IN THE STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Jones Nissan, Inc., Plaintiff, vs. THAG, LLC; Nissan of Sumter, LLC; Terry L. Holmes; and Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Civil Action No. 2020-CP-22-00373 **ORDER**

This matter comes before the Court on Plaintiff's motion for summary judgment as to its claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) conversion, and (4) piercing the corporate veil as well as to Defendants' counterclaims. For the reasons set forth below, the Court grants Plaintiff's motion as to its claims for breach of contract and conversion. The Court denies Plaintiff's motion as to its claim that it is entitled to pierce the corporate veil. The Court also grants in part and denies in part Plaintiff's motion for summary judgment as to Defendants' counterclaims.

FINDINGS OF FACT

Plaintiff Jones Nissan, Inc. ("Plaintiff") owned and operated the Jones Nissan automobile dealership ("the dealership") in Sumter, South Carolina from 1990 until early 2017. In July 2016, Plaintiff entered into an "Asset Purchase Agreement" ("the contract") with defendant THAG, LLC ("THAG") pursuant to which THAG agreed to purchase the dealership for $2,250,000.00 cash along with other considerations. The contract was amended multiple times by the parties prior to the transaction closing in early 2017. At all relevant times, defendant Terry Holmes ("Holmes") was the sole member of THAG.

Pursuant to the contract's third amendment, Plaintiff, at THAG and Holmes' request, agreed to owner-finance $650,000.00 of the $2,250,000.00 purchase price. The terms and conditions of the financed portion of the sale price were memorialized through a combination of documents, namely a promissory note, a "Pledged Collateral Account Control Agreement," and a "Pledge Agreement," all of which were signed by Holmes purportedly on behalf of THAG. The parties' financing agreement required that THAG or its assigns at all times maintain a sufficient balance in Merrill Lynch Account No. XXX-XX250 ("the pledged account") to satisfy the outstanding balance of the financed portion of the purchase price of the dealership as contemplated in the third amendment to the Asset Purchase Agreement. The agreement also gave Plaintiff a security interest in the pledged account and allowed Plaintiff to issue a "Notice of Exclusive Control" to take control of the pledged account if THAG defaulted on its debt obligation. Defendants initially funded the pledged account with $650,000.00 as required. However, Defendants, either individually or through their agents, failed to deliver the Pledged Collateral Account Control Agreement to Merrill Lynch and consequently failed to notify Merrill Lynch of the agreed upon limits on Defendants' rights to dispose of the funds in the pledged account.

THAG, via Holmes, assigned the contract to defendant Nissan of Sumter, LLC ("Nissan of Sumter") on February 28, 2017. Nissan of Sumter thus assumed THAG's obligations under the contract, including payment of the $650,000 debt obligation.

Defendants made monthly payments of $12,566.32 or $12,566.33 on the $650,000.00 debt obligation from March 2017 through July 2019. Despite still owing 31 of the 60 required payments, Defendants never made another required payment after July 2019. On August 20, 2019, Plaintiff notified Defendants of their default on the promissory note, and in exercise of its rights

under the note, demanded that the then outstanding debt of $360,035.15 be satisfied in full.[1] Defendants failed to satisfy the outstanding debt.

After Defendants defaulted and failed to satisfy the outstanding debt, Plaintiff attempted to exercise its contractual rights to collect the outstanding debt from the designated, collateralized funds on deposit in the pledged Merrill Lynch account. However, the designated, collateralized funds had already been withdrawn, transferred, or otherwise disposed of by Defendants and were no longer in the account nor available to Plaintiff to satisfy the debt. Defendants, who sold the dealership in 2019, have never paid the remaining $389,555.98 they agreed to pay Plaintiff.

In April 2020, Plaintiff filed this action and asserted ten claims against Defendants: (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, (3) conversion and civil theft, (4) breach of the implied covenant of good faith and fair dealing, (5) fraud, (6) constructive fraud, (7) money had and received, (8) quantum meruit, (9) piercing the corporate veil/alter ego, and (10) accounting. Defendants answered and asserted counterclaims against Plaintiff for breach of contract and breach of the implied covenant of good faith and fair dealing.

Plaintiff subsequently moved for summary judgment on its claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) conversion, and (4) piercing the corporate veil. Plaintiff also moved for summary judgment on Defendants' counterclaims and requested that the Court award Plaintiff attorneys' fees based on the parties' contract documents. In response, Defendants submitted an affidavit of Terry Holmes in which Holmes repeated the allegations in Defendants' counterclaims.

The Court heard oral argument on Plaintiff's motion on July 13, 2023.

[1] Although Plaintiff's written demand stated the outstanding debt at the time as $360,035.15, that amount represented the outstanding principal only. The correct debt amount, with interest included, was $389,555.98.

LEGAL STANDARD

A trial court must grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In reviewing a summary judgment motion, the court must view "the evidence and all inferences which can reasonably be drawn therefrom . . . in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Richland Cty.*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). However, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

CONCLUSIONS OF LAW

Viewing the evidence and all reasonable inferences in the light most favorable to Defendants, the Court finds that no genuine issue of material fact exists as to Plaintiff's claims for breach of contract and conversion against Defendants THAG and Nissan of Sumter, and therefore Plaintiff is entitled to judgment as a matter of law on those claims. Likewise, the Court finds that no genuine issue of material fact exists as to the portions of Defendants' defenses and counterclaims that are based on (1) Plaintiff's alleged misrepresentation of the market value of the dealership, (2) the amount of rent Plaintiff charged Defendants, and (3) Plaintiff's alleged violation of the terms of the noncompete clause in the Asset Purchase Agreement. No evidence supports those contentions by Defendants, and the Court therefore finds that Plaintiff is entitled to judgment as a matter of law as to those contentions.

The Court finds genuine issues of material fact exist as to Plaintiff's remaining claims against Defendants and as to Defendants' remaining counterclaims. The Court further finds that an award of attorneys' fees is premature.

I. Plaintiff's Breach of Contract and Conversion Claims

A. Breach of Contract

It is undisputed that the contract between Plaintiff and Defendants required Defendants to pay Plaintiff $650,000.00, plus interest, in 60 monthly installments. It is further undisputed that Defendants failed to make all the required payments. Defendants therefore breached the contract as a matter of law.

A plaintiff asserting a breach of contract claim must prove "the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272–73 (Ct. App. 2015). The breaching party is "liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* The interpretation and enforcement of an unambiguous contract is a question of law for the court and can be properly disposed of at summary judgment. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). This Court must apply the plain language of the agreement and enforce its terms according to their plain meaning. *Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013).

The contract documents at issue are clear and unambiguous. Plaintiff agreed to finance $650,000.00 of the purchase price for the dealership in exchange for THAG's agreement to repay the $650,000, plus interest, over the course of 60 months. THAG voluntarily entered into the Pledged Collateral Control Agreement with Plaintiff, in which it agreed that the pledged Merrill Lynch account would be maintained for the benefit of Plaintiff and that Plaintiff could exercise

exclusive control over the account under specified conditions of default with proper notice. THAG, via Terry Holmes, voluntarily executed the promissory note memorializing their commitment to pay the $650,000 plus interest and voluntarily entered into the Pledge Agreement granting Plaintiff a security interest in the pledged account and the right to collect and satisfy the debt from the account if Defendants defaulted on the debt. When they executed the promissory note, THAG and Holmes expressly waived any rights to "demand, presentment, notice of non-payment, dishonor, protest, and notice of protest."

There is no dispute that THAG voluntarily entered into the Asset Purchase Agreement or its three amendments. In fact, Defendants admitted that THAG entered into these contracts in their answer to the amended complaint. There is also no dispute that, pursuant to the contract's third amendment, THAG was required to pay Plaintiff $650,000 amortized over 60 months at 6% interest. Defendant Holmes also admitted this fact in a letter he wrote to Plaintiff in August 2019. Further, there is no dispute that THAG made only 29 of the required 60 monthly payments or that THAG failed maintain sufficient funds in the pledged account to cover the outstanding debt obligation in the event of default.

Defendant Holmes admitted at his deposition that he did not read the contract documents before signing them. His failure to read the contract documents is no defense to Plaintiff's claims. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013) ("[A] party who signed a contract is deemed to have read and understood 'the effect' of the contract.").

Thus, no genuine issue of material fact exists as to Defendants' breach of the unambiguous agreements. The Court therefore finds that Plaintiff is entitled to summary judgment on its claim for breach of contract.

B. Conversion

Plaintiff is entitled to summary judgment on its conversion claim because Defendants drained the pledged Merrill Lynch account despite Plaintiff's security interest and entitlement to exercise exclusive control over the account if Defendants defaulted on their debt obligation.

Conversion is "the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." *Mullis v. Trident Emergency Physicians*, 351 S.C. 503, 506–07, 570 S.E.2d 549, 550 (Ct. App. 2002). Money may be the subject of conversion if "it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." *Id.* at 507, 570 S.E.2d at 551 (quoting *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990)).

The Court finds Plaintiff is entitled to summary judgment on its conversion claim. Defendants funded the Merrill Lynch account with $650,000, agreed to maintain a sufficient balance in the account at all times to cover the outstanding debt obligation, and agreed that Plaintiff was entitled to issue a notice and take exclusive control over the account if Defendants defaulted. Nonetheless, Defendants drained the account when they still owed Plaintiff the determinative sum of $389,555.98. Defendants therefore unlawfully converted the funds in the account, and Plaintiff is entitled to judgment as a matter of law on its conversion claim. *See Mullis*, 351 S.C. at 507, 570 S.E.2d at 551 (affirming a judgment on a conversion claim because the plaintiff identified a determinative sum improperly withheld by the defendant).

C. Damages

The Court finds Plaintiff is entitled to recover actual damages in the amount of $389,555.98, which is the amount of the outstanding debt at the time of the breach. It is undisputed

that Defendants made only 29 of the agreed-upon 60 payments on the promissory note. Defendants have thus failed to make the 31 remaining payments due under the note, and the balance now due totals $389,555.98 according to the affidavits of James E. Jones and Karen H. Oliver submitted by Plaintiff. This sum is comprised of the outstanding principal balance of $360,035.15 and past due interest of $29,520.83. Defendants have submitted no evidence calling this calculation into question. Accordingly, the Court enters judgment in Plaintiff's favor and finds Plaintiff is entitled to $389,555.98 in actual damages.

II. Defendants' Counterclaims and Defenses

Defendants' counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing are based in part on allegations that (1) Plaintiff misrepresented material facts concerning the market value of the dealership, (2) Plaintiff charged "an exorbitant amount of rent to THAG in exchange for its use of the dealership property," and (3) Plaintiff owned and operated a car dealership next door to THAG, in direct competition with THAG and in violation of the non-compete agreement contained within the parties' contract. Defendants assert the same allegations as affirmative defenses to Plaintiff's claims. Defendants bear the burden of coming forward with specific evidence supporting these allegations. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) ("With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing"—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case.' . . . Once [the] moving party carries its initial burden, [the] opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a *genuine*

issue for trial.'" (first alteration in original)). The Court finds each of these allegations is meritless as both a counterclaim and a defense to Plaintiff's claims.

As to Defendants' assertion that Plaintiff misrepresented the market value of the dealership, Holmes acknowledged in his deposition testimony that he was not forced to enter into any of the agreements with Plaintiff or to pay any particular amount. The contract documents evidence that Defendants had time to conduct their own inquiry into the value of the business, and all parties were sophisticated business entities represented by counsel. The fact that Defendants may have agreed to pay too much or more than they should have is not a valid defense to Plaintiff's claims, nor is it a valid basis for a breach of contract counterclaim. Accordingly, the Court grants summary judgment in favor of Plaintiff on this portion of Defendants' counterclaims and defenses.

Defendants also contend Plaintiff charged too much rent pursuant to the commercial lease agreement entered into in conjunction with the Second Amendment to the Assert Purchase Agreement. Again, the deposition testimony of Holmes establishes that the rent amount was set forth in the lease agreement (presumably between MarGin Properties as Landlord and Sumter Real Estate Holdings as Tenant, as referenced in the Second Amendment to the Asset Purchase Agreement at paragraph 12(b)(viii)). Defendant Holmes specifically testified in his deposition that the $32,500 rent "was the amount of the lease agreement" and stated "we agreed to do that to get started along the way." Again, Defendants voluntarily entered into the lease agreement and cannot now contend that holding them to those terms was a breach of the parties' contract. Accordingly, the Court grants summary judgment in favor of Plaintiff on this portion of Defendants' counterclaims and defenses.

Finally, Defendant Holmes makes the bare assertion in his affidavit that Plaintiff violated the terms of the noncompete clause in the Asset Purchase Agreement by operating another car

dealership next door to the Defendants' dealership. However, the noncompete provision does not prevent Plaintiff from operating a car dealership. The noncompete clause, at paragraph 12(b)(iv) of the Asset Purchase Agreement, states that Plaintiff will not directly or indirectly "compete with the business of Purchaser *by engaging in any new Nissan brand motor vehicle sales or service dealership*" for a period of five years. Defendants have failed to set forth by affidavit or otherwise any facts showing that Plaintiff breached the terms of the noncompete. Accordingly, the Court finds no genuine issue of material fact exists and Plaintiff is entitled to judgment as a matter of law on this portion of Defendants' counterclaims and defenses.

III. Plaintiff's Remaining Claims and Defendants' Remaining Counterclaims

The Court finds genuine issues of material fact exist with regard to the remaining claims on which Plaintiff moved for summary judgment.[2] The Court also finds genuine issues of material fact exist as to the remaining portions of Defendants' counterclaims—specifically, the allegations in subparagraphs c, d, and e of paragraph 57 and subparagraphs c, d, and e of paragraph 61 of Defendants' Answer and Counterclaims filed on May 1, 2023.

IV. Plaintiff's Request for Attorneys' Fees

Plaintiff asserts that it is entitled to an award of attorneys' fees under the terms of the contracts referenced above, the promissory note and Pledge Agreement in particular. The Court finds that an award of attorneys' fees is premature at this stage and therefore denies Plaintiff's request at this time. Plaintiff is free to raise its request for attorneys' fees again at a later date.

CONCLUSION

[2] Plaintiff did not move for summary judgment on its claims for breach of contract accompanied by a fraudulent act, fraud, constructive fraud, money had and received, quantum meruit, and accounting. The Court therefore makes no ruling as to those claims.

For the reasons set forth above, the Court hereby GRANTS Plaintiff's motion for summary judgment as to its claims for breach of contract and conversion and awards Plaintiff actual damages in the amount of $389,555.98 against Defendants THAG, LLC, and Nissan of Sumter, LLC.[3] The Court further GRANTS Plaintiff's motion for summary judgment as to the portions of Defendants' counterclaims and affirmative defenses that are based upon (1) the market value of the dealership, (2) the amount of rent charged by Plaintiff, and (3) the noncompete provision in the parties' contract.

The Court DENIES summary judgment as to Plaintiff's remaining claims and as to the remaining portions of Defendants' counterclaims.

The Court DENIES Plaintiff's request for attorneys' fees as premature at this stage.

IT IS SO ORDERED.

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The Honorable Kristi Fisher Curtis
Circuit Court Judge

[3] Plaintiff also moved for summary judgment against Terry L. Holmes individually via its' cause of action for piercing the corporate veil. This court denied summary judgment as to that cause of action. Judgment as to the Plaintiff's causes of action for breach of contract and conversion is awarded at this time only against Defendants THAG, LLC, and Nissan of Sumter, LLC, and not against Holmes individually.

Georgetown Common Pleas

Case Caption: Jones Nissan Inc VS Thag Llc , defendant, et al

Case Number: 2020CP2200373

Type: Order/Summary Judgment

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762