

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 LEE & ASSOCIATES CHARLESTON,)
 LLC,)
)
 Plaintiff,)
)
 v.)
)
 CHICORA GARDENS HOLDINGS,)
 LLC, CHICORA LIFE CENTER, LC,)
 and JEREMY BLACKBURN,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO.: 2014-CP-10-7481

FILED
 2015 OCT 23 PM 2:56
 JULIE J. ARMSTRONG
 CLERK OF COURT

**ORDER GRANTING PLAINTIFF
 MOTION FOR SUMMARY
 JUDGMENT AND DENYING
 DEFENDANTS' MOTION FOR
 SUMMARY JUDGMENT**

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SC Court of Appeals

This matter is before the Court on cross motions for summary judgment. Plaintiff Lee & Associates Charleston, LLC ("Lee & Associates") moved for summary judgment on Plaintiff's foreclosure of bond claim (First Cause of Action) and breach of contract claim (Second Cause of Action) against Defendant Chicora Gardens Holdings, LLC. Defendants Chicora Gardens Holdings, LLC, Chicora Life Center, LC, and Jeremy Blackburn moved for summary judgment seeking dissolution of Plaintiff's mechanic's lien and dismissal of Plaintiff's defamation claim (Fourth Cause of Action). The Court hereby grants Plaintiff's motion for summary judgment and denies Defendants' motion for summary judgment.

FACTS

This action arises from Plaintiff's efforts to collect a commission allegedly due and owing by Defendants pursuant to an Exclusive Agency Agreement to Lease Real Property ("Exclusive Agency Agreement") entered on February 21, 2014, between Plaintiff and Defendant Chicora Gardens. The Exclusive Agency Agreement was for a one year term commencing February 21, 2014 and expiring January 31, 2015.

As indicated by the title of the Agreement, Plaintiff and Defendant Chicora Gardens contracted to make Plaintiff the exclusive agent for Chicora Gardens in its efforts to lease space in the former Naval Hospital property located at 3600 Rivers Avenue in North Charleston, South Carolina (hereafter "the Subject Property").

On June 30, 2014, Charleston County entered into a Lease ("Charleston County Lease") with Defendant Chicora Life Center, as landlord, leasing the Subject Property.¹ The twenty-five (25) year lease provided for base rent of \$12.00 per square foot and 98,087 square feet of leased space for a rent of \$1,177,044.00 per year.

The Exclusive Agency Agreement specifically references Charleston County as a potential tenant subject to a lower commission rate. Section 23 of the Exclusive Agency Agreement creates a separate commission based on when the lease is entered for so-called "Excluded Entities." Charleston County is listed as an "Excluded Entity" in Exhibit B to the Exclusive Agency Agreement. Because the Charleston County Lease was entered on June 30, 2014, the commission owed is 1% pursuant to Section 23.

Fifty percent of the commission is due upon execution of the lease and 50% upon occupancy by Charleston County. Exclusive Agency Agreement, Section 4(a). The commission is owed whether the tenant is found by Lee & Associates, by another broker, by Chicora Gardens, or by any other person. Exclusive Agency Agreement, Section 2(b).

Based on the foregoing, Lee & Associates claims that Chicora Gardens owes a total commission of \$294,261.00 (25 years x \$1,177,044.00 per year x 1% commission) on the Charleston County Lease, 50% of which was due and owing as of June 30, 2014, when the lease was signed, and

¹ Defendants Chicora Gardens and Chicora Life Center are affiliates. Chicora Gardens owned the Subject Property at the time the parties entered the Exclusive Agency Agreement and at the time the Charleston County Lease was signed. After the mechanic's lien was filed in this matter, Chicora Gardens transferred the Subject Property to Chicora Life Center.

50% of which is due and owing upon occupancy. To date, Charleston County has not occupied the premises, so the current amount owed by Chicora Gardens is 50% of \$294,261.00, or \$147,130.50.

On or around August 6, 2014, Lee & Associates filed a Mechanic's Lien against the Naval Hospital property pursuant to S.C. Code Ann. §§ 21-5-20 and 21-5-21. On August 22, 2014, Chicora filed a Cash Bond to Release the Mechanic's Lien in the amount of \$179,400.00.²

STANDARD OF REVIEW

A court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

Rule 56(c), SCRPC. The party seeking judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 578-79, 556 S.E.2d 732, 736 (Ct. App. 2001); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). However, when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. Rather, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Regions Bank, 582 S.E.2d at 438.

The primary concern of the court interpreting a contract is to give effect to the intent of the parties. Lee v. Univ. of S.C., 407 S.C. 512, 757 S.E.2d 394, 397 (2014). The best evidence of the parties' intent is the contract's plain language. Id. "Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the

The fact that the lease was signed with Chicora Life Center does not impact Plaintiff's claims herein.

² Defendants refused to provide Plaintiff with a copy of the Charleston Lease, so Plaintiff's original lien amount was estimated to be \$138,000. The bond amount was 130% of this original figure. After Plaintiff obtained the Charleston County Lease, it filed an amended verified statement for the correct amount of the commission, or \$147,130.50.

subjective, after-the-fact meaning one party assigns to it.” Laser Supply & Servs., Inc. v. Orchard Park Assoc., 382 S.C. 326, 676 S.E.2d 139, 143–144 (Ct.App. 2009); N. Am. Rescue Products, Inc. v. Richardson, 411 S.C. 371, 769 S.E.2d 237, 240-41 (2015).

The question of whether a contract is ambiguous is a question of law. Id. A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485, 493 (Ct.App. 2004). If a contract's language is unambiguous, the plain language will determine the contract's force and effect. Lee, 757 S.E.2d at 397. The construction of a clear and unambiguous contract presents a question of law for the court. Ward v. West Oil Co., Inc., 379 S.C. 225, 665 S.E.2d 618 (Ct.App.2008); S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008).

FINDINGS

I. LEE & ASSOCIATES IS ENTITLED TO SUMMARY JUDGMENT ON ITS BREACH OF CONTRACT CLAIM.

To establish the right to recover a commission from a principal for services rendered in procuring a purchaser of property, the broker must establish that a contract for the payment of a commission existed between himself and the principal at the time the services were performed. Hilton Head Island Realty, Inc. v. Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890, 893 (Ct. App. 1986) (citing 12 C.J.S. Brokers § 118 at 334-38 (1980)). The contract can be either express or implied. Id. (citing 12 Am.Jur.2d Brokers § 158 at 896 (1964); 12 C.J.S. Brokers § 119 at 339 (1980)). “[A] real estate broker is entitled to compensation, where a sale is effected during the continuance of the broker's agency.” Hutson v. Stone, 119 S.C. 259 112 S.E. 39, 40 (1922)

In this case, there is an express agreement between the parties. The Exclusive Agency Agreement unambiguously manifests the parties' intent that Lee & Associates was to receive a

commission on all leases of the Naval Hospital that were entered during the term of the agreement, including any leases with Charleston County. Exclusive Agency Agreement, Section 4(a).

This broad language in the Exclusive Agency Agreement granting a commission on all leases is called an "exclusive sales contract." Courts "have interpreted an exclusive sales contract to be an agreement that gives the realtor sole right to sell the property, and a commission must be paid even if the owner sells the land." Wilbur Smith & Associates v. Nat'l Bank of S. Carolina, 274 S.C. 296, 263 S.E.2d 643, 646 (1980) (quoting Dorman Realty & Ins. Co., Inc. v. Stalvey, 264 S.C. 94, 212 S.E.2d 591 (1975)).

A. HALF OF THE COMMISSION IS DUE UPON EXECUTION OF THE LEASE.

Defendant Chicora Gardens has asserted a number of defenses, but all are refuted by the unambiguous language of the contract. First, Defendant Chicora Gardens argues that no commission is due until Charleston County occupies the premises. The Exclusive Agency Agreement plainly states that half of the commission, ~~\$147,130.50~~, is due when the lease is signed. Section 4(a) states in relevant part:

... fifty percent (50%) of the above fee to be paid, in cash, at lease or amendment³ execution, and fifty percent (50%) to be paid in cash upon occupancy by tenant. In all events, it is understood that no fee shall be deemed earned until and unless the lease or other agreement shall have become effective between the tenant and the Client by the execution of a contract or other enforceable instrument.

Exclusive Agency Agreement, Section 4(a).

In addition, Section 15(g) states:

Commission shall be deemed earned and payable to Agent when a tenant has entered into a ratified lease with Client even if Client refused to lease once Client has entered into a ratified lease with a tenant.

³ Section 4(a) also grants Lee & Associates a commission on any renewal or extension of an existing lease during the term of the agreement.

Exclusive Agency Agreement, Section 15(g).

The language of the Exclusive Agency Agreement triggering payment of the commission upon execution of the lease is not only enforceable, but a common term in such brokerage agreements. See, e.g., Maro v. Lewis, 389 S.C. 216, 697 S.E.2d 684, 689 (Ct. App. 2010) (“Per the parties' listing agreement, executing a contract for sale of the property during the listing period appears all that was necessary to secure Maro's commission.”). In fact, when the brokerage agreement does not specify when the commission is due and owing, it is typically deemed due and owing upon entering the sales contract. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814, 816 (Ct.App. 2009) (“Generally, a broker earns his commission when he procures a purchaser who is accepted by the owner of the property and with whom the latter, uninfluenced by any representation or fraud on the part of the broker, enters into a valid and enforceable contract.”). In short, the contract's language granting half of the commission upon execution of the lease is enforceable.

Defendant Chicora Gardens claims that the Charleston County Lease has not been finalized, has a number of contingencies, and has not been “ratified.” A plain review of the Charleston County Lease shows that it is indeed a “lease” and not an “agreement to agree” as argued by defense counsel. It is titled a “lease.” It identifies the term of the lease, the lease rate, and the square footage to be leased. There are no sections in the lease titled “contingency.” Section 54 of the Lease does allow the tenant to terminate the Lease for non-appropriation of funds, but the use of the term “termination” makes clear that the Lease has been entered, and it is simply subject to termination in the future. Section 2 of the Lease calls for “Tenant Improvements” prior to occupation, which are currently taking place at the Naval Hospital, but this does not call into question the fact that the Lease has been executed.

Defendant Chicora Gardens also claims that the Charleston County Lease has not been ratified as called for in Section 15(g) quoted above. Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent. Lincoln v. Aetna Cas. & Sur. Co., 300 S.C. 188, 386 S.E.2d 801, 803 (Ct.App. 1989). Ratification exists upon the concurrence of three elements; (1) acceptance by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. Id. Thus, ratification occurs when the agent enters an unauthorized contract, and the principal must accept or "ratify" the contract. Since in this case the principal, Chicora Gardens, entered the lease, ratification is neither required nor relevant.

B. THE EXCLUSIVE AGENCY AGREEMENT WAS NOT TERMINATED.

Defendant Chicora Gardens has claimed that it attempted to terminate the agency relationship a day before signing the Charleston County Lease. The Exclusive Agency Agreement is for a one year term and contains no provisions allowing for early termination. Again, this is not unusual and is designed to insure that a vendor does not unilaterally cancel the Agency Agreement on the eve of a sale. Further, Defendant Chicora Gardens has failed to identify any writing provided to Lee & Associates and attempting to terminate the Exclusive Agency Agreement prior to June 30, 2014, when the Charleston County Lease was entered.

C. DEFENDANTS HAVE NOT IDENTIFIED ANY PROVISION OF THE EXCLUSIVE AGENCY AGREEMENT BREACHED BY LEE & ASSOCIATES.

Defendant Chicora Gardens has asserted that Plaintiff Lee & Associates failed to adhere to timelines in an alleged "Marketing Plan." There are no such timelines in the Exclusive Agency

Agreement. Defendant Chicora Gardens has produced a generic timeline from a brochure published by Lee & Associates with suggested goals for various actions, but this timeline was not incorporated into the Exclusive Agency Agreement. In the end, Defendant Chicora Gardens has not pointed to any provision in the Exclusive Agency Agreement that was breached by Lee & Associates.

Similarly, Defendant Chicora Gardens has claimed that Plaintiff Lee & Associates had no role in lining up the Charleston County Lease. This assertion has no relevance at all as to whether the commission is owed. Again, the Exclusive Agency Agreement makes clear that a commission is owed on all leases entered during the term of the Agreement, specifically granting a 1% commission for any lease with Charleston County. Exclusive Agency Agreement, Section 23 and Exhibit B. As noted above, such exclusive sales agreements are enforceable, even if the owner leases the property without the help of the agent. Wilbur Smith & Associates, 263 S.E.2d at 646.

Based on the foregoing, Defendant Chicora Gardens has plainly breached the Exclusive Agency Agreement by refusing to pay any commission to Lee & Associates for the Charleston County Lease entered on June 30, 2014. The Charleston County Lease has been executed during the term of the lease, and Lee & Associates has not violated any terms of the Exclusive Agency Agreement. As such, Lee & Associates is entitled to summary judgment on its breach of contract claim.

II. LEE & ASSOCIATES IS ENTITLED TO FORECLOSE ON ITS LIEN AND COLLECT ON DEFENDANTS' BOND.

Plaintiff Lee & Associates also seeks summary judgment to foreclose its mechanics lien and collect on the Defendants' cash bond. South Carolina Code Ann. § 29-5-21(B) grants a lien to commercial real estate agents with a written agreement:

(1) A real estate licensee who, by virtue of a written agreement with the owner, performs professional services for which he is licensed under Title 40 incident

to marketing, developing, or improving commercial real estate preparatory to or as a part of a commercial real estate lease or rental transaction involving the commercial real estate, has furnished labor or material for the improvement of commercial real estate within the meaning of Section 29-5-20.

(2) A real estate licensee shall not acquire a lien under this subsection unless:

(a) the owner of the commercial real estate or the owner's authorized agent authorizes the real estate licensee, under the terms of a written agreement, to lease an interest in the commercial real estate; and

(b) the real estate licensee or the real estate licensee's affiliated licensees provide licensed services that result, during the term of a written agreement described in item (1) of this subsection, in the procuring of a person or entity that rents or leases the commercial real estate or rents or leases an interest in the commercial real estate upon terms contained in a written agreement described in item (1) of this subsection.

S.C. Code Ann. § 29-5-21(B).

Defendant Chicora Gardens has attacked Lee & Associates' claim to a lien under this section on a number of grounds. First, Defendant Chicora Gardens argues that that the licensed services provided by Lee & Associates to Defendants did not result in the procurement of the subject Charleston County Lease as required by S.C. Code Ann. § 25-5-21(B)(2)(b) (“[T]he real estate licensee . . . provide licenses services that result . . . in the procuring of a person or entity that rents or leases the commercial real estate.”). More specifically, Defendant has argued that Lee & Associates was not involved in the final negotiations of the lease terms that took place from April to June between Chicora Gardens and Charleston County. This argument is unavailing in that it is based on an overly restrictive reading of the statute and also ignores the ample evidence that Lee & Associates did, in fact, provide licensed services that aided in the procurement of the Charleston County Lease.

First, the mechanics lien statute refers to brokers providing “licensed services.” “Licensed services” is a broadly defined term of art used in the real estate brokerage industry and is not limited

to negotiating the final terms of a lease, as Defendants are arguing. Rather, “licensed services” are broadly defined under South Carolina law:

A licensee may offer the following services to a customer **including, but not limited to:**

- (a) identify and show property for sale, lease, or exchange;
- (b) provide real estate statistics and information on property;
- (c) provide pre-printed real estate form contracts, leases, and related exhibits and addenda;
- (d) act as a scribe in the preparation of real estate form contracts, leases, and related exhibits and addenda;
- (e) locate a list of architects, engineers, surveyors, inspectors, lenders, insurance agents, attorneys, and other professionals; and
- (f) identify schools, shopping facilities, places of worship, and other similar facilities on behalf of any of the parties in a real estate transaction.

S.C. Code Ann. § 40-57-137(O)(1) (emphasis added).

Ignoring the broad reach of “licensed services” employed in the mechanics lien statute, Defendants have argued that Lee & Associates is not entitled to a lien because it purportedly did not participate in negotiations with Charleston County (Defendants’ Motion, Page 5) or that it purportedly stopped providing services on or around April 4, 2012 (Defendants’ Motion, Pages 5-6).

These arguments are both factually and legally wrong.

Legally, as adopted in the South Carolina statute governing realtors cited above, “licensed services” includes all the services that a real estate agent might provide, including showing and marketing the property; providing statistics and information on the property; providing forms, contracts, and leases; acting as a scribe in the preparation of forms, contracts, and leases; identifying appropriate professionals; and providing regional information related to the property. It is not limited to situations where the agent initially identifies the tenant or seats the tenant at the signing table.

Factually, as amply demonstrated by the emails compiled and provided by Lee & Associates and further supported by the Affidavit of Robert H. Nuttall, Jr., Lee & Associates' broker-in-charge, Lee & Associates engaged in a broad array of licensed services that led to the procurement of the Charleston County lease:

1. Defendants demanded that Lee & Associates' agents, Milton Thomas and Bob Nuttall, participate in numerous conference calls to strategize about how to market the property in general and how to specifically market to Charleston County, including the setting of rental rates;
2. At the repeated urging of Defendants, Lee & Associates participated in negotiations with Charleston County, including negotiations over the rental rate;
3. Plaintiff Lee & Associates prepared a proposal for lease terms with Charleston County;
4. Lee & Associates worked with the appraiser who appraised the property to help Chicora Gardens understand the comparable properties used to determine the appraiser's recommended lease rate;
5. Lee & Associates met with Charleston County officials and its unofficial adviser, Eric Meyer, to present Chicora Gardens' position of wanting a higher rental rate;
6. Lee & Associates worked with Chicora Gardens to determine what the operating expenses for the building should be in order to determine the net rental rate for the Charleston County lease;
7. Lee & Associates helped draft and edit letters of intent which were sent to Charleston County; and
8. Lee & Associates worked with Chicora Gardens on the layouts proposed by Charleston County, pointing out flaws with the way the Charleston County planned to use the lobby

of the building, which would severely impact the future leasability of the remainder of the space in the building.

Lee & Associates also submitted evidence that it provided licensed services in conjunction with the Charleston County negotiations after April 4, 2014.

In opposition to Lee & Associates' presentation, Defendant Chicora Gardens has submitted affidavits from two of its principals, Douglas Durbano and Jeremy Blackburn. Both affidavits summarily claim that "Lee & Assoc. did not provide services that resulting in the procuring of any tenant." More specifically, they claim that someone from Charleston County refused to deal with Lee & Associates due to a personal conflict. These affidavits do not create a genuine issue of fact for a number of reasons. First, the general disclaimer that Lee & Associates did not provide any services resulting in the procurement of a tenant is directly contradicted by the emails submitted by Lee & Associates, most of which are copied to both Durbano and Blackburn. These emails show unequivocally that Lee & Associates was involved in Charleston County negotiations (at the insistence of Durbano) and provided other services in the pursuit of Charleston County as a tenant. Second, Durbano's and Blackburn's claim that Lee & Associates had no involvement with Charleston County after a personal conflict arose implicitly contradicts their claim that Lee & Associates *never* had any involvement in Charleston County negotiations. Based on a review of the emails and the affidavits taken as a whole, there is no dispute that Lee & Associates provided services that led to the lease with Charleston County. Even if Lee & Associates was not directly involved in negotiations with Charleston County after April 4, 2014, that does not change the fact that licensed services were provided, and a lease did result from those services.

Based on the foregoing, Lee & Associates' lien is valid and was properly filed. As a result, Lee & Associates is entitled to pursue a foreclosure of that lien. On August 22, 2014, Chicora filed a

cash bond to release the mechanic's lien in the amount of \$179,400.00. Accordingly, Lee & Associates is entitled to summary judgment on its claim for the first half of the commission and is entitled to collect against the cash bond on that judgment.

III. LEE & ASSOCIATES IS ENTITLED TO A JUDGMENT AND FORECLOSURE IN THE AMOUNT OF \$218,238.35.

Finally, the Court must calculate the amount due and owing to Lee & Associates. First, the Court must calculate the amount of the commission due and owing to date. As pointed out above, Charleston County is an "excluded entity" under the Exclusive Agency Agreement and entered the lease on June 30, 2014. ~~Based on~~ ^{not Under} Section 23 of the Exclusive Agency Agreement, Lee & Associates is entitled to a one percent (1%) commission on the Charleston County Lease.

The Charleston County Lease is for 25 years. The base rent is \$12.00 per square foot, and Charleston County leased 98,087 square feet at the Naval Hospital. Thus, yearly rent is \$1,177,044.00. Total rent for 25 years is \$29,426,100. One percent of that total rent is \$294,261 in commission owed, half of which, or \$147,130.50, is due upon execution of the lease.

~~Although~~ ^{however} Section 4(a) of Exclusive Agency Agreement provides a commission based on the first ten years of the lease, that language is not incorporated into Section 23, which provides the commission for Excluded Entities, including Charleston County. Indeed, it would be difficult, if not impossible, to calculate commission for an Excluded Entity under Section 4(a) because the commission structure is completely different. Under Section 4(a), Lee & Associates is entitled to a 4% commission on the first five years of the lease, a 2% commission on the second five years of the lease, and a 2.5% commission for any renewals or extensions of the lease. Under Section 23, the commission percentage is based on when the lease is entered. For leases entered from May 1, 2014 to June 30, 2014, the commission is 1%. Defendant Chicora Gardens ~~has failed to explain how this~~

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Confirms this creates a genuine issue of material fact.

flat rate of 1% is to be shoehorned into the fluctuating rate set out in Section 4(a). Moreover, there is no language in Section 23 incorporating the ten year limitation on calculating the commission found in Section 4(a). As such, the Court finds that Lee & Associates is entitled to a ~~1%~~ commission on ~~the full 25 year lease period as set out above.~~ *to be determined at a subsequent hearing.*

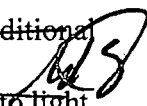
Based on the foregoing, Lee & Associates is entitled to judgment ~~in the amount of~~ *as to liability* \$147,130.50 on its breach of contract claim against Defendant Chicora Gardens.

In addition, the lien statute provides that the "prevailing party" in a lien foreclosure action is entitled to recover attorney's fees and costs. S.C. Code Ann. § 29-5-10(a). To date, Plaintiff Lee & Associates has incurred \$49,815.00 in attorney's fees and \$4,503.35 in costs in pursuing this claim. The Court finds that this request is ~~reasonable~~ and awards ~~same~~ *claims it* ~~will be determined at the hearing.~~

In addition, Plaintiff Lee & Associates is entitled to prejudgment interest in that this was a liquidated damages claim due and owing on June 30, 2015. 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. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 631 S.E.2d 252, 258 (2006). The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. Id. In South Carolina, prejudgment interest is set by statute at annual rate of 8.75%. S.C. Code Ann. § 34-31-20(A). Prejudgment interest running from June 30, 2014 ~~to October 19, 2015 on \$147,130.50 is \$16,789.50.~~ *shall also be determined at the hearing.*

Based on the above, Plaintiff Lee & Associates is entitled to a total judgment against Chicora Gardens in the amount of ~~\$218,238.35.~~ Plaintiff Lee & Associates is further entitled to collect on ~~that judgment from the cash bond of \$179,400.00 posted by Defendant Chicora Gardens to release~~

** This matter is set for a damages hearing on Nov. 10, 2015 at*
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(10 AM) (PK)

Lee & Associates' lien. ~~This conclusion does not limit any potential future requests for additional damages should Charleston County occupy the premises or should any other tenants come to light.~~ 

III. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT.

Defendants have also moved for summary judgment seeking to discharge Lee & Associates' lien and also to dismiss Lee & Associates' claim for defamation. Defendants seek to dissolve Lee & Associates' lien on the grounds that Lee & Associates did not provide licensed services that resulted in the procurement of the Charleston County Lease. S.C. Code Ann. § 29-5-21(b)(2)(b). As set out above, the evidence presented shows that Lee & Associates did in fact provide such licensed services resulting in lease with Charleston County.

Defendants also claim that Lee & Associates' mechanics lien was premature because the Charleston County Lease is not final. Again, as pointed out above, the Charleston County Lease has been executed and that is all that is required under the Exclusive Agency Agreement to trigger payment of half of the commission. The issues raised by Defendants all address when Charleston County will *occupy* the premises. Occupation of the premises triggers the second half of the commission, which Plaintiff Lee & Associates is not seeking at this time. Accordingly, Lee & Associates' lien is not premature. Rather, the mechanics lien statutes put strict time lines that the claimant has to adhere to in order to perfect its lien. Lee & Associates met these timelines and is, therefore, in compliance with the lien statutes.

Defendants also assert that Lee & Associates' mechanics lien should be dissolved pursuant to S.C. Code Ann. § 29-5-100, which is informatively titled "Proceedings not invalidated by inaccuracy of statement of account," and which states:

No inaccuracy in such statement relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor or

materials shall invalidate the proceedings, unless it appear that the person filing the certificate has wilfully and knowingly claimed more than is his due.

S.C. Code Ann. § 29-5-100.

Under South Carolina law, a court cannot dissolve a lien if the claimant makes a prima facie showing for filing the lien or if the amount owed depends upon which of the parties' allegations are to be believed. Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 232 S.E.2d 501 (1977); Black v. Haile, 270 S.C. 93, 240 S.E.2d 646 (1978). The statutory authority to dissolve a lien is only available when there is no genuine issue of material fact. Cobb v. Maccaro, 310 S.C. 303, 305-06, 423 S.E.2d 156, 157 (Ct. App. 1992). A lien may only be invalidated under this Section on the grounds that the lienholder *wilfully and knowingly* submitted an inflated claim, a determination that can only be made at trial.

Defendants have presented no evidence that Lee & Associates willfully and knowingly submitted an inflated mechanics lien. Rather, as noted above, Lee & Associates' calculation of the lien amount was based on a plain reading of the Exclusive Agency Agreement and the commission granted thereunder.

DEFAMATION

Finally, Defendants also seek summary judgment on Lee & Associates' defamation claim. After refusing to pay Lee & Associates any commission, Jeremy Blackburn, a principal of Defendants, sent an email to Lee & Associates disputing its right to a commission and its right to a lien. The email was copied to the Mayor of North Charleston and to Charleston County. Among other things, the email alleged that:

1. Lee & Associates' lien was "wrongful and very harmful."
2. The lien was "contrary to the Agency Agreement and it is having a catastrophic effect on this project and will hurt a lot of people."

3. Lee & Associates had breached the Exclusive Agency Agreement in numerous ways.
4. The lien was preventing a new loan from being made.
5. Lee & Associates never proposed a single tenant for the project.
6. Lee & Associates had undisclosed conflicts of interest;
7. Defendants properly terminated the Exclusive Agency Agreement before the Charleston County Lease was entered.
8. Lee & Associates "took no part in" the acquisition of the Charleston County Lease.

At the hearing on this matter, counsel for Defendants acknowledged that whether these statements were defamatory is a question of fact and not ripe for summary judgment. However, Defendants did argue that Blackburn's statements were conditionally privileged. One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 514 S.E.2d 126, 134 (1999). "The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312, 315 (Ct.App. 1987) (quoting Conwell v. Spur Oil Co. of W.S.C., 240 S.C. 170, 125 S.E.2d 270, 274-75 (1962)).

When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641, 643 (1946); Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743, 748 (Ct.App. 2001).

In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. Murray, 542 S.E.2d at 749 (citing 50 Am.Jur.2d Libel and Slander § 276 (1995)). However, the question whether the privilege has been abused is one for the jury. Id. An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved, or (2) a statement made in reckless disregard of the victim's rights. Swinton Creek, 514 S.E.2d at 135.

Blackburn's statements are not privileged because they were sent to the Mayor of North Charleston and Charleston County, neither of which have an interest in the dispute between Lee & Associates and Chicora Gardens over the commission and mechanics lien. A simple reading of the email calls into question whether Mr. Blackburn was acting in good faith by copying the mayor and the County with the email concerning the commission or simply trying to embarrass Lee & Associates. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. Murray, 542 S.E.2d at 749.

Whether the City of North Charleston and Charleston County had a sufficient interest in the commission dispute and whether Blackburn acted in good faith or exceeded the scope of any privilege are all issues of fact that should be decided after a full trial. Accordingly, Defendants' motion for summary judgment on Plaintiffs' defamation claim is denied.

CONCLUSION

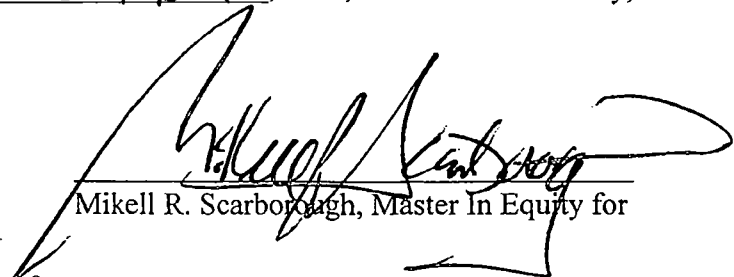
Based on the foregoing, there are no genuine issues of material fact concerning Defendant Chicora Gardens' debt owed to Plaintiff Lee & Associates. The parties entered an unambiguous Exclusive Agency Agreement. That Agreement provides that Plaintiff Lee & Associates will receive a commission for all tenants at the Naval Hospital, half paid upon execution of the lease and half paid upon occupation of the premises. The Agreement has a one year term and had no provisions for early termination.

On June 30, 2014, during the term of the Exclusive Agency Agreement, Defendants executed a Lease Agreement with Charleston County. Based on the terms of that lease, Chicora Gardens owes Lee & Associates \$~~147,130.50~~, representing the half of the commission owed upon execution of the lease. There is no defense to Chicora Gardens' failure to pay this commission. In addition, Lee & Associates is entitled to ^{pursue its} ~~\$49,815.00~~ in attorney's fees and ~~\$4,503.35~~ in costs and ~~\$16,789.50~~ in ~~APR~~ prejudgment interest.

~~Based on the above, Plaintiff Lee & Associates is entitled to a total judgment against Chicora Gardens in the amount of \$218,238.35. Plaintiff Lee & Associates is further entitled to collect on that judgment from the cash bond of \$179,400.00 posted by Defendant Chicora Gardens to release Lee & Associates' lien. This conclusion does not limit any potential future requests for additional damages should Charleston County occupy the premises or should any other tenants come to light.~~

In addition, Defendants are not entitled to dissolution of the lien or to summary judgment on Plaintiff's claim for defamation.

IT IS SO ORDERED this 16 day of October, 2015, at Charleston County, South Carolina.


Mikell R. Scarborough, Master In Equity for