STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

R & J Restaurants, LLC d/b/a Steve's Bar & Grille, LLC,

Plaintiff,

vs.

Sotirios Mantekas and Kelman, Inc.,

Defendants.

J&S Real Estate Holdings, LLC,

Cross-claim plaintiff,

vs.

Sotirios Mantekas and Kelman, Inc.,

Cross-claim defendants.

Sotirios Mantekas and Kelman, Inc.,

Cross-claim plaintiffs,

vs.

J&S Real Estate Holdings, LLC-, and John Sherwood,

Cross-claim defendants.

ORDER

Case No. 2012-CP-46-472

This matter came before me on September 15, 16, 17, and 19, 2014, for a non-jury trial. Representing the parties were: D. Bradley Jordan and Geoffry M. Dunn for Plaintiff, R&J Restaurants, LLC d/b/a Steve's Bar & Grille, LLC ("R&J"); Tracy T. James for Defendants J&S Real Estate Holdings, LLC ("J&S"), and John Sherwood ("Sherwood"); and, Lucy L. McDow and Charles B. Burnette for Defendants Sotirios Mantekas ("Mantekas") and Kelman, Inc. ("Kelman"). Also present were the parties. Both sides presented witnesses and voluminous

exhibits. Counsel for the parties presented arguments and briefs for the Court's consideration. Based on the testimony, exhibits, and arguments of counsel, I make the following findings of fact and conclusions of law.

PROCEDURAL HISTORY

This action was commenced nearly four years ago, on February 11, 2011 ("First Lawsuit"). Prior to service, the First Lawsuit was amended by filing dated March 8, 2011. On April 14, 2011, J&S answered R&J's first Complaint, denying its allegations, counterclaiming against R&J for ejectment, and filed and served a Third-Party Complaint against Kelman, seeking indemnification. Kelman did not respond to the Third-Party Complaint in the First Lawsuit, and has been ruled in default.

On February 3, 2012, R&J commenced a second action against J&S, Sherwood, Kelman, Mantekas, and others (the "Second Lawsuit"). R&J amended its complaint in the Second Lawsuit on March 15, 2012, and served all parties with the pleading on March 30, 2012. J&S and Sherwood answered R&J's amended complaint on April 30, 2012, counterclaimed against R&J, and asserted cross-claims against Kelman for indemnification. J&S also asserted a cross-claim against Mantekas based on a personal guaranty related to the assigned Lease. Kelman and Mantekas did not respond timely to J&S's cross-claims.

By Order dated June 19, 2012, the First Lawsuit and Second Lawsuit were consolidated. On September 19, 2012, J&S moved to have default entered against Kelman and Mantekas, and to have judgment issued in its favor as to liability. Judge Lee S. Alford ultimately granted J&S a default judgment as to liability against Kelman and Mantekas, and that judgment is final.

J&S, Sherwood, R&J, Roberge and LeFever settled all claims between them by a written settlement agreement dated September 6, 2013. The settlement did not effect, and specifically reserved, all claims by J&S, R&J, Roberge and LeFever against Kelman and Mantekas.

The claims remaining for adjudication in the case are the following: (1) R&J's claim for fraud and negligent misrepresentation against Kelman and Mantekas; (2) J&S's claim against Kelman for contractual and equitable indemnification; (3) J&S's claim against Mantekas on his personal guaranty for breach of the Lease; (4) Kelman's claim against J&S for return of its security deposit; and, (5) Kelman's claim for equitable indemnity against J&S and Sherwood.

FINDINGS OF FACT

The following are findings of fact, which I find based on all the evidence, and after consideration of any applicable burden of proof. The proof in this case consumed four days of

trial, and presented the testimony of thirteen witnesses. The parties introduced 151 exhibits into evidence, some quite lengthy, including videos and photos. Thus, these findings have required the resolution of numerous factual issues in dispute, and arrival at findings that best represent the facts and circumstances of this case. In so doing, I have necessarily considered the credibility of the witnesses, and their respective interests in this matter.

A. General findings.

This matter arises out a lease dispute between the following parties: R&J, both as lessee and purchaser of a restaurant business; J&S, as owner-lessor of the leased property and restaurant facilities; Kelman, as the original lessee and assignor of the lease, as well as the seller of the restaurant business, to R&J; and, Mantekas, as the owner and principal agent of Kelman. James LeFever ("LeFever") and Rich Roberge ("Roberge") are the members of R&J. John Sherwood ("Sherwood") is the managing-member of J&S. Mantekas is the owner of Kelman.

J&S owns the real property located at 2150 Gold Hill Road in Fort Mill, upon which is located an approximately 5,000 square foot structure upfitted as a commercial restaurant and lounge ("Property"). J&S leased the Property to Kelman on February 1, 2008, pursuant to a detailed commercial lease, for a three-year term ending on February 28, 2011 ("Lease"). Mantekas guaranteed performance of the Lease. Under the terms of the Lease, Kelman, as Lessee, was responsible for maintenance and upkeep of the interior of the building. J&S, as Lessor, was responsible to ". . . make all repairs as shall be reasonable [sic] necessary to keep the exterior of the demised premises [i.e., the Property], including the roof in good condition and repair, ..." Under the circumstances of this case, the septic tank is considered to be a portion of the exterior of the "demised premises."

Kelman operated a restaurant and lounge on the Property known as Steve and Kelly's and/or Steve's Bar & Grille ("Steve's"). For personal reasons, in late 2009, Mantekas decided that Kelman would sell Steve's. On January 14, 2010, R&J purchased Steve's. In connection with the sale, and with J&S's consent, Kelman assigned its Lease with J&S to R&J. Under the terms of the transaction, Kelman, and Mantekas by virtue of his guarantee, remained liable under the Lease until February 28, 2011, the remainder of the original Lease term.

In connection with the sale, the contract documents addressed the parties' rights and responsibilities, and following is the relevant language of each.

The Offer To Purchase [the ongoing business of Steve's], dated November 20, 2009, states: "This document contains the entire understanding of the parties and there are no oral

agreements, understandings, or representations relied upon by the parties." It also states: "This offer contingent on (1) verify [sic] taxable sales w/P&L's for 2009. Buyer will have 1 week to review after receiving documents. (2) review 2008 tax returns with 1 week to review after receiving documents to verify P&L's."

The Counter Offer, made by Kelman and accepted on behalf of R&J, dated November 21, 2009, states: "I/We accept all of the terms and conditions of the Offer for Purchase and Sale of Assets, Earnest Money Receipt and Agreement dated 11/19/09 except as follows: Purchase price to be $355,000.00. Cash including inventory."

The Authorization To Prepare Closing Documents and Disclosure ("Authorization and Disclosure"), dated November 21, 2009, states: "My investigation and analysis of the subject business having been favorably concluded and all contingencies and conditions of the sales contract having been resolved to my satisfaction, I hereby reaffirm said contract and all of my obligations thereunder. I expressly waive all rights that I may have to rescind said agreement, and I hold myself ready, willing and able to close this sale as soon as the appropriate documents have been prepared."

The Contingency Removal Form ("Contingency Removal"), signed December 3, 2009, states: "We the undersigned Purchasers of that certain business known as: Steve's Grill, located at 2150 Gold Hill Rd. Ft. Mill, SC hereby remove the contingencies on that certain Offer to Purchase dated: 11/21/2009 which reads: 1. Verify Taxable Sales w/P&L's for 2009. Buyer will have 1 week to review after receiving documents. 2. Review 2008 Tax Returns with 1 week to review after receiving documents to verify P&Ls. All other terms and conditions of the Offer to Purchase remain the same."

The Bill of Sale and Agreement ("Bill of Sale"), signed January 14, 2010, states: "The parties wish to set forth, document and affirm their various agreements in connection with this sale as set forth in their contract dated November 20, 2009 and as thereafter amended, the terms of which are incorporated herein as a part of this Agreement."

The Settlement Agreement (between Broker and R&J) ("Settlement Agreement"), dated January 14, 2010, states: "NOW THEREFORE, for and in consideration of the payment of $5,000.00 by Broker to Buyer and the closing by Buyer of the purchase contract between Buyer and Seller subject to the lease as modified by Landlord, Buyer and Broker each agree that they have settled all claims between themselves in their relationship arising from the purchase and sale of the Business. Additionally, the parties agree that all reliance by Buyer was upon Broker,

identified above, and reliance by Broker was upon Buyer and Landlord, as identified above, and that no reliance forming the basis of any claim does or shall hereafter be alleged by either against the other."

While these documents do not necessarily relate directly to the problems encountered by R&J, they do demonstrate an awareness of R&J that it was in all respects relying on its own "due diligence" at each stage of the consummation of the transaction.

After completion of the sale, R&J began operation of the business. Over the course of its operation, R&J encountered three problems that temporarily interfered with the operation of the restaurant. They were: (1) occasional backing up of the septic system with overflow of waste in the bathrooms; (2) water intrusion into the building from roof leaks and infiltration of ground water from outside the building, both occurring on occasion during significant rain events; and, (3) fires inside the restaurant that were apparently due to faulty electrical wiring.

During the course of its operation of the restaurant, R&J spent a considerable amount on repairs and maintenance of the property to deal with the problems referenced above. Also, over the course of about twenty months of operation, R&J shut down due to fire damage and repair approximately thirty days, and three to four times due to septic tank issues.

In dealing with the referenced problems, R&J repeatedly sought to have J&S perform repairs. Such demands were based on the Lessor's duty under the Lease to maintain the exterior of the Property and its roof. These demands were all refused by Sherwood despite the language of the Lease.

Notwithstanding their current position and R&J's remaining claims against Kelman and Mantekas, and despite present allegations of gross deficiencies in the Property, in May of 2010, LeFever and Roberge actually sought to purchase the Property from J&S. Negotiations for that purchase eventually fell through when the parties could not agree on a price.

After the second electrical fire event, R&J ceased operation in early September, 2011, and were locked out of the building by Sherwood on September 13, 2011.

There was considerable evidence that improvements to the property made by Kelman were done without required permitting. These included some significant additional electrical wiring for various upfits and additions to the restaurant. However, the evidence does not demonstrate that any of that work was the cause in fact of fires, or of any other event causing temporary interruption of J&S's restaurant operation. Rather, it appears that the points of origin of the electrical fires involved electrical work in place when Kelman leased the Property. This

would be the responsibility of J&S and Sherwood.

There was not sufficient evidence to demonstrate that any other improvements by Kelman were the cause-in-fact of any damage to R&J.

Concerning the septic system, R&J was advised by Sherwood in writing prior to its purchase to have an inspection made of the septic system. Pursuing that recommendation, R&J asked Mantekas to suggest someone to perform the inspection. Mantekas gave R&J the name of Autry Septic Tank Service ("Autry"), which had pumped out the septic tank for Kelman. R&J hired Autry to inspect the system, and upon Autry's assurances, R&J took no exception to the septic system. There is no evidence to suggest that Mantekas exercised any influence or control over Autry or the inspection. R&J was fully aware of the need to pump out the septic system, which, based on Kelman's experience, as documented by its financial records, and as represented by Mantekas, occurred about once a month. After the purchase, R&J had to pump the tank more frequently, but there is no evidence equating the load placed on the system by R&J with the load imposed by Kelman. From the disparity between the revenues of R&J and Kelman from the operation of the business, it may reasonably be inferred that R&J placed more of a load on the system than Kelman.

After Sherwood denied any responsibility for the condition of the septic system, and refused to fix it, R&J had the septic system repaired on its own in November, 2010, at a cost of $9,150. Mantekas contributed $2,500 toward replacement of the outside septic tank and related repairs to the septic system. Beyond this, the evidence does not indicate that Kelman's actions regarding waste disposal were the same as R&J's. There was testimony from which one could infer that R&J's employees poured grease down the sink drain, which would affect the septic system, but there was no such evidence of Kelman's staff doing the same.

R&J asserts that after purchasing Steve's, the roof leaked during significant rain events, and ground water infiltrated from outside, causing flooding in the dining area of the restaurant. It appears that the roof leaks increased during R&J's tenancy following a hail storm that occurred in April, 2011, and not due to an existing condition at the time of R&J's purchase from Kelman. While water intrusion occurred, there was no evidence that business was interrupted, and there was no quantification of lost business due to such events.

In any event, it is clear that J&S, as Lessor, was the responsible party for repairs to the roof and exterior of the building. It does not appear that R&J gave any written notice to Sherwood about the leaks or water intrusion, even though J&S would be responsible for such

problems under the Lease. It does appear that Kelman had some roof leaks and one event of water intrusion from outside, but Mantekas attempted to have the leaks fixed. Mantekas also told Sherwood about the water intrusion, but Sherwood failed to take action on behalf of J&S.

The evidence showed that R&J grossed substantially more revenue from the restaurant than Kelman in both 2010 and 2011, as demonstrated by the parties' financial records. Roberge and LeFever both testified concerning lost revenues due to flooding and septic tank problems. A comparison of their testimony to other financial information in the record indicates that this testimony relates to gross revenues, not lost profits. The record does not provide evidence to establish R&J's lost profits to a reasonable degree of certainty.

Over the course of this litigation, J&S reached a settlement with R&J, resolving R&J's claims against J&S. J&S paid $44,600 in settlement of all such claims. Sherwood testified that he and J&S incurred in excess of $130,000 in legal expenses in addition to the settlement of claims. Under the Lease, it is acknowledged that Kelman, and Mantekas by virtue of his personal guaranty, must indemnify J&S for damages sustained by J&S due to any breach of the Lease by R&J through February 28, 2011, which is the end of the initial term of the Lease. However, Plaintiff's Amended Complaint contains numerous allegations of wrongdoing by J&S and Sherwood unrelated to Kelman or Mantekas. The record does not allocate the settlement payments among the several causes of action against Sherwood and J&S to those involving Kelman and Mantekas. Nor was there any attempt to separate settlement of Sherwood's individual liability from that of J&S. Thus, the record does not show what liabilities of Kelman or Mantekas were paid by way of settlement to Plaintiff by J&S.

B. <u>Specific Findings</u>.

1. I find that under the facts of this case, considering the level of sophistication of all parties, the documents comprising the agreements of the parties concerning the entire transaction, the involvement of professionals on behalf of Plaintiff, and the detailed investigations undertaken by Plaintiff, there was no justifiable reliance on the part of Plaintiff concerning the disclosures made or not made by Kelman or Mantekas with respect to any septic system problems or water problems.

2. There is no proof by a preponderance of the evidence that any modification of the restaurant by Kelman, particularly with regard to the electrical system, was the cause of any business interruption or damage to Plaintiff.

3. There is no basis in the record upon which to allocate settlement amounts paid by

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J&S to Plaintiff between matters that were sole responsibility of J&S as landlord, or Sherwood individually, or the joint responsibility of J&S and Kelman, in order to establish a basis for indemnification by Kelman and Mantekas of J&S. As a result, there is no basis in the record upon which to determine what damages Kelman and Mantekas may owe J&S on its cross-claim against Kelman and Mantekas. Such a determination would be based on speculation.

4. J&S received substantial compensation for its damages by retaining all improvements, furniture and fixtures purchased by Kelman and sold to Plaintiff in the sale of the restaurant.

5. Issues of disclosure or non-disclosure aside, the damages suffered by R&J were almost entirely due to responsibilities imposed on J&S as landlord under the Lease. The evidence demonstrates that J&S, through Sherwood, repeatedly failed and refused to perform its obligations under the Lease.

6. There is insufficient evidence to establish that any condition of the premises existing on February 28, 2011, the end of the original lease term, was the cause of any damage to J&S or Sherwood.

CONCLUSIONS OF LAW

Based on the findings of fact herein, I make the following conclusions of law.

A. Interpretation of the Parties' Contract.

As in all cases, the Court is required to review a contract and interpret its meaning in accordance with established standards for judicial review of contracts. The parameters of judicial contract interpretation are well-defined in *Gambrell v. Travelers Insurance Company*, 280 S.C. 69, 310 S.E.2d 814 (1983). One of the fundamental axioms to be followed is to ". . . enforce, not write, contracts . . . and . . . give . . . language its plain, ordinary and popular meaning." (*Id.* at 280 S.C. at 71, 310 S.E.2d at 816.)

"The cardinal rule of construction in interpreting any contract is to ascertain and give effect to the intention of the parties. Such intent should be gleaned, as nearly as possible, from the instrument itself. *Erkes v. Kasparek*, 303 S.C. 70, 72, 399 S.E.2d 6, 8 (1990); *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). "A contract should receive sensible and reasonable construction and not such construction as will lead to absurd consequences or unjust results." *Holden v. Alice Manufacturing, Inc.*, 317 S.C. 215, 231, 452 S.E.2d 628, 631 (Ct.App. 1994); *Bruce v. Blalock*, 241 S.C. 155, 127 S.E.2d 439 (1962).

In this case, there are multiple documents making up the transaction between R&J, J&S,

Kelman and Mantekas. They are the Lease, Offer to Purchase, Counter Offer, Authorization and Disclosure, Contingency Removal, and Bill of Sale. Each is a separate document, but all together make up the overall "contract" between the parties, and must be read in context with each other.

B. R&J's claim against Kelman and Mantekas.

R&J's claims of fraud and negligent misrepresentation against Kelman and Mantekas is premised on its reliance, and right to rely, on representations or failures to disclose by Mantekas.

The merger and non-reliance clauses in the parties' contract documents do not automatically bar R&J from claiming reliance on misrepresentations or concealment by Kelman and Mantekas. Further, R&J's right to inspect the restaurant and Kelman's financial records does not automatically bar R&J from claiming reliance on misrepresentations or concealment by Kelman and Mantekas. *Florentine Corp., Inc. v. PEDA I, Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985); *Slack v. James*, 364 S.C. 609 S.E.2d 636 (2005); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990); *Redwend Limited Partnership v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct.App.2003); *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667 (Ct.App.2008).

Contractual merger clauses must be considered in light of the other circumstances of a transaction to determine the reasonableness of a party's reliance on misrepresentations or concealment that occur outside the written contract. When the Supreme Court enforces a non-reliance or merger restriction, it stresses that "[w]here there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *Florentine Corp., Inc.,supra*, 287 S.C. at 386, 339 S.E.2d at 114.

The necessary elements to prove fraud are:

> 1) a representation; 2) its falsity; 3) its materiality; 4) knowledge of its falsity or a reckless disregard of its truth or falsity; 5) intent that the representation be acted upon; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance on its truth; 8) the hearer's right to rely thereon; and 9) the hearer's consequent and proximate injury. Failure to prove any one of these elements is fatal. *Florentine Corp., Inc.,supra*, 287 S.C. at 385-386, 339 S.E.2d at 113-114.

The requisites of a claim of negligent misrepresentation are substantially the same, except that the misrepresentations need not be knowing. The culpable party need only owe ". . . a duty of care to see that he communicated truthful information to the plaintiff . . . [and that he breach]

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that duty by failing to exercise due care; . . ." *Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005).

In this case, the detailed and repeated affirmations of the documents, coupled with the specific facts of this case, lead to the conclusion that R&J did not rely on, and had no right to rely upon, any disclosure, or failure to disclose, outside the contract documents. Thus, R&J's claims against Kelman and Mantekas for fraud and negligent misrepresentation must fail.

Further, the ultimate and direct causes of R&J's losses were the repeated refusal of J&S to fulfill its duties as landlord under the Lease, and electrical fires, neither of which was due to misrepresentation or breach of contract on the part of Kelman.

Additionally, to the extent R&J seeks compensation for lost profits due to business interruption caused by either septic system issues, or water intrusion, the same are not proved by the applicable standard, namely, a reasonable degree of certainty. *See Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988); and, *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct.App. 2004). At best, R&J offered only evidence of loss of gross revenue due to these occurrences. That is not the equivalent of lost profits, and is not a sufficient proof of its damages.

C. <u>J&S Claim for Indemnification</u>.

J&S was granted a default judgment as to liability against Kelman and Mantekas on its claims for equitable and contractual indemnification, leaving only the need for a hearing to determine its damages on those claims. By prior order of this court, the damage claim was to be presented in conjunction with the trial of the rest of the case.

In a claim for indemnification, a party is entitled to compensation to the extent his liability is entirely based on the conduct of his indemnitor. "A right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *McCoy v. Greenwave Enterprises, Inc.*, 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014).

> Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party. *Jourdan v. Boggs/Vaughn Contracting, Inc.*, 324 S.C. 309, 312, 476 S.E.2d 708 710 (Ct. App. 1996).

In either type of indemnity claim, contractual or equitable, the indemnitee is entitled to be

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compensated for payment of damages assessed against him, as well as attorneys' fees and costs, which are attributable to the negligence or breach of contract of his indemnitor. *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 414 S.E.2d 118 (1992); *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). An award of attorneys' fees and costs is mandated when liability for indemnity is established. *McCoy, supra.*

> In order to recover attorneys' fees under this principle, the plaintiff must show: (1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of defendant's tortious conduct; (2) that the dispute was with a third party-not with the defendant; and (3) that the plaintiff incurred attorneys' fees connected with that dispute. *Addy, supra*, 257 S.C. at 33, 183 S.E.2d at 710; *Rhett v. Gray*, 401 S.C. 478, 498, 736 S.E.2d 873, 883-884 (Ct.App. 2013).

Such recovery is ". . . subject to the proviso that no personal negligence of his own has joined in causing the injury." *Addy, supra*, 257 S.C. at 34, 183 S.E.2d at 710; *Rhett, supra*, 401 S.C. at 498, 736 S.E.2d at 884 (Ct.App. 2013). Thus, entitlement to recovery presupposes that the indemnitee is not at fault in any way in incurring the damages against him. (*See Town of Winnsboro, supra, and, Addy, supra*, where in each case the indemnitee was absolved of fault by the jury, and a verdict was rendered against the indemitor.)

In the present case, by virtue of their default, Kelman and Mantekas are deemed to have admitted liability under J&S's claims for indemnification. They are also deemed to have admitted that J&S sustained damage due to acts or failures to act solely attributable to Kelman and Mantekas. J&S seeks reimbursement from Kelman and Mantekas for the entire settlement amount paid to R&J, and all attorneys' fees and costs incurred in defense of R&J's claims. I conclude that J&S is not entitled to this relief.

First of all, the settlement resolved not just claims on which Kelman and Mantekas would be liable to J&S by virtue of their default, but also separate and distinct claims against J&S not involving Kelman and Mantekas, and claims against Sherwood personally for which Kelman and Mantekas could not be liable. Sherwood has made no claim of any kind against Kelman and Mantekas. Thus, settlement payments were made, and attorneys' fees incurred, that had nothing to do with the duty of Kelman and Mantekas to indemnify J&S.

Secondly, no evidence was offered to show what portion of the settlement payment went toward resolving claims for which J&S would be entitled to indemnity from Kelman and Mantekas. It is, therefore, not possible to determine what portion of the settlement must be paid by Kelman and Mantekas.

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Nevertheless, even if no settlement had been paid, some amount of J&S's legal expenses may be attributed to defense of the claims on which it is entitled to indemnity by reason of the default of Kelman and Mantekas. *See McCoy, supra.* No legal expenses of Sherwood would be subject to reimbursement. In this connection, the only evidence in the record concerning J&S's attorneys' fees and costs was the bare testimony of Sherwood that his and J&S's legal expenses exceeded $130,000. There is no evidence upon which an allocation of those expenses can be made to charge Kelman and Mantekas.

The relative positions of J&S as cross-plaintiff, and Kelman and Mantekas, as cross-defendants in default, is unusual under the facts of this case. "A defendant in default admits liability but not the damages as set forth in the prayer for relief. *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). While a defaulting party essentially concedes liability, he does not the amount of that liability. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241-42, 246 S.E.2d 880, 882 (1978).

Nor does the default lessen J&S's obligation to prove its damages, with a sufficient showing to allow a true calculation of those damages.

> In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence.. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. . . . (it is incumbent upon the judge to make a judicial determination of the amount recoverable based on the proof). A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered. (Internal citations omitted.) *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 529, 374 S.E.2d 505, 506-07 (Ct.App.1988).

Even against a defaulting defendant, a party seeking special damages for breach of contract, must plead and prove those damages and their amounts. *Id.* If the claimant's proof is ". . . speculative, uncertain, or otherwise insufficient to permit calculation of his special damages, his claim should be denied." 296 S.C. at 528, 374 S.E.2d at 506. "[T]he award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted." *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct.App. 2012).

Within the framework of a claim for indemnity, the proof required would be to establish by a preponderance of the evidence the damages suffered due to the conduct of Kelman and Mantekas. That proof is lacking since there is no distinction made in J&S's settlement with R&J

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between the payment attributable to the liability of Kelman and Mantekas, and that attributable to J&S's and Sherwood's sole liability. Thus, I conclude that no award may be made in regard to the settlement between R&J, and J&S and Sherwood.

Since Kelman and Mantekas are liable to indemnify J&S for some amount by virtue of their default, they are liable for some share of the attorneys' fees and costs incurred by J&S in defense of those claims. As the amount of liability for some portion of legal expenses could not be properly ascertained until the rulings set forth in this order, I conclude that the appropriate procedure is to permit J&S to submit to the court, and to Kelman and Mantekas, an itemized claim for fees and expenses. A separate hearing will be held to determine what attorneys' fees and costs may be assessed against Kelman and Mantekas.

D. Claims of Kelman and Mantekas.

Kelman and Mantekas assert two remaining claims in their pleading, namely, a cross-claim against J&S for return of Kelman's security deposit, and a claim against J&S and Sherwood for equitable indemnification. They also assert a right to set off any amounts they might owe by way of indemnity against benefits received or retained by J&S and Sherwood by virtue of the cancellation of the Lease and recovery of the leased premises.

Based on the record presented and the posture of the case as to the liability of Kelman and Mantekas, I conclude that they are not entitled to recovery. In the cross-claims of J&S against Kelman and Mantekas, there are allegations of breaches of the Lease by Kelman, and the shared liability of Mantekas based on his personal guaranty of performance by Kelman. I conclude that they are bound by the facts deemed admitted by virtue of their default. The recoveries they seek by way of cross-claim are inconsistent with those facts, and they are estopped to claim otherwise. *See, e.g., Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008); *Brown v. Theos*, 345 S.C. 626, 550 S.E.2d 304 (2001); *Doe v. Doe*, 346 S.C. 145, 551 S.E.2d 257 (2001); and, *Graham v. State Farm Fire and Cas. Ins. Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982).

ORDER OF THE COURT

Based on the findings of fact and conclusions of law herein, it is ordered as follows:

1. Defendants Kelman and Mantekas are granted judgment on R&J's claims for fraud and negligent misrepresentation, and the same are dismissed with prejudice.

2. Defendant J&S is granted judgment as to liability on its claims for indemnity against Defendants Kelman and Mantekas, but J&S is awarded no damages on such claims for the reasons discussed herein.

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3. Defendant J&S is granted judgment for reasonable attorneys' fees and costs. The amount of such judgment, if any, shall be determined by subsequent hearing on the issue of attorneys' fees and costs attributable to J&S's claim for indemnity against Defendants Kelman and Mantekas. Prior to such hearing, J&S shall submit by way of affidavit to the court, and to counsel for Kelman and Mantekas, copies of all records to be relied upon in support of the claim, which shall include, without limitation, an itemized statement of all time billed and costs incurred, as well as an accounting of all payments, and a copy of any written fee agreement between J&S and its counsel. At the hearing, all parties shall be entitled to present such other evidence as may be relevant to the award sought by J&S.

AND IT IS SO ORDERED.

December 8, 2014

S. Jackson Kimball
Special Circuit Court Judge
York County

#19

(5)

STATE OF SOUTH CAROLINA)
)
YORK COUNTY)

COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

R & J Restaurants, LLC d/b/a Steve's Bar & Grille, LLC,

Plaintiff,

vs.

Sotirios Mantekas and Kelman, Inc.,

Defendants.

J&S Real Estate Holdings, LLC,

Cross-claim plaintiff,

vs.

Sotirios Mantekas and Kelman, Inc.,

Cross-claim defendants.

ORDER

(RULE 59(e), SCRCP)

Sotirios Mantekas and Kelman, Inc.,

Cross-claim plaintiffs,

vs.

J&S Real Estate Holdings, LLC; and John Sherwood;

Cross-claim defendants.

Case No. 2012-CP-46-472

This matter came before me on February 3, 2015, on cross-motions by J&S Real Estate Holdings, LLC, ("J&S"), Kelman, Inc. ("Kelman"), and Sotirios Mantekas ("Mantekas") for reconsideration of the findings, conclusions and rulings in my trial order. All parties, including the non-moving plaintiff, R&J Restaurants, LLC ("R&J"), were represented by counsel.

This order addresses two matters: (1) my treatment of J&S's cross-claim against Sotirios Mantekas in the order filed December 11, 2014, that followed the bench trial of the case; and, (2) minor corrections of the prior order brought to my attention pursuant the parties' motions.

1. **J&S's cross-claims against Mantekas.**

J&S sought a recovery through a cross-claim, its Sixteenth Defense, against Mantekas based upon Mantekas's personal guaranty of the lease, which is the subject of this action, through February 28, 2011.

J&S's other cross-claim, its Fifteenth Defense, sought a recovery against Kelman, for Kelman's indemnification of acts or omissions by Kelman ". . . during its Lease term of the Property." The two cross-claims are against different parties, and have different premises, factually and legally. Kelman and Mantekas both defaulted on the cross-claims against them. They and I am bound by the consequences of those defaults, as reflected in the prior order. The effect of the defaults is the crux of the challenge presented, and separately addressed in this order, with regard to Mantekas's personal guaranty.

My earlier order could be interpreted as conflating J&S's indemnification cross-claim and its personal-guaranty cross-claim, and treating the two claims as being jointly against Kelman and Mantekas. As the parties acknowledge, however, the indemnification cross-claim was asserted against Kelman only, and the personal-guaranty claim was asserted against Mantekas only. As a result, while I do not alter my ruling that Kelman, because of its default, is liable for a potential attorney-fee award to J&S under the indemnification cross-claim, I limit that finding to Kelman, and separately consider and address whether Mantekas's personal guaranty makes him also liable for attorney fees.

When Kelman was lessee of J&S's property, Mantekas personally guaranteed Kelman's performance under the lease. When Kelman later sold its restaurant business and wished to assign the lease to R&J as a new tenant, J&S gave its permission for the lease assignment under the negotiated terms reflected in the Amendment and Assignment of Lease and Consent by Landlord that was signed by all parties on January 14, 2010.

That assignment did several things relevant to J&S's cross-claims. Kelman assumed two duties to J&S: 1) to forever indemnify J&S against anything Kelman itself had done or failed to do before the assignment; and, 2) to indemnify J&S against loss or damages suffered by J&S as a result of R&J's tenancy, but only until February 28, 2011.

Mantekas himself did not agree to indemnify J&S. He agreed only that his personal guaranty of the lease itself would remain in effect for J&S's benefit until February 28, 2011, which was the expiration date of the original lease between J&S and Kelman. For that limited remaining period of time, Mantekas personally guaranteed R&J's performance under the lease,

just as he had guaranteed Kelman's.

To obtain damages under that guaranty from Mantekas, J&S pled that R&J had defaulted under the assigned lease prior to February 28, 2011, ". . . as a result of which J&S is owed back rent, late fees, and other damages for non-performance under the Assigned Lease." Based on Mantekas's pleading default, Mantekas is deemed to have admitted that statement. As a consequence of R&J's non-performance, J&S further pled that it was ". . . entitled to judgment against Mantekas for any and all amounts found to be due and owing to J&S from R&J pursuant to the Assigned Lease." Mantekas has also admitted that statement.

Notwithstanding this framework based on the pleadings, and as I have already ruled, J&S failed to prove sufficiently any amount of damages owed to it as of February 28, 2011, by R&J for R&J's breach of the lease, so as to bring such damages within the time period of Mantekas's guaranty. Consequently, I made no award of actual damages to J&S, despite Mantekas's default.

It may be fatal to any claim for attorney fees by J&S that it did not specifically seek attorney fees against Mantekas in its cross-claim. Nevertheless, assuming that J&S is not prohibited from now seeking such fees, it nevertheless proved no attorney fees ". . . to be due and owing to J&S from R&J pursuant to the Assigned Lease." Such fees, if any, would have arisen only if J&S had been a ". . . prevailing party . . ." *vis-à-vis* R&J in the litigation between those parties.[1] No determination can now be made that J&S was the prevailing party, or that R&J owed J&S any attorney fees for which Mantekas would be liable. In fact, J&S had previously settled with R&J by paying money to R&J, not receiving money from R&J.

Despite Mantekas's default, no damages or attorney fees were established against him under his personal guaranty, and no indemnification claim was pled against him. The cross-claim against him, like the cross-claim against Kelman, was properly pled to follow the terms of the respective duties each had assumed under the assignment of the lease.

2. <u>Corrections of prior order</u>.

Based on the parties' Rule 59(e) motions, I also make the following amendments to the prior order:

a) The last sentence of the first paragraph under "Procedural History", which reads, "Kelman did not respond to the Third-Party Complaint in the First Lawsuit, and has been ruled in default.", should be corrected to read: "Kelman did not respond to the Third-Party

[1] "10. ATTORNEY FEES. In the event of any litigation between the parties hereto arising out of this lease, or the leased premises, the prevailing party therein shall be allowed all reasonable attorneys' fees expended or incurred in such litigation to be recovered as a part of the costs therein."

#3

Complaint in the First Lawsuit."

b) The last sentence of the fifth full paragraph at page 5 of the prior order, which reads, "Negotiations for that purchase eventually fell through when the parties could not agree on a price.", should be corrected to read: "Negotiations for that purchase eventually fell through."

c) The next to the last line at page 5 of the prior order, which reads in part, ". . . temporary interruption of **J&S's** restaurant operation.", should be corrected to read: ". . . temporary interruption of **R&J's** restaurant operation." (Emphases added for clarity.)

d) The fourth line of the second full paragraph at page 6 of the prior order, which reads in part, ". . . which had pumped out the septic tank for Kelman.", should be corrected to read: ". . . which had provided septic tank service for Kelman."

Based on the findings of fact and conclusions of law herein, I alter and amend the prior order as follows:

1. Because of Mantekas's default, judgment is granted to J&S as to liability against him under his personal guaranty, but J&S is awarded no damages or attorney fees on such claims for the reasons discussed herein and in the prior order.

2. A judgment to J&S for reasonable attorney fees and costs, if any, the amount of which is to be determined by subsequent hearing, will be entered under the indemnity cross-claim against Kelman alone.

3. In all other respects, the prior order based on the trial of this case is confirmed, as I find no further basis for reconsideration or amendment of the order.

AND IT IS SO ORDERED.

March 3, 2015

S. Jackson Kimball
Special Circuit Court Judge
York County

#4

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

FILED-RECEIVED
2015 APR 21 AM 8:20
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4600472

PLAINTIFF(S)		DEFENDANT(S)	
R & J Restaurants LLC	Steves Bar & Grille LLC	Sotirios Mantekas Southeastern Business Brokers of Charlotte Inc	Kelman Inc National Restaurant Associates Franchising Inc

Submitted by: Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

This matter came before me upon motion of J&S Real Estate Holdings, LLC, pursuant to Rule 59(e), SCRCP, asking the Court to alter or amend the Court's Order filed March 4, 2015. Representing the parties were: Tracy T. James for J&S; and, Lucy L. McDow and Charles B. Burnette for Defendants Sotirios Mantekas and Kelman, Inc.

The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to ". . . reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (Citations omitted). A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment, but was not. *See Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009); and, *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009).

This court has held multiple motion hearings, and has issued multiple orders, involving this case. I ultimately heard the case as the trial judge, sitting without a jury, all extending well over a year. I am intimately familiar with the facts of the case, and have ruled on numerous issues of law over the course of this litigation. Based on my extensive involvement with the case, and upon reviewing the record presented and considering the memoranda and arguments of counsel, I find no matter presented that was not addressed expressly, or by clear implication, in the order under review with this motion. I further find no basis for reconsideration or amendment of my rulings in the prior order.

Therefore, it is ordered that J&S's Motion pursuant to Rule 59(e), SCRCP, be denied.

AND IT IS SO ORDERED.

RECEIVED
MAY 27 2015
SC Court of Appeals

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Special Circuit Court Judge	3063 Judge Code	4/17/2015 Date

For Clerk of Court Office Use Only

This judgment was entered on 4-21-15 and a copy mailed first class or placed in the appropriate attorney's box on 4-21-15 to attorneys of record or to parties (when appearing pro se) as follows:

David Bradley Jordan PO Box 11785 546 East Main Street Rock Hill, SC 29731

Walter L. Heinsohn PO Box 4287 Rock Hill, SC 29732
Tracy Thompson James 227 West Trade Street Suite 1550 Charlotte, NC 28202
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Kirsten Elena Small PO Drawer 10648 Greenville, SC 29603-0648
Lucy L. McDow PO Box 767 Rock Hill, SC 29731-6767

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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