STATE OF SOUTH CAROLIN COUNTY OF CHARLESTON Wells Fargo Bank, N.A. as trustee for the Certificate holders of Banc of America Mortgage Securities, Inc. Mortgage Pass - Through Certificates, Series 2005-E, Plaintiff, vs. Daniel O. Myers, Bethany A. Theis, and Bank of America, N.A., Defendants. Daniel O. Myers and Bethany A. Theis Third-Party Plaintiffs, vs. Aubie Melot, John Melot, and Carolina One LLC Third-Party Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-10-1160 **ORDER**

This matter came before the Court for a non-jury trial on Wednesday, November 19, 2014. Present at the time of the hearing were the following: Mary Leigh Arnold, Esquire on behalf of Daniel O. Myers and Bethany A. Theis, and Daniel O. Myers (hereinafter collective "Myers"); Brooks Derrick Esquire, on behalf of Aubie and John Melot, and John Melot (hereinafter "Melots"); and David Collins Esquire and Michael Scarafile, Esquire, on behalf of Carolina One LLC (hereinafter "Carolina One").

STIPULATION OF THE PARTIES AS TO EXHBITS AND PROCEDURE

At the commencement of the case counsel for the parties informed the Court that they believed for judicial economy reasons the better course of action would be to allow the claims between the Myers and Melots to proceed for with trial and to hold in abeyance the claims between Melots and Carolina One. This Court finding that the claims between Melots and Carolina One are dependent upon a judgment being entered in favor of Myers, directed that the Myers and Melots claims be bifurcated and that they proceed with their claims at trial. The Court further directed, in accordance with the agreement of counsel, that the claims between Melots and Carolina One would be held in abeyance and that those claims would be addressed upon the disposition of the Myers and Melots claims.

By stipulation of the parties, Myers' Exhibits 1-19 were entered into evidence without objection. Additionally by stipulation of the parties Melots' Exhibits 1-14 were entered into evidence without objection. As to Melots' Exhibit 1, which contains private financial information including account numbers, it will be deemed sealed to protect the information contained therein.

ISSUE

The issue before the Court is whether the contract to buy and sell between the parties allowed buyer to terminate the contract in its discretion prior to third party lender approval.

FINDINGS OF FACTS

Contract Evidence

1. The gravamen of the within action is a breach of contract claim against the Melots for breach of a contract to buy real property from Myers.

2. Myers owned of a home at 94 N. Shelmore Blvd. in Mt. Pleasant, South Carolina which was their primary residence until 2007, when they moved to a new home. (Third Party Complaint, ¶ 26).

3. Myers signed an Exclusive Right to Sell Agreement Listing Agreement to list the property with Carolina One, LLC (hereinafter "Carolina") on July 14, 2011. (Myers Exhibit No. 1). The agreed listing price was $600,000. Nancy Hoy was designated as the broker. (Myers Exhibit No. 1).

4. Substantial interest was shown in the house, and two offers were submitted on August 9, 2011. One of these offers was from Marshal and Jane Beckham for $620,000.00, which was $20,000.00 above the asking price. (Third Party Complaint, ¶ 28 and Myers Exhibit No. 2).

5. A third offer on the property was submitted on August 10, 2011 by the Melots, who were also represented by Nancy Hoy, the same Carolina One Real Estate Agent who represented the Myers. (Myers Exhibit No. 3). Rather than offer a specific purchase price, the Melots instead offered to purchase the home for "$5,000 above verifiable basified [sic] highest offer." (Myers Exhibit No. 3).

6. Myers communicated their concern to Nancy Hoy that the Melots' offer was not specific enough as to price to be properly evaluated. Myers were informed by Ms. Hoy that the Melots framed their offer in this manner to ensure their offer was accepted. (Myers' Exhibit No. 4.)

7. Myers, seeking to ensure that all potential buyers had an opportunity to make their best offer, rejected all offers but asked Nancy Hoy, dual agent for Myers and Melots, to communicate to all prospective purchasers that multiple competing offers significantly above the

listing price were received, and requested that all interested buyers submit a final, best offer. (Third Party Complaint, ¶ 33).

8. Between August 10 and August 14, 2011, Myers received three new offers from the previous prospective buyers (including Melots) and one additional prospective buyer. (Third Party Complaint, ¶ 36). The prospective buyer who had previously offered $620,000 had raised the offered price to $630,000. Another, new offer was for $615,000. (Third Party Complaint, ¶ 37).

9. On August 14, 2011, Melots again submitted an offer with a purchase price of "$5,000.00 above verifiable bonified(sic) highest offer." (Myers Exhibit No. 6 and Melots' Exhibit No. 3).

10. Myers countered with the sum certain price of $640,000 which was accepted by Melots. (Agreement to Buy and Sell Real Estate Residential, Myers Exhibit No. 6 and Melots' Exhibit No. 3).

11. Attached to the Agreement to Buy and Sell Real Estate Residential (hereinafter "Agreement") executed by Myers and the Melots are a Short Sale Addendum and Addendum 1. (Myers Exhibit No. 6 and Melots' Exhibit No. 3). The terms of the Agreement provide for a closing "within 7 days of final approval from all third parties." (Myers Exhibit No. 6 and Melots' Exhibit No. 3). The Agreement further provided in Addendum 1 that the sale was "as is" and that Buyers would have an opportunity for inspection of the property after third party approval was given, and that if they were not satisfied with the inspection they would have the opportunity to withdraw from the contract. The Agreement provides that, in the event of a default, the aggrieved party would be entitled to all remedies provided for at law, including but not limited to attorney's fees and actual costs incurred. The Agreement states in bold, capital letters that

"**THIS IS A LEGALLY BINDING AGREEMENT.**" (Myers Exhibit No. 6 and Melots' Exhibit No. 3).

12. The Agreement does not allow for indiscriminate termination by the buyer prior to third party lender approval. Termination is limited to "within 20 days prior to closing" if written approval of the transaction has not been received from the Lender. (Myers Exhibit No. 6 and Melots' Exhibit No. 3).

13. On August 18, 2011, the Myers received an email from Nancy Hoy stating "The Buyers got home late last night and saw your home today on North Shelmore. They were pleased with their purchase and glad they took the leap forward. . . I will talk with the Mark Week's office tomorrow and get the paper work in order for them to help us with the short sale. . ." (Myers Exhibit No. 7).

14. On the same day Nancy Hoy advised Myers the Melots were pleased with their purchase she sent to the Melos via email several listings for the Melots to view. (Melots Exhibits Nos. 5 and 6).

15. Nancy Hoy continued sending potential properties for the Melots to look at and purchase through Oct 4, 2011. (Melots' Exhibits Nos. 7 and 8.)

16. On October 5, 2011, the Melots advised Nancy Hoy they were walking away from the Agreement to Buy and Sell. Mr. Melot sent Nancy Hoy an email which states in pertinent part: "Yes, we were told what the banks often do and we understood that but, at the time, we did not know what our insurance company would eventually do. It was only last week that they let us know and Aubie called you immediately...When the insurance company told us what their timeframe for continuing to pay our rent would be we realized that we would need to hear from the bank in the next day or two in order to have a chance of completing the

renovations we would need (downstairs master, bath, laundry) before we would be out on the street...We must look for something that satisfies our needs that we can move into by our insurance company's deadline." (Melots Exhibit No. 9).

17. On October 5, 2011, Nancy Hoy advised the Myers of the Melots intent not to go through with the sale. Mr. Myers expressed his dissatisfaction and opinion that the contract did not give the Sellers the right to withdraw prior to closing and that Sellers had breached the contract. (Myers Exhibit No. 9).

18. On the following day, on October 6, 2011, Nancy Hoy forwarded the Melots email to the Myers and requested that the Myers sign a release. (Myers Exhibit No. 8). The Myers declined to sign a release. (Myers Exhibit No. 8).

19. On October 10, 2011, again Nancy Hoy sent a release to the Myers attention. (Myers Exhibit No. No. 11A). The Myers once again declined to sign the release and asked Ms. Hoy what she proposed since the Melots had "irrevocably breached." (Myers Exhibit No. 11B).

20. On October 27, 2011, a number of emails were transmitted back and forth between Mr. Myers and Michael Scarafile of Carolina One Real Estate. (Myers Exhibit No. 12). Mr. Scarafile, at one point stated: "At this point I will advise him to either get his own attorney or wait for bank approval and, if it is approved as is, he will still have his contract right to inspect and, if not satisfied, terminate the contact at that time. Not sure that serves anyone, but it would certainly put him in compliance with the contract." (Myers Exhibit No. 12).

21. On the same day Mr. Myers responded to Scarafile by stating in pertinent part: "Given the buyer's email to Nancy where he stated he was advised that he should keep looking for a better deal after signing a contract, I think it's clear he's in breach and was never acting in good faith. A pre-textual reason to refuse to close won't fix that. They are in breach now and we

won't wait for them to act out a phony charade before we file our lawsuit." (Myers Exhibit No. 12.).

22. Demand was made by Myers, through his counsel, to Melots that the earnest money deposit be tendered to Myers but Melots failed to respond. (Myers Exhibit No. 12).

23. After entering into the Agreement the Melots obtain several estimates for work they wanted performed on the property. (Melots Exhibit Nos. 12, 13 and 14).

24. No inspection report relating to the property was conducted or admitted into evidence.

Damage Evidence

25. The only witness presented at trial was that of Daniel O. Myers.

26. Myers entered into a Residential Rental Agreement for alternative housing commencing on September 15, 2011 for a period of twelve months at the rate of $3,000 a month for a total of $36,000.00. (Myers Exhibit No. 15).

27. On February 16, 2012, Wells Fargo initiated foreclosure proceedings. Myers continued to market the property resulting in a new offer to purchase from Bea Smith on May 9, 2012 for $500,000. (Myers Exhibit No. 13). The difference between the Melots purchase price and the Smith purchase price is $140,000 less than the amount the Melots had agreed to pay for the property. Myers Exhibit Nos. 6, 13 and 14).

28. The subject property was secured by two loans, a primary lien and a secondary lien. No funds were paid to the secondary lien holder, Bank of America, at the time of closing. (Myers Exhibit No. 14). Records subpoena by Melots from Bank of America show a charge off balance of $378,720.92. (Melots Exhibit No. 1).

29. Myers have not been released from liability of the indebtedness to Bank of America.

30. Myers paid to Home Team Pest Defense for pest control the amount of $270.00 between the date of contract for the Melots and the date of closing with Smith. (Myers Exhibit No. 16).

31. Myers incurred costs for yard maintenance in the amount of $180.00 in November 2011. (Myers Exhibit No. 17).

32. Myers received notification in September 2014 from Bank of America that Myers credit card account was being closed as a result of adverse credit entries and specifically referenced public records or collection matter filed. (Myers Exhibit No. 18).

33. Myers testified that he suffered damages and was seeking damages from Melots in the following amounts:

1. Difference in contract amounts $140,000.00;
2. Cost of Rental $36,000.00;
3. Cost of pest control $270.00;
4. Cost for maintenance $180.00;
5. Damage to credit of $100,000.00;
6. Mental anguish of $100,000.00; and
7. Attorneys' fees in the amount of $20,000.00.

CONCLUSIONS OF LAW

Breach of Contract

In an action for breach of contract the Plaintiff must show the existence of a contract, the beach of said contract, and damages that result from said breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602 (1962). To recover for a breach of contract, the non-breaching party must prove:

(1) a binding contract entered into by the parties;

(2) a breach or unjustifiable failure to perform the contract; and

(3) damage suffered by the plaintiff as a direct and proximate result of the breach.

Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962).

In this case it is undisputed that the parties entered into an agreement. It is undisputed that the Melots did not perform under the terms of the Agreement, and the Melots have failed to provide evidence to support basis for that non-performance. Therefore the only remaining element to be proved as to the Melots breach of contract is the damages claimed by Plaintiff which will be explained in greater detail below.

Parties have the right to make their own contracts. Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975); MailSource, LLC v. M.A. Bailey & Assocs. 356 S.C. 363, 369, 588 S.E.2d 635, 638-39 (Ct. App. 2003). A court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 230,428 S.E.2d 705, 707 (1993); and Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C.636,643,216 S.E,2d 547, 550 (1975) (stating "[T]he parties have a right to make their own contract and it is not the function of this Court to

rewrite it or torture the meaning of a policy to extend coverage never intended by the parties. "). Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction. See, e.g., Lewis v. Premium Inv. 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); E. Bus. Forms, Inc. v. Kistler. 258 S.C. 429, 189 S.E.2d 22 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter).

Here the contract is clear and the Court cannot insert a term that does not exist. The contract does not provide the Buyer with the unfettered right to terminate at any time prior to third party approval. The contract is clear, the Purchaser is only entitled to terminate if approval is not obtained 20 days prior to closing. Thus, the buyers, the Melots breached the contract when they indiscriminately terminated. Pursuant to the clear terms of the contract the Melots were not entitled to walk away from the contract on the asserted grounds they were told they could terminate any time prior to bank approval.

Contrary to the position of the Melots that the purchasers could terminate the contract at any time prior to bank approval, the contract simply does not provide for such. The Melots cite to paragraph 1 of the Short Sale Addendum which provides:

> 1. Contingency: Purchaser and Seller acknowledge that the purchase price is less than the amount of the Seller's debt(s) secured by the property, which are owed to one or more lender(s) or lienholder(s) (collectively "Lender"). Such a transaction is known as a "short sale." Therefore, this contract is contingent upon: (a) Lender's approval of the purchase price and other terms of the Contract and the HUD-1 Settlement statement, (b) Lender's agreement to accept a payoff which is less than the balance due on the loan or other indebtedness, and (c) Lender's release and satisfaction of the mortgage(s) and/or other liens(s) upon receipt of discounted payoff amount(s).
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> If Seller has not obtained and provided Purchaser or Purchaser's Agent written notice of Lender's approval of the transaction, as set forth above, within 20 days prior to the closing date specified in the Contract, Purchase may terminate the Contract, and in

such event Purchaser shall be entitled to a refund of the earnest money deposit, and neither party shall have any further rights or obligations hereunder.

The contract provides for very specific grounds for termination. The first is Purchasers could terminate 20 days prior to closing if the bank had not approved the sale. Here the time period had not even come into play nor was it ever triggered. The Melots terminated prior to a closing date being set. In fact, the Melots terminated so early, the approval process had barely begun. The Melots position that they could terminate at any time prior to lender approval has no basis under a clear reading of the contract.

The second basis that Melots assert for justification of their termination is a contingency on a home inspection. Again, this is a provision that never came into play in this matter. No evidence of an inspection was entered into evidence. No testimony that an inspection was even conducted was offer into evidence. The Melots only offered several estimates for work they want to be performed in order to meet their needs. This, however, is no evidence of an unsatisfactory inspection. In fact, what transpired here is the circumstances changed for the Melots and they simply decided they no longer wanted to close the transaction. Days after ratifying the contract the Melots continued to search for potential purchases. After the formation of a contract, which provides for certain terms, a mere change of heart is not a basis to terminate. The Melots breached the contract when they terminated and walked away.

When calculating damages for breach of contract, damages should place a nonbreaching party in the position he would have enjoyed had the contract been performed. Collins Entm't., Inc. v. White, 363 S.C. 546, 559, 611 S.E.2d 262, 268-69 (Ct. App. 2005). Generally, damages will consist of "(1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id. at 559, 611 S.E.2d at 269. Though a party need not prove damages with mathematical certainty, the evidence

should allow a court to reasonably determine an appropriate amount. Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000). Furthermore, an amount of damages cannot be left to conjecture, guess, or speculation. Collins, 363 S.C. at 559, 611 S.E.2d at 269.

The Myers have established damages for the difference in the contract price between the Melot contract and the Smith contract in the amount of $140,000.00.

"The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). Myers requested prejudgment interest. Myers entitled to prejudgment interest on the sum of $140,000 from the date of closing of the Smith contract which occurred on January 18, 2013. (Myers Exhibit No. 14). Prejudgment interest is award at the legal rate of interest from January 18, 2013 until November 19, 2014 on the amount of $140,000.00.

The Myers are entitled to earnest money deposit held in escrow by Carolina One.

Cost of Leasing Alternate Housing

The cost associate with the alternate housing is not attributable to the actions of Melot for 2 reasons: (1) The Myers were living at 15 Robert Mills when the Melots made their offer; and (2) the Melots made their offer after Myers executed the lease.

Costs Associate with Home Maintenance

This Court is of the opinion that the costs associated with home maintenance are not attributable to the actions of the Melots.

Damage to Credit

This court is of the opinion that and damage to Myers credit was not proximately caused by the Melots. First, Myers testified that he stopped making payments to expedite the short sale process. Second, Myers was already in default on the 15 Robert Mills property, which would ultimately result in foreclosure.

Mental Anguish

The general rule is that a plaintiff cannot recover in contract for mental anguish regardless of the defendant's motives. S.C. Jurisprudence Damages Section 21 (2013).

> An exception may exist in cases of fraud; where the contract anticipates a certain strength of feeling or susceptibility (for example, for breach of promise to marry; for mistreatment of passengers or guests by carriers or innkeepers; for dealings with funeral homes; or where the conduct in a business relationship is 'so outrageous and shocking to be actionable'). Contract cases allowing mental anguish damages are, however, an exception. The general rule is that no matter how foreseeable the injury, e.g., financial loss due to breach of contract, damages for mental distress are not usually awarded in contract actions and are never awarded for mere disappointment.
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> Id.

As such, Myers provided no evidence to overcome the general rule to recover for mental anguish for breach of contract.

Negligent Misrepresentation and Fraud

Without addressing the specific elements of negligent misrepresentation and fraud, this Court is of the opinion that Myers did not establish all necessary elements of the causes of action.

Now therefore it is,

ORDERED that judgment be entered in favor of the Myers against Defendant, John Melot, on the cause of action for breach of contract in the amount of $140,000.00, with interest thereon at the legal rate until paid; and it is

FURHTER ORDERED that Myers is entitled to pre-judgment interest at the legal rate from January 18, 2013 until November 19, 2014 in the amount of $22,486.30 for a total judgment award of $162,486.30; and it is

FURTHER ORDERED that the earnest money deposit will be turned over to Myers and applied against the above judgment amount; and it is

FURTHER ORDERED that the causes of action for negligent misrepresentation and fraud are dismissed; and it is

FURTHER ORDERED that Aubie Melot having passed away during the pendency of the matter is dismissed as a party; and it is

FURTHER ORDERED that ten (10) days after entry of this Order Myers, if he so elects, shall file a motion for attorney's fees with all appropriate supporting documentation.

AND IT IS SO ORDERED.

Maite Murphy

The Honorable Maite Murphy
Circuit Court Judge

Charleston, S.C.
December 16, 2014