:18-33:16; Plaintiff's Ex. 4, 6, 8, 10, 12, 15, 17, 19, 22, 24, 26, 28 and 39). The balance sheets are made at or near the time of the event by someone with knowledge and it is the regular practice of IBI to create, maintain and rely upon the balance sheets. (Tr. 35:10-18). Instead of invoicing their clients, IBI works off its balance sheet. (Tr. 109:10-11; 321:7-8).

The April 30, 2019 balance sheet showed three items as "pending": "Haul Dirt", "Staining Each Door $45 each" and "Making Theater room larger". (Plaintiff's Ex. 28). The August 9, 2019 balance sheet kept the same pending items as reflected on the April 30, 2019 balance sheet and added "Landscape Overage (Landscape Lights)" and "Deck extension Flooring and Rail" items. (Plaintiff's Ex. 26; Tr. 46:9-47:21).

The final balance sheet included the same items reflected on the April 30, 2019 and August 9, 2019 balance sheets and added "2 extra floor recepticals" as an additional item. (Plaintiff's Ex.

39). The final balance sheet reflected $14,075.00 for "Haul Dirt, $1,305.00 for "Staining Each Door $45 Each 29 Doors", $7,975.00 for "Making Theatre room larger", $30,945.00 for "Landscape Overage (Landscape lights)", $6,415.00 for "Deck extension Flooring and Rail Not on Plan", $550.00 for "2 extra floor recepticals". (Plaintiff's Ex. 39). Montgomery testified that Merlo had known about and approved each of these specific items. (Tr. 209:14-18).

Regarding the "Haul Dirt" item, Montgomery testified that haul dirt was on the balance sheet from the beginning of the project and was pending when Merlo signed the Guaranty and that $14,075.00 figure was based on the cost to haul dirt. (Tr. 99:1-104:11; 253:15-254:9). Regarding the "Staining Each Door $45 each" item, Montgomery testified that on final balance sheet (Plaintiff's Ex. 39), the $7,975.00 figure was calculated by multiplying 45 times the 29 doors, to which Merlo had acquiesced. (Tr. 104:12-23; 207:18-209:13; Plaintiff's Ex. 52).

Regarding the "Making Theater room larger" item, Montgomery testified that Merlo was charged $7,974.00, which was calculated by Grissinger based upon the work performed. (Tr. 104:24-111:19; 217:4-22; 246:13-24). Grissinger testified that IBI came up with the price for making the theater room larger by square footage, extra materials, extra door and extra labor, which IBI paid for and for which IBI had documentation to support. (Tr. 319:18-322:25).

Regarding the "Landscape Overage (Landscape Lights)" item, Montgomery testified that the total charge was $44,945 less the $15,000 allowance, which equals $29,945. (Tr. 117:11-119:19). The $1,000 difference was the cost of the landscape lights, four at $250 a piece. (Tr. 209:22-211:5; Plaintiff's Ex. 53).

Regarding the "Deck extension Flooring and Rail Not on Plan" item, Montgomery testified that Grissinger calculated the $6,415.00 figure based on railing, deck flooring and decking, which was calculated with the deck, the decking and railing. (Tr. 119:20-120:12).

Regarding the "2 extra floor recepticals" items, Montgomery testified that he believed the $550.00 figure was generated by the costs of outlets and an electrician's services (Tr. 120:22-13).

V. THE TRIAL COURT PROPERLY RULED ON QUESTIONS OF LAW DURING THE TRIAL.

The trial court properly ruled on questions of law during the trial. In an action at law referred to a master-in-equity, appellate courts will correct errors of law, but must affirm the master in-equity's factual findings unless no evidence reasonably supports those findings. *See, Townes Associates, Ltd., v. City of Greenville*, 266 S.C. 81 (1976). Merlo argues that this Court should find that IBI's alleged failure to construct 10' basement ceilings was a breach of contract, which requires IBI to bear all liability for its non-performance. (Merlo's Initial Brief p. 10-1). Again this argument is wholly without merit for the reasons set forth in Section IV above. There was no evidence to demonstrate how Merlo was damaged because of the basement ceiling height. Damages are an element of a breach of contract. "In order to prevail on [a] claim of breach of contract, [a] plaintiff bears the burden of establishing the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach." *Taylor v. Cummins Atl., Inc*., 852 F. Supp. 1279, 1286 (D.S.C. 1994), aff'd, 48 F.3d 1217 (4th Cir. 1995), cert. denied, 516 U.S. 864, 116 (1995).

Cleary, there was no breach of the contract relative to the basement ceiling height because it was impossible for IBI to construct 10' basement ceilings pursuant to Merlo's own plans and IBI built the basement ceilings pursuant to those plans. Assuming arguendo that constructing the basement ceilings to a height less than 10' was a breach (it was not a breach), then the doctrines of equitable estoppel, estoppel by silence and waiver bar Merlo's claim relative to the 10' basement ceiling issue for the reasons stated in Section IV above, which are incorporated herein by reference.

"Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *Southern Development Land and Golf Company, Ltd., v. South Carolina Public Service Authority*, 426 S.E.2d 748, 751 (Ct. App. 1993) (internal citation omitted). "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344 (1992).

Merlo also argues that "it is undisputed" that IBI placed Merlo's driveway, landscaping and irrigation lines, and boulder wall such that they encroached on his neighbor's property, and built a wood framed exterior wall where the plans called for a poured-in-place concrete exterior wall. (Merlo's Initial Brief p. 11). Regarding the alleged breach of contract because of an alleged driveway encroachment, Montgomery testified that "we're going off the approval and authority of the owner it's his property, okay, and in this situation [Merlo] came out later on to the concrete guys and instructed them to make it even bigger behind our backs, so we had no knowledge of this until after the fact." (Tr. 127:12-21). Montgomery also testified that "Yes, we would be responsible for the installation of the driveway. We're not responsible for the owner going behind our back and instructing the workers to do something different than what was out there." (Tr. 132:8-12). Merlo even told IBI "PS-Driveway looks great!" in an e-mail. (Plaintiff's Ex. 55, Tr. 241:24-242:1). Laplante, IBI's expert, testified that, "the layout of the lot is always the owner's responsibility to get it surveyed and laid out, it's always done that way. It's not the responsibility of the architect nor the contractor, it's the homeowner's responsibility on every job I've ever done to have the lot staked out and identified clearly with where the lines go." (Tr. 766:15-21). Therefore, there is no breach of contract. Furthermore, the doctrines of waiver and equitable

estoppel apply based upon Merlo's direct involvement with the driveway and his inherent obligation to know the boundaries of his own property. Therefore, IBI did not breach the contract as a matter of law,

Merlo testified regarding the alleged landscaping and irrigation line issues, but the trial court found that "Merlo was inconsistent, at best, in his statements about the project. Overall, I found that Merlo was not credible in his testimony." (Tr. 383:3-7; Master-in-Equity's Order and Judgment of Foreclosure and Sale, p. 12). "[Q]uestions concerning credibility and the weight to be accorded evidence are exclusively for the trial court." *McCall v. IKON*, 380 S.C. 649, 658 (Ct. App. 2008). Regarding the alleged boulder wall encroachment, Grissinger testified that the boulder wall "was laid out by me and the homeowner, so the homeowner kind of needs to know his metes and bounds, too, so we was under his instruction of where [the boulder wall] went." (Tr. 294:25-295:3). Clearly, Merlo was directly involved with placement of the boulder wall. Therefore, IBI did not breach the contract as a matter of law.

Regarding the alleged breach of contract relative to a wood framed exterior wall where the plans called for a poured-in-place concrete exterior wall, Grissinger testified that there was no need for a poured concrete wall because it was not used to backfill dirt, and not having a concrete wall gave Merlo more interior space in the house and Merlo never mentioned it even though Merlo was at the property frequently. (Tr. 274:9-276:4). Furthermore, Laplante, IBI's expert, testified that the plans were not clear whether the subject wall was even supposed to be concrete because the plans "aren't proficient in that they don't identify what that wall is. They don't identify what the wall is…It could be block, it could be framed, it could be poured concrete." (Tr. 749:4-15). Furthermore, there is no evidence demonstrating how specifically Merlo was damaged relative to not having the poured concrete wall. Additionally, the doctrines of waiver, estoppel by silence

and equitable estoppel apply because even though Merlo was at the property frequently, he never mentioned the absence of the poured concrete wall. Therefore, IBI did not breach the contract as a matter of law.

Merlo argues that IBI breached the contract by allegedly violating the implied duty of good faith and fair dealing by "stealing Merlo's house plans and using them for their own gain." (Merlo's Initial Brief p. 11). However, there is no evidence that IBI had stolen anything. The Sandy Creek site plan was a standard plan that was purchased by Merlo as the starting point of the discussions between IBI and Merlo, which Merlo had later modified significantly. (Tr. 245:5-246:2). The Merlo project was based off the modified Sandy Creek site plan. (Tr. 150:1-7; Defendant's Ex. 6). Montgomery testified that there were two sets of plans and Merlo had modified his original Sandy Creek site plan by adding a theater room, workout room, secondary kitchen in the basement, and more square footage that he could recall. (Tr. 139:3-17; 105:6-18). Montgomery testified that he received Merlo's original Sandy Creek site plan and electronically filed it in IBI's electronic file that contained miscellaneous and generic plans over years knowing that Merlo would be sending IBI modified plans. (Tr. 134:16-23). Around that same time, IBI was building another house on the Riverstone project and IBI had used the Sandy Creek site plan for the Riverstone project. (Tr. 135:4-15). IBI discovered the Sandy Creek site plan mistake when it realized that there was no architectural plan cost associated with the Riverstone project while working with its accountant for year-end bookwork and then immediately purchased a license to use the plan. (Tr. 135:15-136-16).

Furthermore, during the course of the Merlo project, IBI was oblivious that the original Sandy Creek site plan was used for the Riverstone project because it had sent Merlo to the Riverstone project to look at retaining walls. (Tr. 142:19-25). Montgomery further testified that

"I did not testify that I took his personal plans because they're not his personal plans, they're still available online. I took the Sandy Creek Plan. If anything that you're painting a picture of me about I did it in error, I should have not have put it in the file…But at the end of the day we built a different plan than his house, we bought the license to it and it's a plan that's still being reproduced today…I made a simple mistake by filing a very reproducible set of plans into a file that I shouldn't have and that's my mistake…And it's a different plan than what he redesigned". (Tr. 152:15-25; 154:8-10; 14-15). For the Riverstone project, IBI "built the Sandy Creek plan, the original one that was purchased on the internet that is available this day, a reproducible set, a factory mill set, it's there like a pair of socks, anybody can get them." (Tr. 150:15-19). Furthermore, there is no evidence demonstrating how Merlo was specifically damaged by IBI innocently using the original site plan (not Merlo's modified site plan that was used to construct Merlo's house). Therefore, IBI did not breach the contract as a matter of law.

The economic loss rule bars Merlo's negligence claim against IBI as a matter of law. (Merlo's Initial Brief p. 12). *See, Kennedy v. Columbia Lumber and Manufacturing Company, Inc.*, 299 S.C. 335, 347 (1989). There was no evidence admitted showing that IBI violated an applicable building code, deviated from industry standards, or constructed a home that they knew or should have known would pose serious risks of physical harm.

Merlo's claim against IBI for negligent misrepresentation also fails as a matter of law. "To prove a claim for the common law tort of negligent misrepresentation, [Merlo] was required to establish the following elements: (1) 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 the proximate result of his reliance on the representation." *Quail Hill, LLC v. County of Richland*, 287 S.C. 223, 240 (2010). There was no evidence presented that IBI falsely represented anything to Merlo during the course of the subject project. "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Id*. (internal citations omitted).

Merlo argues that there was no consideration to support the Guaranty. (Merlo's Initial Brief p. 13). However, for the reasons explained in Section IV above, which are incorporated herein by reference, Merlo's argument in this regard is meritless.

Merlo argues that his termination of IBI was justified based on IBI's breaches of contract and performance. (Merlo's Initial Brief p. 13). However, for the reasons explained in this Section IV above, which are incorporated herein by reference, Merlo's argument in this regard is meritless. Merlo prevented IBI from performing 100% of the scope of work by terminating the contract. Thus, Merlo cannot benefit from breaching the contract. "[A] party cannot take advantage of his own default in the performance of a contract." *Willms Trucking Company, Inc*., *v. JW Construction Co., Inc*., 442 S.E.2d 197, 201 (Ct. App. 1994) (internal citation omitted). Furthermore, IBI is entitled to the benefit of the bargain. "The legal principles governing this case are straight forward. In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed. That is, damages give him the benefit of his bargain." *South Carolina Federal Savings Bank v. Thornton-Crosby Development Company, Inc*., 303 S.C. 74, 77 (Ct. App. 1990) (internal citations omitted).

GrandSouth Bank held the construction loan that primarily funded the project. (Tr. 325:4-328:20; Plaintiff's Ex. 61). Lee Matthew West, III (herein "West"), was called by IBI as a witness.

West performed construction loan draw inspections for the Merlo project on behalf of GrandSouth Bank (Tr. 161:7-174:2; Plaintiff's Ex. 43, 44, 45, 46, 47, 48, 49, 50, 51). West inspected the Merlo project on August 26, 2019, and found that it was 93% complete.

Merlo terminated IBI on October 12, 2019. (Plaintiff's Ex. 37). Before termination, on June 4, 2019, Merlo sent IBI an e-mail that thanked it for getting the project "to the finish line." (Tr. 658:20-659:70; Plaintiff's Ex. 89). Merlo terminated IBI three days after Merlo attempted put theater equipment on IBI' account with a supplier, to which IBI objected, and also being told by IBI that a certificate of occupancy would not be requested until full payment was made and sending IBI an e-mail the day before termination agreeing to meet to discuss payment. (Tr. 60:4-66:15, 75:10-77:16, 626:7-631:18; Plaintiff's Ex. 37, 41). IBI was at the subject property the day before termination working on the project "getting ready to finish up the house." (Tr. 265:16-266:13).

Ronald Fred Marchant, III (herein "Marchant"), was called by IBI as a witness. Marchant was a senior vice president of GrandSouth Bank who was familiar with the Merlo project. (Tr. 342:10-:343:25). On November 12, 2019, Marchant visited the subject property and found it had "matched up with what our inspection records said". (Tr. 344:10-11). Marchant testified "I walked in and observed the completion level of the house. It was, I thought, right on with what our inspection had said. It was nearing completion, almost to the punch list, you know, the appliances were on site and not in…It looked, to me it looked to be at the level of completion it should be and it looked presentable." (Tr. 344:16-24). Marchant had sent an e-mail to his boss at the bank after Mr. Marchant's visit and stated in part therein, "I visited the home yesterday and it looks good. Needs to be punched out and appliances installed. Other than that, it is ready to go." (Tr. 345:17-346:23; Plaintiff's Ex. 69). Mr. Marchant testified that he did not find anything wrong with the house during his visit. (Tr. 347:16-21). Mr. Marchant also testified that he had inspected hundreds

of residential homes in his career in the banking industry. (Tr. 347:24-348:6). Therefore, as a matter of law, there is sufficient evidence to support the trial court's ruling that IBI did not breach the contract and Merlo's termination of IBI was not justified. (Master-in-Equity's Order and Judgment of Foreclosure and Sale p. 16).

Moreover, after listening to Merlo's testimony as to alleged various issues with the house, IBI's expert as to quality of construction, Laplante, an architect, testified that in his opinion, that IBI performed under the contract in compliance with the standard of care and that the construction of the project was performed in a good workman like manner per industry standards, that a custom home can take 18 to 26 months, that a home taking 23 months to construct is not a big issue, and that there were no indications that IBI's management of the construction of the project and supervision were not adequate. (Tr. 736:13-738:18). Laplante testified the quality of construction performed by IBI is "a very well-built home". (Tr. 735:2-11). Laplante also opined that the "crazy" volume of photographs taken by Merlo during the course of the project was "a bad faith procedure" on the part of Merlo during the construction process and that there was not anything in Merlo's photographs presented at trial that indicated any issues with construction that would rise to the level of breaching the standard of care. (Tr. 736:18-737:20). Merlo testified that he has "4,500 pictures". (Tr. 566:25-567-2).

There was ample evidence demonstrating that Merlo was not credible for the reasons outlined in the judgment. (Master-in-Equity's Order and Judgment of Foreclosure and Sale p. 12-14; Tr. 536-663; 707-731:). "[Q]uestions concerning credibility and the weight to be accorded evidence are exclusively for the trial court." *McCall v. IKON*, 380 S.C. 649, 658 (Ct. App. 2008). Therefore, it follows that Merlo's "re-work lists" were also not credible and are therefore of no consequence, especially in light of Merlo's inconsistent statements as detailed in

the judgment. Even if the "re-work lists" were credible (they were not), Merlo offered no expert testimony to counter IBI's expert's testimony that the house was built by IBI to acceptable industry standards in terms of quality and the Court also correctly found that the "various photographs presented by Merlo and relied upon by him a showing substandard work were all taken during the midst of construction and do not represent the final product". (Master-in-Equity's Order and Judgment of Foreclosure and Sale p. 11-12).

Merlo argues that the trial court erroneously found that Merlo approved of all change orders because IBI did not present any change orders in accordance with the contract in regard to the "Haul Dirt", "Making Theater room larger", "Landscape Overage (Landscape Lights), "Deck extension Flooring and Railing" or "2 extra floor recepticals" items, where were added to IBI's final balance sheet. (Merlo's Initial Brief p. 13). However, this argument is meritless because of the Guaranty and for the reasons set forth in Section IV above, which are incorporated by reference herein.

Merlo argues that the trial court erroneously failed to find that IBI, Grissinger and Montgomery had breached their fiduciary duty. However, this argument is without merit. "Whether there is a fiduciary relationship between two people is an equitable issue. Generally, legal issues are for the determination of the jury and equitable issues are for the determination of the court. A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. This Court has recognized certain relationships are by nature fiduciary, such as the attorney client relationship." *Hendricks v. Clemson University*, 353 S.C. 449, 458-9 (2003) (internal citations and quotation marks omitted).

Merlo presented no evidence that the parties were in a fiduciary relationship during the course of the subject project.

Merlo argues that the trial court erroneously failed to take judicial notice of UL489 Paragraph 7.1.4.3.3 as a learned treatise. However, this argument is wholly without merit because Merlo did not call an expert witness in support of UL489 Paragraph 7.1.4.3.3 (or for any other matter), did not cross examine Laplante, IBI's expert witness, about it and the court properly did not take judicial notice. (Tr. 527:10-534:20; 701:15-707:15).

Rule 803(18), SCRE, states:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. This rule is in addition to any statutory provisions on this subject.

Rule 201, SCRE, in relevant part, states:

> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> **(c) When Discretionary.** A court may take judicial notice, whether requested or not.
> **(d) When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

At trial, Merlo argued that Oconee County had adopted UL489 Paragraph 7.1.4.3.3 even though the subject jurisdiction was the City of Seneca, not Oconee County. (Tr. 527:10-534:20; 701:15-707:15). The trial court correctly ruled that an adequate foundation for the court to take judicial notice of the purported UL489 Paragraph 7.1.4.3 was not established and therefore properly excluded it. (Tr. 527:10-534:20; 701:15-707:15).

Merlo argues that the trial court erroneously established damages to IBI as if IBI had fully completed the project. However, this argument is wholly without meruit. "[A] party cannot take advantage of his own default in the performance of a contract." *Willms Trucking Company, Inc*., *v. JW Construction Co., Inc*., 442 S.E.2d 197, 201 (Ct. App. 1994) (internal citation omitted). Furthermore, IBI is entitled to the benefit of the bargain. "The legal principles governing this case are straight forward. In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed. That is, damages give him the benefit of his bargain." *South Carolina Federal Savings Bank v. Thornton-Crosby Development Company, Inc*., 303 S.C. 74, 77 (Ct. App. 1990) (internal citations omitted).

VI. THE TRIAL COURT'S FINDINGS OF FACT ARE FULLY SUPPORTED IN THE RECORD.

The trial court's findings of fact are fully supported in the record. The judgment was entered after a multiple day trial with approximately 190 exhibits admitted. The trial transcript is over 800 pages. Merlo arguments otherwise are wholly without merit and are generally otherwise a regurgitation of the same arguments made in his brief, which are addressed throughout this brief. (Merlo's Initial Brief p. 14-16). In an action at law referred to a master-in-equity, appellate courts will correct errors of law, but must affirm the master in-equity's factual findings unless no evidence reasonably supports those findings. *See, Townes Associates, Ltd., v. City of Greenville*, 266 S.C. 81 (1976). There is clearly more than sufficient evidence for this Court to affirm that reasonably supports the trial court's findings. Furthermore, there was ample evidence demonstrating that Merlo was not credible for the reasons outlined in the judgment. (Master-in-Equity's Order and Judgment of Foreclosure and Sale p. 12-14; Tr. 536-663; 707-731). The trial court found that "Merlo was inconsistent, at best, in his statements about the project. Overall, I found that Merlo

was not credible in his testimony." (Master-in-Equity's Order and Judgment of Foreclosure and Sale p. 12). Furthermore, Karen M. Merlo, Merlo's wife, testified during cross examination that Merlo paid Joy Construction multiple checks (in the total amount of $137,000), to complete the project. (Tr. 792:9-794:24). "[Q]uestions concerning credibility and the weight to be accorded evidence are exclusively for the trial court." *McCall v. IKON*, 380 S.C. 649, 658 (Ct. App. 2008).

CONCLUSION

For the reasons stated herein, Respondents respectfully request that this Honorable Court affirm the subject Master-in-Equity's Order and Judgment of Foreclosure and Sale and Order Denying Motion to Alter or Amend, and award Respondent's attorney's fees and costs in defending this appeal.

Respectfully submitted,

Jason M. Tarokh, #72837
Tarokh Law, PLLC
P.O. Box 10827
Tampa, FL 33679
(813) 922-5510
jason@tarokhlaw.com
Attorney for Respondents

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