STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Lunar Systems, Ltd., Plaintiffs, vs. Ashley River Properties One, LLC successor in the interest to Ripley Light Yacht Club, LLC and Ripley Light Development, LLC, Defendants.	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT C/A NO.: 2005-CP-10-2434 **ORDER AND JUDGMENT**
Ashley River Properties One, LLC Third-Party Plaintiff, vs. Lunar Systems, LTD and Thomas J. Lussier, Third-Party Defendants.	

Presiding Judge:	Hon. Deadra L. Jefferson
Date of Trial:	January 23, 2013
Court Reporter:	Joyce Rueger
Plaintiff's counsel:	William C. Cleveland, Esq.
Defendant's counsel:	Clayton B. McCullough, Esq.
Third-Party Defendant's counsel:	Frank M. Cisa, Esq.

PROCEDURAL BACKGROUND

This case came before the Court for a non-jury trial on January 23, 2013. The Plaintiff Ashley River Properties II, LLC, ("ARP-II") as assignee of Lunar Systems, Ltd. was represented by William C. Cleveland, Esq. The Defendant Ashley River Properties One, LLC ("ARP-I")

was represented by Clayton B. McCullough, Esq. The third-party Defendant Lunar Systems, Ltd. was represented by Frank M. Cisa, Esq.

On May 19, 2010, the Honorable Thomas L. Hughson, Jr., issued an order, which, among other things, granted ARP-I's Motion to Cancel Lunar's *lis pendens*, granted ARP-I's Motion to Substitute ARP-II as the proper plaintiff, granted ARP-I leave to Amend its answer to add defenses and assert counterclaims against ARP-II and third-party claims against Lunar, and granted ARP-II's Motion to Amend to Add an Independent Claim against ARP-I arising out of the ARP-II Indemnity Agreement.

The claims presently before this Court are as follows: (1) ARP-II's claim against ARP-I as assignee of Lunar and independently for indemnification and (2) ARP-I's claims against ARP-II, Lunar, and Thomas J. Lussier ("Lussier") for abuse of process. ARP-I, ARP-II, and Lunar/Lussier have each asserted various affirmative defenses to these claims.

Having heard the testimony of the witnesses and having duly considered the admitted evidence, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On June 7, 2005, Plaintiff filed a Complaint seeking the following relief: 1) for the Court to "determine the amount owed to the Plaintiff and declare that the Plaintiff has an ownership interest in the condominium property in an amount in proportion to the total purchase price of the condominium property . . . , and decree that the Plaintiff is entitled to an order partitioning the property to sever Plaintiff's interest as a tenant in common"; 2) In the alternative, for the Court to declare the Plaintiff is owed $325,000 from the Defendants, with interest, "which debt is secured by the condominium property"; 3) that

the Plaintiff is "entitled to security interest and/or equitable mortgage relative to the condominium property"; 4) that the Court declare the respective rights, obligations, and duties of the parties; 5) for attorneys fees; and 6) for other relief as the Court deems proper.

2. On July 7, 2005, Defendant Robert C. Cunningham filed an Answer in the form of a general denial. On November 1, 2005, an Amended Answer was filed by Defendant ARP-II, in the form of a general denial, and alleged the following affirmative defenses: 1) failure to state a claim upon which relief may be granted; 2) doctrine of laches; 3) doctrine of estoppel; and 4) doctrine of waiver.

3. On May 23, 2008, an Order of Entry of Default was entered against Defendant ARP-I, and on December 18, 2008, an Order Setting Aside Default Judgment was entered by this Court. On January 14, 2009, Defendant ARP-I filed an Answer in the form of a general denial, while alleging the following affirmative defenses: 1) failure to state a claim; 2) waiver; 3) laches; 4) estoppel; 5) release and satisfaction and discharge; 6) lack of subject matter jurisdiction; 7) lack of privity or timely notice; 8) accord and satisfaction; 9) *res judicata* and/or collateral estoppel; 10) extinguishment of debt; 11) unclean hands; 12) payment, set-off, and/or offset; 13) assignment void and invalid; 14) insufficient process; 15) failure to mitigate damages; 16) absence of damages; and 17) reservation of additional and further defenses.

4. In December 2003, Kriti Ripley, LLC ("Kriti") and Emerald Investments, LLC ("Emerald") formed ARP-II to continue the development of a marina on the Ashley River. Emerald is wholly-owned by Stuart Longman, as is the Defendant ARP-I.

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5. The ARP-II operating agreement contains a broad agreement to arbitrate any dispute or controversy.

6. On December 30, 2003, at the time of executing the ARP-II operating agreement, Emerald, Longman and three other of Mr. Longman's companies, ARP-I, Sapphire Development., LLC ("Sapphire"), and Ripley Light Development, LLC executed an indemnity agreement ("Indemnity Agreement") promising to indemnify ARP-II and Kriti for any claims arising out of Mr. Longman's development activities that were not expressly disclosed in attachments to the indemnity agreement.

7. On March 8, 2001, Lunar Systems Ltd. ("Lunar") entered into a real estate purchase agreement with Emerald to purchase a condominium that was proposed to be built on property partially owned by ARP-I and partially owned by ARP-II. Lunar paid $325,000 as an earnest money deposit.

8. The condominium that Lunar contracted to purchase was never built.

9. Lunar's purchase contract provided that property owned by ARP-I and ARP-II serves as collateral to secure the repayment of Lunar's deposit in the event the condominiums were not built. Lunar's claim for the return of its deposit was not disclosed by the attachments to the Indemnity Agreement.

10. On June 7, 2005, Lunar Systems brought this lawsuit against ARP-II and ARP-I seeking to recover its deposit plus accrued interest. At that time, Lunar filed a lis pendens against the ARP-I and ARP-II property identified in the Lunar real estate purchase contract as collateral for the repayment of Lunar's deposit.

11. On October 30, 2005, a New York arbitration proceeding that involved ARP-II, Longman, Kriti and Emerald issued its award ("The 2005 Award"). The award found

"that Kriti and ARP II are entitled to indemnification from Emerald and Longman in the amount of $400,000 for all claims to date of third party vendors against ARP II." When this amount was added to other damages found against Emerald and Longman, the total awarded in favor of Kriti and ARP II against Emerald and Longman was $1,184,581.72.

12. The 2005 Award stated, "we are persuaded that Emerald or Longman or another entity controlled by Longman (a) received and kept the deposits, (b) did not use these funds for the benefit of ARP II, and (c) ARP II must now resolve all these third party claims." The 2005 Award stated, "the resolution of all such claims to be at the expense of ARP II."

13. On November 15, 2005, Kriti and ARP-II petitioned the arbitrators to modify the award of indemnification for preconstruction investor claims from $400,000 to $1,031,060.74. Kriti and ARP-II also requested clarification as to the "identity of the third party vendees who have 'claims to date'."

14. On December 9, 2005, the arbitrators responded to Kriti and ARP-II's application, denied their request to modify the award, and instead made only two minor grammatical corrections.[1]

15. On February 15, 2008, the Honorable Ira Gammerman, Judicial Hearing Officer, confirmed the First Award and Second Award, which dealt with accounting issues and monetary claims.

16. Although ARP-II and Kriti have attempted to execute on their judgment, Emerald and Longman have paid no monies toward satisfaction of the judgment and it remains unsatisfied, except for the award of some administrative fees for which Emerald and Longman received credit and which are not relevant to this dispute.

[1] Such corrections include the substitution of "vendors" for "vendees" from paragraph 7, page 4 of the award, along with the omission of "to" from line 2 of the same paragraph.

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17. On May 12, 2006, Lunar caused to be filed a Partial Release of *lis pendens* with respect to ARP-II's property only.

18. On December 20, 2007, ARP-II paid Lunar $325,000 and gave it a note in the amount of $175,000 in exchange for an assignment of Lunar's claim against ARP-I and a covenant not to sue.

19. After the Assignment and Release was executed, ARP-II brought the present action against ARP-I.

20. On February 15, 2008, the First Award and a subsequent arbitration award dealing with accounting matters were confirmed by the Honorable Ira Gammerman, Judicial Hearing Officer and reduced to judgment on March 27, 2008 in the amount of $1,184,581.72 against Emerald and Longman.

21. On April 29, 2008, this New York Judgment was enrolled in Charleston County.

22. ARP-II ultimately filed a document on June 11, 2010, which released the *lis pendens* on ARP-I's property, over two years after the New York courts had confirmed the First Award.

23. Following receipt of the assignment of Lunar's claim, ARP-II determined that ARP-I had not appeared in this lawsuit and proceeded to enter ARP-I's default.

24. ARP-I claims that it did not receive notice of entry of the default or ARP-II's application to the Court for an order of damages.

25. At some point, ARP-I did discover the entry of this default because it moved before the Court for an order setting aside the default on August 12, 2008, which was granted on December 18, 2008.

26. On May 19, 2010, the Court entered a Consent Order cancelling the Plaintiff's *lis pendens* on ARP I's property. That property has since been deeded to Emerald's bank in lieu of foreclosure.

27. On June 4, 2010, ARP-II amended its complaint so as to assert both the claim it had received by way of assignment from Lunar and its own claim under the Indemnity Agreement for indemnification from ARP-I.

28. In response to ARP-II's amended complaint, ARP-I filed a counterclaim against ARP-II, and a third-party claim against Lunar, claiming ARP-II and Lunar are liable for abuse of process because Lunar assigned its claims against ARP-I to ARP-II and because ARP-II entered ARP-I's default and sought to obtain a default judgment.

CONCLUSIONS OF LAW

I. ARP-II (As Assignee of Lunar) Claim Against ARP-I

1. The Assignment and Release does not permit ARP-II to pursue ARP-I in this action because ARP-II, as assignee, merely stands in Lunar's shoes and receives the same rights that Lunar had at the time of the assignment. See Singletary v. Aetna Cas. & Sur. Co., 316 SC 199, 447 S.E.2d 869 (Ct. App. 1994) ("assignee ... stands in the shoes of its assignor" and "[a]n assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment"); Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (S.C. Ct. App. 2007) (noting the three elements to an assignment: an assignor, assignee, and transfer of control from the former to latter).

1. Moreover, the Assignment and Release constituted an accord and satisfaction of Lunar's claim. South Carolina Farm Bureau Mut. Ins. Co. v. Kelly, 345 S.C. 232, 239, 547 S.E.2d 871, 875 (Ct.App.2001) (noting that "[a]n accord and satisfaction occurs when there is (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the consideration expressed in the new agreement.").
2. Thus, in lieu of Lunar receiving the property it intended to acquire when initially putting down its deposit, Lunar agreed to accept $325,000 and a promissory note for $175,000, in exchange for releasing its claim against ARP-I.
3. The First Award required ARP-II to resolve all disputed third-party claims at its own expense, including the Lunar claim.
4. Because the Assignment and Release fully settled Lunar's claim against ARP-II, the party obligated to discharge Lunar's Claim under the First Award, ARP-II merely received an assignment of a satisfied claim.
5. Given the foregoing, ARP-I is entitled to a declaration that ARP-II possesses no claim against ARP-I by virtue of the Assignment and Release.

II. ARP-II's Claim Pursuant to the Indemnity Agreement

6. Allowing ARP-II to pursue Lunar's purportedly assigned claim against ARP-I would circumvent the First Award and permit the re-litigation of previously decided issues and claims. See Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2003) (*res judicata* applies to prior arbitration awards, including claims that could have been submitted but were not); Ross Marine, LLC v. Query, Sautter, & Gliseman, LLC, 380 S.C. 494, 498, 671 S.E.2d 604, 606 (2009) (noting when an issue is litigated and

determined by final judgment, such "determination is conclusive in a subsequent action whether on the same or a different claim.")

6. Moreover, such re-litigation would violate this state's strong policy in favor of arbitration. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) ("There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.").

7. ARP-II and Kriti had the opportunity to and actually did fully litigate the issues of third-party claims, including Lunar's, in addition to ARP-I's obligations under the Indemnity Agreement in the First New York Arbitration. As previously discussed, the First Award fully addressed and resolved the preconstruction investor claims and indemnification issues, as evidenced by the panel's denial of ARP-II's petition for an award modification. The New York courts subsequently confirmed the First Award, and a judgment encompassing the $400,000.00 indemnification award was enrolled in Charleston County.

8. ARP-II is now estopped from re-litigating these issues and pursuing additional indemnification against ARP-I even though ARP-I was not a named party in the First New York Arbitration. In Beall v. Doe, the Court held that a verdict in a prior lawsuit was binding on the defendant, even though the plaintiff was not a party to the prior action. 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). The Court followed the doctrine of "nonmutual collateral estoppel", which can be asserted defensively and offensively; all that is required is that "the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action." Id. (quoting

Graham v. State Farm Fire and Casualty Ins. Co., 277 S.C 389, 391, 287 S.E.2d 495, 496 (1982).

9. The Indemnity Agreement was entered into the record as an exhibit at the First New York Arbitration and this very issue regarding indemnification was litigated, decided, and subsequently confirmed by the New York courts.

10. Alternatively, putting aside the issue of "nonmutual collateral estoppel," ARP-II's claims and arguments in the First Arbitration did address conduct by ARP-I, not just Emerald and Longman individually, and the First Award reflects this fact. The First Award states that the indemnification award was based on conduct by "Emerald or Longman or another entity controlled by Longman." According to the Indemnity Agreement, this other entity was ARP-I and/or its predecessors[2], evidencing the fact that the First Arbitration considered ARP-I's involvement as well as the Indemnity Agreement in making its decision. Moreover, Williams and Longman testified at trial that the Indemnity Agreement was part of the First Arbitration.

11. Given the above, the rights and obligations of ARP-I have been fully litigated and decided; and, therefore, under the doctrine of *res judicata* ARP-II may not pursue additional indemnification against ARP-I.

III. ARP-I's Abuse of Process Claims Against ARP-II, Lunar, and Lussier

12. Abuse of Process is the use of the legal system for a purpose other than that which was intended by the law. Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Cp. App. 1999). The elements of such claim consist

[22] The Indemnity Agreement was made and entered into by Ripley Light Development, LLC, Emerald Investments. LLC, Ashley River Properties I, LLC, Sapphire Development, LLC, and Stuart Longman, collectively referred to as the "Indemnitors", with Kriti Ripley, LLC, and Ashley River Properties II, LLC, referred to as the "Indemnified Parties."

of "an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding." Furthermore, "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." Id. (quoting Hainer v. Am. Med. Int'l, 328 S.C. 128, 136-37, 492 S.E.2d 103, 107 (1997). A "Defendant who has done nothing more than carry out process to its authorized conclusion, even though with bad intentions, cannot be liable for abuse of process." Hainer v. Am. Med. Int'l, 328 S.C. 128, 492 S.E.2d 103 (1997). See also Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 567 S.E.2d 251 (Cp. App. 2002) (noting "bad motive" alone insufficient to support claim).

13. ARP-I argues that ARP-II's entering ARP-I's default constitutes the necessary ulterior purpose necessary to pursue its claim.

14. The Defendant fails to demonstrate how the entry of a default constitutes an ulterior purpose. ARP-II has steadfastly sought indemnification for the amounts that it is obligated to pay Lunar. When a party has not appeared, the seeking of an entry of default is a step normally taken by litigants in an effort to recover on their claims.

15. The Defendant asserts that Lunar's filing of a *lis pendens* and ARP-II's continuation of the *lis pendens* satisfies the elements of an abuse of process claim. Lunar's contract provided that ARP-I's property was collateral for the repayment of Lunar's deposit. Therefore, Lunar was within its rights to file the *lis pendens* initially. Likewise, Lunar and ARP-II were entitled to exchange ARP-II's payment and note for an assignment of Lunar's claims against ARP-I and its property. Therefore, ARP-II's continuation of the *lis pendens* was not for any ulterior purpose, but rather for the

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purpose of being indemnified. See D.R. Horton, Inc. v. Wescott Land Co., Inc., 398 S.C. 528, 550, 730 S.E.2d 340, 351 (Ct. App. 2012) (Finding "[p]urchaser's filing of lis pendens on property subject to contract with real estate developer, even if done with ulterior motive to tie up property and attempt to force developer to accept purchaser's new contract terms, did not on its own constitute abuse of process, as purchaser did not engage in any willful acts not authorized in use of the process").

16. The Defendant has testified as to damages he alleges he suffered. However, this testimony is at best speculative as to any alleged losses, and Defendant has not proven any damages on its abuse of process claim. "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Cp. App. 2002). "As a general rule, courts will find that 'all damages must be susceptible of ascertainment with a reasonable degree of certainty.'" 11 S.C. Jur. *Damages* § 5. Furthermore, "When the tortious conduct of a defendant causes a plaintiff to lose prospective profits," the plaintiff may recover such profits after proving "1) it is reasonably certain that such profits would have been realized except for the tort, and (2) such lost profits can be ascertained and measured from the evidence produced with reasonable certainty." Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (2008). Such certainty "means the damages may not be left to mere speculation or conjecture." Id. Because the Defendant did not engage in willful acts not authorized in use of the process, they cannot recover any damages for such claim.

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17. The Defendant has failed to prove the necessary elements to recover on its abuse of process claim. These parties have filed numerous lawsuits and litigation has been ongoing between the parties since 2005, not only regarding the subject property, but also concerning business associations with one another.

BASED ON THE FOREGOING, the Court denies ARP-II's indemnity claims against ARP-I. The Court denies ARP-I's abuse of process counterclaim against ARP-II, and third-party claim for abuse of process against Lunar and Lussier.

IT IS SO ORDERED.

Honorable Daniel L. Jefferson
Presiding Judge, Ninth Judicial Circuit

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