

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Thomas Russo, Circuit Court Judge

RECEIVED

JUL 13 2017

CASE NO. 2011-CP-10-05774
APPELLATE CASE NO. 2016-001632

S.C. SUPREME COURT

PAVILION DEVELOPMENT CORP. & LARRY MCNAIR,.....Plaintiff/
Appellants,

v.

NEXSEN PRUET, LLC.....Defendant/ Respondent,

AND

DC & SONS, LLCCounterclaim Defendant.

APPELLANTS' MOTION TO AMEND/SUPPLIMENT THEIR DESIGNATION OF
MATTER ON APPEAL TO INCLUDE A DOCUMENT RESPONSIVE TO AN
ARGUMENT PRESENTED IN RESPONDENT'S INITIAL BRIEF

Appellants Pavilion Development Corp. ("Pavilion") and Larry McNair hereby move before this Honorable Court to amend/supplement their Designation of Matter on Appeal to include a document responsive to an argument raised by Respondent's in their initial brief. In its initial brief, Nexsen Pruet claims the denial of Appellants motion to amend their complaint, (and thus the loss by Pavilion and McNair of the right to bring their malpractice claim against Nexsen Pruet as the statute of limitations ran during the appeal of the novel issue of the

assignability of legal malpractice claims), is just because, “Appellants confessed judgment for an unsupported amount.” (Respondent’s Brief, p. 18). In their initial reply brief, Appellants refute this statement by way of citation to the pre-trial brief, which was submitted to the trial judge before the settlement agreement, which included the confession, was reached. It is the pre-trial brief that Appellants seek to include in the record on appeal. The argument that judgment was for an “unsupported amount” was raised by Nexsen Pruet in the initial appeal in this case concerning the assignability of legal malpractice claims. In response, the pre-trial brief was included in the Record of that appeal at pages 67-114. Appellants now seek to include the document in the Record of the current appeal as Nexsen Pruet has again raised the issue of whether the judgment is supported.

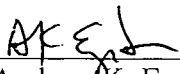
The South Carolina Appellate Court Rules state, “A party shall not include any matter in his Designation which is not relevant to the appeal.” Rules 209(b) and 210(c) SCACR. The pre-trial brief is relevant and demonstrates that the elements of DC & Sons’ damages which comprise the \$4.5 million confession of judgment are all real: (1) a lost real estate contract which would have realized a profit of \$2,852,000; (2) sums actually paid by DC & Sons in interest on the mortgage it had to keep in place because of the inability to close and the cost of refinancing; (3) the \$50,000 earnest money deposit; and (4) prejudgment interest at the statutory rate. The trial judge had already granted summary judgment as to Pavilion’s liability, and the damages were hard figures. Further, the parties had exchanged and Judge Young had received trial briefs as well as binders of 147 trial exhibits and 12 depositions, including: Plaintiff’s Exhibit 95, which was the back-up contract DC & Sons lost; Plaintiff’s Exhibit 139, which was the closing statement on the refinance of the mortgage showing interest and the closing costs

paid by DC & Sons; and Plaintiff's Exhibit 72, which was the contract with Pavilion showing the earnest money deposit of \$50,000. (See Exh. A).

Appellants seek to include the document that refutes Nexsen Pruet's contention of an "unsupported judgment" – a document that is relevant to the issue raised by Nexsen Pruet in this appeal.

Respectfully submitted by:

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ATTORNEYS FOR APPELLANTS

On this ¹⁵13 day of July, 2017
Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

DC & SONS, LLC
Plaintiff,

CASE NO.: 2008-CP-10-4675

vs.

RICHARD H. COEN, LOWCOUNTRY
CAPITAL, LARRY MCNAIR,
COENCO, LLC, & PAVILION
DEVELOPMENT CORP.
Defendants.

PRE-TRIAL BRIEF OF DC & SONS

PAVILION DEVELOPMENT
CORPORATION,
Plaintiff,

CONSOLIDATED UNDER
CASE NO. 2007-CP-10-1457

vs.

DC & SONS, LLC,
Defendants.

I. Name of each attorney, court identification number, full name of each firm:

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II. FACTS

A. THE CLAIM

1. The contract between Plaintiff and Defendant Pavilion

In 2006, DC & Sons, LLC (referred to as "DC & Sons" or "the Crowleys"), owned a piece of property on the waterfront of Shem Creek, in Mt. Pleasant known as the Cottage on the Creek. In August 2006, the Defendant Pavilion offered to buy the property for \$5 million, closing in 4 months. The Defendant Pavilion put up \$50,000 as earnest money. The only requirement on the part of the Crowleys was to deliver title. Pavilion failed to honor the contract because of the claims to the Cottage on the Creek property made by the Coen Defendants (Richard Coen, Lowcountry Capital and CoenCo).

2. Interference by the Coen Defendants

The Coen Defendants contacted Pavilion and told Pavilion that DC & Sons could not deliver title because the Coen Defendants had the right to buy and/or lease the Cottage on the Creek property. The Coen Defendants told Pavilion that if it bought the property, it would not be able to develop the property because the Coen Defendants had a claim to the property.

This caused Pavilion concern, and it asked DC & Sons if there was any truth to the claim.

The Coen Defendants' claim came as a surprise to DC & Sons. It was true that a year or so earlier, the Crowleys had a dispute with the Coen Defendants about what rights the Coen Defendants might have to the Cottage on the Creek property. But, DC & Sons settled that old dispute when they bought the property from the previous owner and paid the Coen entities over \$280,000 for them to give up any claim they might have or would ever have in the property.

The Defendant Pavilion had concern about a possible cloud on title and asked DC & Sons for assurance that the Coen Defendants had no lease. DC & Sons insisted there was no lease on

the property and even provided Defendant Pavilion with a copy of the release documents previously signed by the Coen Defendants. Despite these assurances, the Defendant Pavilion, who had yet to get its property zoned as it wanted, found it convenient to accept the Coen Defendants' explanation.

Defendant Pavilion insisted that it was prepared to close if only DC & Sons would clear up the Coen Defendants' claim. DC & Sons maintained that the Coen Defendants had no interest in the property and offered Defendant Pavilion title insurance against the Coen Defendants' claim. Beyond that, DC & Sons pointed out they had no control over the Coen Defendants and were unable to resolve his claim. Under these circumstances, DC & Sons insisted that Defendant Pavilion either accept the title insurance and close on the property or release them from the contract. DC & Sons had a back up buyer prepared to pay \$5-5.5 million for the Cottage on the Creek property. Pavilion would neither close nor release the property.

3. Defendant Pavilion's wrongful conduct

Defendant Pavilion's response to DC & Sons' demand to close or grant a release from the contract was evasive. When DC & Sons asked Defendant Pavilion to either close on the contract or release DC & Sons from the contract, Pavilion filed a lis pendens and sued DC & Sons for specific performance.

In its suit, Pavilion alleged it was ready willing and able to close and filed three claims: one to quiet title, one for specific performance, and one for declaratory relief. The Defendant Pavilion named the Coen Defendants but never served them. Without the Coen Defendants' joinder, no court could ever resolve the Coen Defendants' claim. DC & Sons did not have the ability to clear the title issue. Under these circumstances, a suit for specific performance will not

lie. Further, Defendant Pavilion was itself in breach of the contract for failing to give proof of financing or that it was financially capable of closing, and was therefore barred from bringing a claim for specific performance.

Defendant McNair, knowing Pavilion was in breach, knowing Pavilion would not close, knowing specific performance would not lie, and knowing quiet title could not be obtained without serving the Coen Defendants, authorized the lis pendens to get his \$50,000 earnest money back and force a cheaper price for the property. An agent is always personally liable for his own torts. *See Long v. Norris & Associates, Ltd.*, 538 S.E.2d 5 (S.C.App. 2000). Eventually, the Pavilion Defendants (Pavilion and McNair) stipulated that the Coen Defendants had no interest, (leasehold or otherwise) in the property and dropped the claims for specific performance, quiet title, and declaratory judgment. (Exhibit 1). Still the Pavilion Defendants refused to drop the lis pendens until DC & Sons agreed to a return of their earnest money – a clear abuse of process, and a request that DC & Sons refused. This Court dissolved the lis pendens as wrongful on March 23, 2009. (Exhibit 2).

B. THE DEFENSES

1. The Pavilion Defendants claim a cloud on title

The Pavilion Defendants claim they were justified in refusing to close as the claim by the Coen Defendants created the reasonable probability of litigation.

DC & Sons responds that a reasonable person, informed of all the facts would not consider the claim of the Coen Defendants to be a cloud on title. This is evidenced by the fact

¹ All this created the anomalous situation whereby Defendant Pavilion claimed it wanted to purchase the property, and would not allow the Crowleys to sell the property to another, but refused to buy the property because it insisted that the Coen claim be resolved. However, DC & Sons had no power to force the Coen Defendants to relinquish the claim, and since Defendant Pavilion did not serve the Coen Defendants in the case, the litigation would never resolve the Coen Defendants' claim. This is addressed in the legal issues section below.

that Defendant Pavilion has since filed a stipulation with the court that the Coen Defendants had no leasehold interest in the property and that a title insurer was prepared to write title insurance.

But even this is not the point as DC & Sons does not sue for failure to close, but for abuse of process for improperly filing a lis pendens in order to force the return of the earnest money.

2. The Pavilion Defendants Claim They Did Not Abuse Process

The Pavilion Defendants claim that they did not abuse process by filing a lis pendens. The Pavilion Defendants claim they were merely trying to enforce their rights under the contract and relied on their attorneys' advice.

However, regardless of the Pavilion Defendants' claims of good faith today, a buyer may not bring a specific performance suit if the seller is unable to convey the title desired. *See Finley v. Burgoyne, Dud*, Eq. 133, 1838 WL 1653 (SC App. Eq. 1838). Moreover, it is improper to maintain an action for specific performance when a seller is not ready willing and able to close, and Pavilion concedes in deposition that it was not ready, willing and able to close given the Coen Defendants' claim. (Exhibit 3, Depo. of Larry McNair, pgs 66-68) Further, Pavilion concedes it was using the lis pendens to get its earnest money back and to get a reduced price for the property. (Exhibit 4, Depo. of Larry McNair, pg 70, line 19 through pg 71 line 8, pg 72, line 4-25).

3. The Pavilion Defendants Claim They Did Not Breach The Contract

The contract and the testimony are undisputed. The contract required Defendant Pavilion to provide the Crowleys with financing information within 30 days. The failure to do so constitutes a default under the contract. Defendant Pavilion does not dispute that it failed to provide the financing documents necessary and the Crowleys called a default because of it. (Exhibit 5, Depo. of Larry McNair, pgs 42-44).

4. Conclusion as to Facts:

Exhibit 6 is the proposed order submitted by DC & Sons and not signed by this Court. It is attached as the issue as to Pavilion is not whether the lis pendens was proper as this Court has ruled as of March 23, 2009 it was improper. The issue as to Pavilion that remains is how soon in the filing of the lis pendens was it improper. This is going to be a legal ruling, as set forth in the proposed order, as Pavilion concedes the lis pendens was filed to collect the earnest money, was to negotiate a lower price, was not to obtain specific performance as they would not close, knew that a third party obstructed the closing, and were in breach of contract themselves.

III. LEGAL AUTHORITIES

A. Abuse of Process

1. "There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. [citation omitted] As a general rule, liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse. [citation omitted] Those who advise or consent to the unlawful acts, or subsequently ratify them, are liable as joint tortfeasors."

Broadmoor Apartments of Charleston v. Horwitz 306 S.C. 482, 486, 413 S.E.2d 9, 11 (S.C.1991).

2. The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. See *Higgins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967) ("[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect the improper use of a regularly issued process."); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 121 at 897 (5th ed. 1984) ("[T]he gist of the tort

is ... misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish."). The purpose itself, though ulterior, need not be illegitimate; rather, the abuse occurs when the purpose is accomplished by using the process in a manner in which it was not intended to be used. See Fowler W. Harper et al., *The Law of Torts* § 4.9 (3d ed.1996)," *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union* 351 S.C. 65, 69-70, 567 S.E.2d 251, 253 (S.C.App. 2002).

3. Filing a Lis Pendens in order to obtain a money judgment is Abuse of Process. "A notice of lis pendens is improper in an action against a property owner where a constructive trust is sought only to satisfy a judgment against the owner, and the interest in the property is thus no more than collateral *** The doctrine of lis pendens may not be predicated on an action or suit seeking merely to recover a money judgment. An action for money only, even if it relates in some way to specific real property, will not support a lis pendens. Accordingly, where the primary purpose of a lawsuit is to recover damages and the action does not directly affect title to or right of possession of real property, the filing of a notice of lis pendens is inappropriate." CJS Lis Pendens § 11, *Actions to which Lis Pendens may not be applied*; *Broadmoor Apartments of Charleston v. Horwitz* 306 S.C. 482, 413 S.E.2d 9 (S.C. 1991) (Evidence was sufficient from which jury could infer that defendant corporation and its president willfully abused process by filing lis pendens and specific performance action with respect to contract of sale for real property with ulterior purpose of preventing sale of property to third parties in hopes of obtaining financial backing with which to purchase property at advantageous price).

4. Filing a suit for Specific Performance where it is impossible for seller to convey marketable title is Abuse of Process. If the seller cannot convey marketable title

despite its best efforts, a purchaser is limited to its remedies at law, and specific performance will not lie. *Finley v. Burgoyne*, Dud.Eq. 133, 1838 WL 1653 (SCApp.Eq. 1838), see also *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Idaho App. 2006).

5. Filing a suit for Specific Performance where the contract is breached is an Abuse of Process. A purchaser cannot bring an action for specific performance when he is in breach. See *D'Amico v. Brightfelt*, 924 So.2d 872 (Fla.App. 2006) (Seller exercised its right to cancel the contract for failure to give written notice of the loan approval).

IV. DAMAGES

A. As to Breach of Contract (Pavilion): Pavilion alone is liable for \$50,000, the amount of the earnest money securing Pavilion's performance of the contract.

B. As to Abuse of Process (Pavilion & McNair): DC & Sons paid \$2,158,000 for this property, and when Pavilion and McNair refused to lift the lis pendens, DC & Sons could not resell the property for \$5-5.5 million to another purchaser. DC & Sons still has the debt on the property and has paid \$675,000 in interest and had to reclose the loan at a cost in excess of \$43,000. DC & Sons' loss is the difference in what it paid, plus the interest on the debt that has continued, and the refinancing cost as stated above.

C. Interest: Since, had the sale gone through, DC & Sons would have wound-up with cash after payment of its mortgage, this Court will be asked to add interest on the liquidated sum at eight and three-quarters percent (8 ¾%).

V. WITNESSES AND EXHIBITS

a) Dianne Crowley: Co-owner of DC & Sons, LLC: Mrs. Crowley will testify concerning her knowledge of conversations and negotiations between DC and Pavilion.

Mrs. Crowley will also testify concerning the damages and losses suffered by DC on account of the actions of Pavilion.

b) Cecil Crowley: Co-owner of DC & Sons, LLC: Mr. Crowley will testify concerning his knowledge of conversations and negotiations between DC and Pavilion. Mr. Crowley may also testify concerning the damages and losses suffered by DC on account of the actions of Pavilion.

c) Rick Brownyard: Mr. Brownyard will testify concerning his knowledge of the Coen Defendants claims to the property which is the subject of this litigation and his knowledge of conversations and negotiations between DC and the Defendants in this case.

d) Richard Coen: Owner of Lowcountry Capital and CoenCo. Mr. Coen is expected to testify concerning his communications with Mr. Maul and Mr. McNair concerning the property which is the subject of this litigation and his claimed interest in the property.

e) Larry McNair: Officer of Pavilion who negotiated with DC & Sons, LLC. Mr. McNair is expected to testify concerning his knowledge of the dealings between the parties to these actions concerning the property which is the subject of this litigation and his decision to file a lis pendens.

f) Rick Maul: Owner of Ocean 1 Realty, the Broker/agent for Pavilion. Mr. Maul is expected to testify concerning his knowledge of the dealings between DC and Pavilion as well as Pavilion and Richard Coen.

g) Jeff Vinzani: Mr. Vinzani represented Pavilion in its efforts to purchase the Cottage on the Creek property. He is expected to testify concerning Pavilion's failure to close and Richard Coen's claim to the property which is the subject of this litigation.

- h) Bruce Wallace: Mr. Wallace represented Pavilion and is expected to testify concerning the filing of Pavilion's lis pendens in this matter.
- i) Matthew Norton: Mr. Norton represented the Coen Defendants in related underlying real estate transactions. He is expected to testify concerning his knowledge of Richard Coen's claims to the property which is the subject of this litigation.
- j) Wendy McPhail: Ms. McPhail was formerly the chief financial officer for the Crowleys and may testify concerning her knowledge of Richard Coen's claims to the property which is the subject of this litigation as well as her knowledge of the books and records of DC & Sons, LLC.
- k) David Dzurisin: Mr. Dzurisin is the accountant and tax professional for the Crowleys and may testify concerning his knowledge of the books and records of DC & Sons, LLC.
- l) Joel Ford: Mr. Ford is an official of the Town of Mount Pleasant Zoning Department. He is expected to testify concerning his knowledge of the current and historic zoning and parking requirements and enforcement actions for the subject property.
- m) Christiane Farrell: Ms. Farrell is an official of the Town of Mount Pleasant Zoning Department. She is expected to testify concerning her knowledge of the current and historic zoning and parking requirements and enforcement actions for the subject property.

See attached Exhibit List

VI. EVIDENTIARY PROBLEMS

See below.

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VII. UNUSUAL QUESTION OR MATTER FOR THE ATTENTION OF THE COURT

The Defendants will be limited in its case by this Court's ruling that the lis pendens was improper as well as by the January 17, 2008 stipulation filed with this Court.

VIII. SETTLEMENT NEGOTIATIONS

Prior negotiations were unsuccessful.

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On this 14 day of January, 2011
Charleston, SC

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EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
PAVILION DEVELOPMENT
CORPORATION,

Plaintiff,

vs.

DIANNE CROWLEY, CECIL CROWLEY,
COENCO, LLC, LOWCOUNTRY CAPITAL,
LLC, WINGS OVER AMERICA, LLC,
REDWING, LLC, DC & SONS, LLC, UP
THE CRIBK, INC., and RICHARD H. COEN,
Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2007-CP-10-1457

STIPULATION

This stipulation is binding on the following parties:

Plaintiff Pavilion Development Corporation, Defendant Dianne Crowley, Defendant Cecil Crowley, Defendant Wings Over America, LLC, Defendant RedWing, LLC, Defendant DC & Sons, LLC (collectively, "Crowley Defendants").

Plaintiff and Crowley Defendants agree and stipulate as follows:

1. Defendant Dianne Crowley and Defendant Cecil Crowley are members or owners of one or more of the following companies: Defendant Wings Over America, LLC, Defendant RedWing, LLC, and Defendant DC & Sons, LLC.
2. Defendant DC & Sons, LLC is the owner of record of all that certain real property which is the subject of this action, as more particularly described in the Lis Pendens filed herein as well as the Lis Pendens filed with the Clerk of Court of Common Pleas under case no. 2007-LP-10-0037 ("the subject property").
3. Defendant Wings Over America has no current, future, or contingent property interests in the subject property except as provider of funds for the purchase by DC & Sons, LLC.

PLAINTIFF EXHIBIT 134



4. Defendant RedWing, LLC has no current, future, or contingent interests in the subject property except for parking which agreement is oral and terminable by DC & Sons, LLC on 30 days notice.
5. Defendant Lowcountry Capital, LLC has no current, future, or contingent interests in the subject property.
6. Defendant Richard H. Coen has no current, future, or contingent property interests in the subject property.
7. Defendant Coenoc, LLC has no current, future, or contingent interests in the subject property.
8. Defendant Up the Creek, Inc. has no current, future, or contingent property interests in the subject property.
9. Dianne & Ceell Crowley executed the contract of sale the subject of this litigation in their capacity as owners of DC & Sons, LLC. The contract of sale is with DC & Sons, LLC and the parties hereto acknowledge that this was effective on the date the agreement was signed by Dianne Crowley and Ceell Crowley.
10. Plaintiff and the Crowley Defendants will execute a Stipulation of Settlement pursuant to Rule 43(k) of the South Carolina Rules of Civil Procedure.
11. Plaintiff and Defendants Dianne Crowley, Ceell Crowley, and Wings Over America, LLC will execute a Stipulation of Dismissal as to Defendants Dianne Crowley, Ceell Crowley, and Wings Over America, LLC.
12. Plaintiff will file a Notice of Dismissal as to Defendant Up the Creek, Inc.

AND IT IS SO STIPULATED THIS 17th DAY OF January 2008.

PLAINTIFF EXHIBIT 134

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PLAINTIFF EXHIBIT 134

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

PAVILION DEVELOPMENT
CORPORATION,
Plaintiff,

CASE NO. 2007-CP-10-1437

vs.

COENCO, LLC, LOWCOUNTRY
CAPITAL, LLC, DC & SONS, LLC,
and RICHARD H. COEN,
Defendants.

DC & SONS, LLC,
Third-Party Plaintiff,

ORDER

vs.

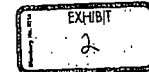
OCEAN 1 REALTY, and JAMES R.
MAULL, JR.,
Third-Party Defendants.

Background

On September 4, 2008, DC & Sons, LLC ("DC & Sons") moved pursuant to § 15-11-40 of the South Carolina Code of Laws to dismiss the *lis pendens* filed by Pavilion Development Corporation ("Pavilion"); § 15-11-40 grants this Court the authority to remove a *lis pendens* on motion of an aggrieved party.

On August 11, 2006, Pavilion entered into a contract to purchase real property on Shem Creek owned by DC & Sons. Pavilion deposited \$50,000 with its escrow agent as an earnest money deposit. For reasons the subject of many pleadings, the closing did not occur and on April 9, 2007, Pavilion sued DC & Sons for specific performance and filed its *lis pendens*. Pavilion ultimately determined it did not want specific performance and filed an amended pleading seeking damages for breach of contract and seeking to impose an equitable lien on the real property for the return of the earnest money. Pavilion has refused to remove the *lis pendens*.

B



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CLERK OF COURT

that it filed with respect to its original complaint for specific performance, and now claims its *lis pendens* is proper so as to secure the return of the \$50,000 earnest money deposit.

Question Presented

Is it proper for Pavilion to file a *lis pendens* against real property to secure the return of an earnest money deposit when the earnest money is in Pavilion's realtor's escrow account?

Discussion

A. Pavilion's Original Complaint for Specific Performance

As Pavilion is no longer ready and willing to buy DC & Sons' property as conceded by Pavilion, the complaint no longer supports a cause of action for specific performance. See *Shay v. Austin*, 466 F.Supp.2d 664 (D.S.C. 2006) (asserting that under South Carolina law, for specific performance to be an appropriate remedy, a court of equity must find the following: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract) (emphasis added). As such, the complaint has been amended to a claim for breach of contract.

B. Pavilion's Amended Complaint for Breach of Contract & Equitable Lien

1. Breach of Contract

It is well settled that under South Carolina law, a breach of contract cause of action does not "affect title to real property", and therefore will not support the filing of a *lis pendens*. See 54 C.J.S. *Lis Pendens* § 11 (2005) quoting *Armstrong v. Carville*, 56 S.C. 463, 476, 35 S.E. 196, 203 (1900). "An action for money only, even if it relates in some way to specific real property,

will not support a *lis pendens*." ¹ Even Pavilion does not claim that the *lis pendens* is supported by its breach of contract claims. (Amended Complaint ¶¶ 9-22).

2. Equitable Lien

As appears from Pavilion's Complaint at paragraph 16, Pavilion claims as "a direct and proximate result of the Defendant's refusal to release the escrow funds, Plaintiff has an equitable lien on the subject real property" in the amount of said escrow funds. Pavilion is wrong in this assertion: it is secured by the escrow funds and not the real property; as Pavilion's claims do not affect title to real property and the disputed funds are distinguishable from the real property.

a. Affecting the Title to Real Property

Pavilion's claim for a release of its earnest money does not affect title to real property. In 2002, the South Carolina Court of Appeals in its *Pond Place Farmers, Inc. v. Pools*, 351 S.C. 1, 567 S.E.2d 881 (S.C.App. 2002) decision surveyed claims that "affect title to real property". An action to establish an equitable lien is not one of them, especially when the money claimed is held in escrow. ²

¹ "A mere breach of contract does not give rise to an equitable lien." *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 143 337 S.E.2d 244, 247 (Cl. App. 1985) citing *U.S. v. Admunt Co.*, 197 F.2d 1, 10 (9th Cir.) ("there must be something more than the mere fact that a contract has been breached before a lien is impressed upon a specific fund."), cert. denied sub nom. *Bullen v. Scaville*, 344 U.S. 903, 73 S.Ct. 283, 97 L.Ed. 698 (1952); *Hallmark Manufacturing, Inc. v. Hallmark Construction Co.*, 372 So.2d 520, 521 (Fla.App.1979) (complaint alleging no more than breach of contract failed to state a claim for equitable lien); *McKenna v. Turpin*, 128 Ind.App. 636, 151 N.E.2d 303, 305 (1958) (where there has been nothing more than a breach of agreement to pay a commission to a broker, he is not entitled to equitable lien on property); *Hilans v. McKenick*, 201 Tenn. 26, 296 S.W.2d 838, 839 (1956) (action for damages is remedy for breach of contract, not action for equitable lien on land); *Kayworth v. Irstalon*, 240 Md. 289, 214 A.2d 168 (1965) ("A mere promise to pay a debt or obligation does not of itself, however, create a lien unless the intention to create it is apparent from the instrument and circumstances leading to it.")

² The *Pond Place* Court stated that an action "affecting the title to real property" allows the filing of a *lis pendens* by an interested party in order to protect their ownership interest in the property subject to the litigation. Id. The Court stated, "Such actions include actions attempting to set aside a fraudulent conveyance of real property, see *Lebovitz v. Mudd*, 293 S.C. 49, 358 S.E.2d 698 (1987); *Dickerson v. Oshlens*, 160 S.C. 288, 158 S.E. 546 (1931); *Bergert v. Shea*, 150 Ga.App. 812, 258 S.E.2d 621 (1979); and actions to establish a constructive trust over real estate, see *Finley v. Hughes*, 106 F.Supp. 355 (E.D.S.C.1952); *Kelly v. Perry*, 111 Ariz. 382, 331 P.2d 159 (1975). They also include actions to quiet title, see *18 *Stewart v. Fahzy*, 14 Ariz.App. 149, 481 P.2d 519 (1971); actions to establish the existence of an easement, see *Prosser v. Zacco*, 402 So.2d 425 (Fla.Dist.Ct.App.1981); actions to reform deeds to resolve a boundary dispute, see *Houder v. Frederick*, 447 S.W.2d 514 (Mo.1969); actions for

While not to overly complicate the obvious - that Pavilion cannot secure itself twice for the same claim, once in the escrow and once in the land - the case of *Carolina Attractions, Inc v. Courtney*, 287 S.C. 140, 337 S.E.2d 244 (Ct. App. 1985) is instructive. The *Carolina Attractions* Court reasoned,

An equitable lien or charge is neither an estate or property in the thing itself, nor a right to recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing so that the very thing itself may be proceeded against in equity for payment of a claim.

Id. at 145. The "thing" in this case is the escrow account, not the real property. Further, "Whenever, in law or in equity, a lien is created or declared there are two things prominently concerned, namely, an obligation and a *res* or *rem* to which or upon which that obligation fastens itself." *Id.* Here, the *res* is the escrow account. Finally, "An equitable lien must rest on an expressed or implied contract." *Id.* In this case, the real estate sales contract expressly states Pavilion is secured in the escrow fund. (Contract ¶ 5).

b. Funds Indistinguishable from the Real Property

Had Pavilion's \$50,000 been used by DC & Sons to develop the property and no longer existed as a separate fund, then a lien may attach to the real property. In *Finley v. Hughes*, 106 F. Supp. 355 (D.S.C. 1952) the funds that were to be held in trust for the Plaintiff were used by the Defendant to purchase and build on the property. Because the funds had been put into the property such that they were indistinguishable from it, the Plaintiff was given an equitable lien in the property. In *South Carolina Federal Savings Bank v. San-A-Dei Corp.*, 307 S.C. 76, 413

specific performance, see *Penfel v. Boyd*, 187 Ga. App. 619, 371 S.E.2d 222 (1985); *Hauptman v. Edgewood, Inc.*, 170 Mont. 310, 553 P.2d 975 (1976); *Wendy's of South Jersey v. Blanchard Mgmt. Corp.*, 9 N.J. 170 N.J. Super. 491, 406 A.2d 1337 (Ch.Div. 1979); and actions for mortgage foreclosures, see *Palmer v. Shelby Plaza Motel, Inc.*, 443 S.E.2d 285 (Fla. Dist. Ct. App. 1983)." *Id.* at 16-18, 89-90.

S.E.2d 852 (Ct. App. 1992) the funds of the Plaintiff were paid directly to the Defendant, the Defendant used the funds to build condominiums on the property, and therefore, the Court imposed an equitable lien on the real property. As these cases make clear, when the fund still exists and has not been merged into the real property, a lien cannot attach to the property. By analogy, in *Shelby Construction v. Sea Garden*, the South Carolina Court of Appeals held where a mechanic's lien had been "bonded off" a *lis pendens* was not required as the lien is against the substitute security. *Shelby Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985).

Conclusion

Defendant's motion for summary judgment as to the *lis pendens* and equitable lien on the real property is GRANTED. The *lis pendens* and equitable lien shall be removed.

IT IS SO ORDERED!

Roger M. Young, Circuit Judge

Charleston, South Carolina.

March 20, 2009

EXHIBIT 3

NOVEMBER 20, 2009

LARRY MCNAIR

66

1 A I guess that would be one reason. Yeah, I
2 would say that would be one reason that you would file
3 it.

4 Q There came a time when you decided you were
5 not going to buy the property for \$5 million?

6 A I think so, yeah. I mean --

7 Q When --

8 A -- the economy started kind of going down
9 hill pretty quick there.

10 Q Can you tell me when you first considered not
11 going through with the purchase of the property?

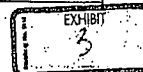
12 A I don't remember the dates, I don't remember
13 the exact date, but I think we did have some
14 discussions about maybe them selling it to us at a
15 lesser price or something. I can't remember the exact
16 date on it, though.

17 Q Would you have any records about when you
18 came to -- when you first considered not buying the
19 property for the \$5 million?

20 A No, I wouldn't have any records on it, I
21 don't think. I think that our lawyer probably had some
22 communication with their lawyer about it, but I
23 don't -- I've -- I've never communicated anything
24 directly with them.

25 Q If Mr. Maul testified that you stopped --

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1 that he stopped pursuing any zoning on the property in
2 June of '07, would that have been the time that you had
3 decided that you weren't going to --

4 A I don't know. I really don't.

5 Q Let's look at this next exhibit.

6 (Plaintiff's Exhibit 4 marked.)

7 BY MR. KEPALOS:

8 Q This will be Exhibit 4 to your --

9 A Okay.

10 Q You mentioned a minute ago that you remember
11 there came a time when you offered a reduced price?

12 A I think so. Okay, I see it.

13 Q Do you see this? This is a letter of
14 February 21, 2008 from Bruce Wallace to Drew Epting.

15 A Okay.

16 Q Would this represent the time that you
17 decided you were not going to buy the property for --

18 A Yes, sir.

19 Q -- \$5 million?

20 A Yes, sir. I would think so. This looks like
21 to me that he was trying to work out some kind of
22 compromise or something with -- with your client.

23 Q You know the -- so you were proposing to buy
24 the property for three and a half million instead of
25 five million?

1 A That's what this says.

2 Q I mean, is that what your recollection was?

3 A Yes. I mean, I remember that there was some
4 discussion about, you know, them selling it to us at a
5 reduced price.

6 Q Sure. I mean, that was your proposal?

7 A Yes.

8 Q Okay. Now, you knew the problem with the
9 title still existed?

10 A Uh-huh (affirmative).

11 Q That's a yes?

12 A Yes. I'm sorry.

13 Q So you were willing to take the -- the
14 property with the title problem if you could get it for
15 3.5 million?

16 MR. DAVID: Object to the form.

17 A (Continuing) I would think that -- I would
18 still think we would have to do something with the
19 title. I don't know, I don't know. I would still
20 think we would have to do something about that.

21 Q So you -- this reduced price was not a
22 proposal to buy the property with the condition of the
23 title as it was?

24 A Ask me that one more time.

25 Q Well, what I want to know is, you knew that

EXHIBIT 4

NOVEMBER 20, 2009

LARRY MCNAIR

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1 complaint in August 2007?

2 A No, sir, I don't.

3 Q Do you know that in August of 2007, you
4 dropped your claim for specific performance?

5 A No, I don't.

6 Q Well --

7 A If that's what this says, I mean --

8 Q Yeah, take a look at that and tell me if
9 there's -- if it omits a claim for specific
10 performance.

11 A If it specifically omits it or it just ain't
12 in here?

13 Q It just is not in there.

14 A Okay. I don't see that in here. I don't
15 see --

16 Q So in --

17 A -- anything that says specific performance in
18 here.

19 Q Sure. So in February of '08, you had decided
20 that you were not willing to purchase the property for
21 the \$5 million?

22 A That was an offer that we had made, I guess
23 to settle a -- a dispute that we were having.

24 Q Sure. And in August of '08, you formally
25 dropped your claim to force the Crowleys to sell you

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NOVEMBER 20, 2009

LARRY MCNAIR

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1 the property for \$5 million?

2 A This amended complaint does not ask for
3 specific performance.

4 Q Okay. Now, were you still willing to buy the
5 property for a lesser amount --

6 A At --

7 Q -- in August of '08?

8 A I don't know.

9 Q Now, you did not dismiss the Lis Pendens
10 after you decided not to buy the property for the \$5
11 million contract price?

12 A We did not do what now?

13 Q You did not dismiss the Lis Pendens --

14 A Okay.

15 Q -- on the property?

16 A Okay.

17 Q You're aware of that?

18 A No, I'm not.

19 Q Now, you know that keeping a Lis Pendens in
20 place created a cloud on the title?

21 A We're in a lawsuit. Like I said, I -- I've
22 always been told you had to file a Lis Pendens on a
23 piece of property when you had an argument over land.
24 What I was told, I don't know.

25 Q Sure. But at this point in August of '08,

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LARRY MCNAIR

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1 you had decided that you weren't interested in buying
2 the property any longer?

3 A Well, that may be true.

4 Q Okay. You knew that keeping the Lis Pendens
5 on the property would prevent the Crowleys from being
6 able to sell it to anybody else?

7 A I think that it does.

8 Q Yeah. Now, why would you seek to prevent the
9 Crowleys from selling the property to someone else
10 after August of '08 if you had decided that you no
11 longer wanted to buy it?

12 MR. DAVID: Object to the form.

13 A (Continuing) Because I felt like they
14 defaulted on their contract with me and they're still
15 holding my earnest money. We asked for our earnest
16 money back. They wouldn't give it back to us, and they
17 -- they couldn't close. They didn't show up on the
18 closing date. They said they can't close. They
19 defaulted. That's what I feel like.

20 Q Well, the realtor was holding your earnest
21 money?

22 A Well, they -- they have to sign something for
23 him to release it, too, as you know.

24 Q You wanted it back?

25 A Absolutely.

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EXHIBIT 5

NOVEMBER 20, 2009

LARRY MCNAIR

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1 A Yes, sir.

2 Q Did you make application for a loan?

3 A I'm sure that Mike talked to the bank. I
4 don't know if he -- I don't know what his arrangement
5 is with that bank, how he does business with them as
6 far as --

7 Q Uh-huh (affirmative).

8 A -- filling out any kind of a formal whatever,
9 I don't know.

10 Q Okay.

11 A I really don't.

12 Q Did you give proof of the application to the
13 seller?

14 A I don't know.

15 (Jay Davis is now present.)

16 A (Continuing). I don't think so.

17 Q Okay.

18 A I don't think so.

19 Q Now, the -- the paragraph requires proof of
20 the application of the loan to go to the seller.

21 A Uh-huh (affirmative).

22 Q And without doing that, it says that the
23 buyer goes in default.

24 A Uh-huh (affirmative).

25 Q Did it ever occur to you that you might be in

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EXHIBIT

5

1 default?

2 A No, sir.

3 Q You didn't --

4 A No. I mean, I knew we were going to come up

5 with the money. We had the money.

6 Q All right. Well --

7 A I mean, you know...

8 Q Let's see, it also says that -- that

9 paragraphs --

10 A We were never notified of it being in default

11 either.

12 Q Well, I don't read this -- is there something

13 in the paragraph that says that you have to be

14 notified?

15 A No, sir.

16 Q It just says that you have to notify?

17 A You're right.

18 Q Okay.

19 A Yes, sir.

20 Q It says also that you have to -- you've got

21 to give seller, that is the Crowleys --

22 A Uh-huh (affirmative).

23 Q -- written proof of loan approval within 90

24 days.

25 A Uh-huh (affirmative).

1 Q It does say that?

2 A It says that, okay.

3 Q Yeah. Did -- did you get formal loan

4 approval?

5 A Not to my knowledge.

6 Q Did you provide the Crowleys with written

7 notice of loan approval?

8 A No, sir, not to my knowledge.

9 Q Now, it says that if the buyer doesn't

10 provide written notice of a loan approval, the seller

11 has the right to cancel the contract.

12 A In that same paragraph?

13 Q Yes.

14 A Okay. I don't see that, but I'll take your

15 word for it.

16 Q Let's see if we can find it.

17 A Okay. Yeah, I see it, okay, I got it.

18 Q Okay.

19 A Yeah, yeah.

20 Q I'm missing a letter here that I -- that I

21 want to look at, so let's -- let's take a break for a

22 second while I get the --

23 A Sure.

24 VIDEOGRAPHER: And we're off the record at

25 9:53 a.m.

the purchase of lots 18, 19 & 22 ("the Cottage on the Creek") from DC & Sons for \$5 million, closing to be had by December 31, 2006. (Exhibit 2, Contract).

2. By the terms of the contract, Pavilion was to make a \$50,000 earnest money deposit, which was made and kept in an escrow account with real estate agent Ocean One Realty. The contract stipulates that the escrow money would be non-refundable at the end of the due diligence period.
3. By the terms of the contract, Pavilion was to provide DC & Sons "with written satisfactory loan approval within 90 consecutive days" and if DC & Sons was not provided with such information, it had the option of canceling the contract. (See contract at paragraph 6). Pavilion & McNair concede loan approval was never achieved:

Q Yeah. Did -- did you get formal loan approval?

A Not to my knowledge.

Q Did you provide the Crowleys with written notice of loan approval?

A No, sir, not to my knowledge.

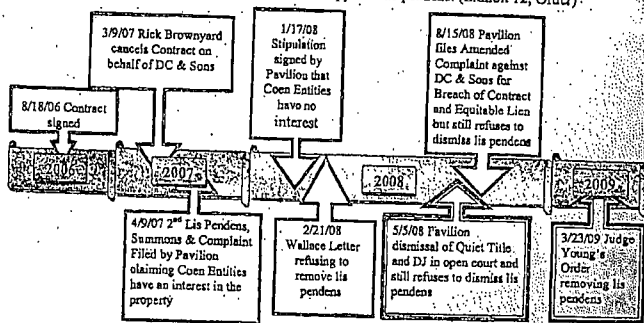
(Exhibit 1; Deposition of Larry McNair, pg 45, lines 4-9)

4. Richard Coen claimed that he had a leasehold in interest in the property, which Pavilion considered a cloud on title. (Exhibit 1, McNair deposition pg 60; Exhibit 3, Wallace letter of 2/21/08).
5. Despite DC & Sons' assurances that the Coen Defendants had no interest in the Cottage on the Creek property, even to the point of offering to provide title insurance (Exhibit 4, offer of title insurance), Pavilion refused to close.
6. On March 9, 2007, Rick Brownyard, counsel for DC & Sons, canceled the contract (Exhibit 5).

7. On April 9, 2007, Pavilion filed a lawsuit for specific performance, quiet title and declaratory judgment and filed a lis pendens on the Cottage on the Creek property. (Exhibit 6, Original Pavilion complaint).
8. Pavilion's complaint named Richard Coen and his entities Lowcountry Capital, LLC and Coenco, LLC, (collectively the "Coen Defendants") but Pavilion never served the Coen Defendants, they never answered, and no attorney made an appearance on their behalf. (Exhibit 7, Docket report and attachments).
9. On January 17, 2008, Pavilion entered into a stipulation wherein Pavilion stipulated that none of the Coen Defendants had any "current, future, or contingent property interests in the subject property" (Exhibit 8, Stipulation).
10. As a result, inter alia, of the stipulation, Counsel for DC & Sons asked that the lis pendens be removed from the property.
11. Counsel for Pavilion and McNair refused, claiming the lis pendens would only be removed once DC & Sons consented to the earnest money deposit being released by the escrow agent. (Exhibit 9, Wallace email of 8/15/08).
12. On February 29, 2008, DC & Sons filed a motion to dismiss the specific performance claim. The motion to dismiss was heard on May 20, 2008, and at the hearing Pavilion agreed in open court to dismiss its actions for declaratory relief and quiet title. Judge Goode denied the motion to dismiss as the SCRPC 12 motion went beyond the pleadings. (Exhibit 10, Order of Goode)
13. On August 15, 2008, Pavilion amended its complaint, dropping its causes of action for specific performance and instead suing DC & Sons for breach of contract and

seeking to impose an equitable lien on the Cottage on the Creek property. (Exhibit 11, Pavilion amended complaint).

14. On March 23, 2009, this Court held that Pavilion was not entitled to an equitable lien on the Cottage on the Creek property and that the lis pendens was improper, as an action for money damages will not support a lis pendens. (Exhibit 12, Order).



FINDINGS OF LAW

The South Carolina Supreme Court has defined abuse of process as "the employment of legal process for some purpose other than that for which it was intended by the law to effect the improper use of a regularly issued process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (S.C. 1967). In *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 74 S.E.2d 451, 455 (S.C. 1967), the Court of Appeals articulated the elements of an abuse of process claim as (a) "an ulterior purpose" and (b) "the improper use of process after it has been issued." While DC & Sons can establish the later element as a matter of law, the ulterior purpose requirement creates a factual issue in this case.

A. Pavilion's Improper Acts

1. Pavilion's filing of an action for specific performance was a use of process not proper

An action for specific performance will lie only when the supposed cloud on title is due to and caused and controlled by the seller. *See Finley v. Burgoyne, Dud*, Eq. 133, 1838 WL 1653 (SC App. Eq. 1838) (If a seller cannot convey marketable title through no fault of its own, the purchaser has the option of rescinding the contract, or taking whatever title the seller could convey, and his failure to make any election constitutes a default by him under the terms of the contract); *See also Calligar v. Fradkoff*, 154 A.D.2d 495, 498, 546 N.Y.S.2d 121, 124 (N.Y.A.D. 2 Dept., 1989) (Specific performance was not warranted where the seller was unable to convey the property in accordance with the terms of the contract due to the intervention of third-party litigation entirely outside of the seller's control). Defendants', then (see Exhibit 3, Wallace letter of 2/21/08) and now (See, Exhibit 1, Deposition of Larry McNair, pg. 60 line 10-20), claim they did not close because of the Coen Defendants' claims. Pavilion could either have closed or walked away from the contract, but filing a lis pendens based upon a specific performance count was not an option and was wrongful.

2. Pavilion concedes it was in breach

An action for specific performance will lie only when the buyer can demonstrate that it was ready willing and able to perform by a tender of the purchase price and is not itself in breach.¹ *See King v. Oxford*, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (S.C.App.1984) (An action for specific performance (being an action in equity) will lie only when the buyer can prove

¹ Failure to rescind or to take title was also a default under the contract. *Calligar*, supra.

it was not itself in breach of the contract); *Shay v. Austin*, 466 F.Supp.2d 664 (D.S.C. 2006) (The party who comes to compel performance must show he has performed his part, or has been and remains ready, able and willing to perform his part of the contract). In the present case, Defendants' filing an action and a *lis pendens* was not proper because Pavilion was admittedly in breach of the contract when it never obtained financing or provided proof of financing to DC & Sons.

3. Filing and maintaining actions for declaratory judgment as to what parties had an interest in the Cottage on the Creek property and quiet title was improper

An action to quiet title coupled with a *lis pendens* will lie only when all persons known to claim an interest in the property have been joined in the action. See 74 C.J.S. *Quieting Title* § 60 (2010). Because Defendants failed to join and serve the Coen Defendants, the filing of a *lis pendens* based upon the quiet title cause of action was improper *ab initio*. (Exhibit 7, Docket report).

4. The Stipulation

An action for specific performance will not lie absent a bona fide cloud on title. See *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C.App. 2002). Pavilion stipulated there was no cloud on title on January 17, 2008. However, it waited almost eight months before amending its complaint to drop its cause of action for specific performance and refused to remove the *lis pendens* from the property until this Court ordered it to do so. The continued maintenance of a *lis pendens* was improper after Pavilion stipulated there was no cloud on title. (See, Exhibit 8, Stipulation).

5. Refusing to remove the *lis pendens* constitutes an improper act in the use of process

A *lis pendens* will not lie unless coupled with an action affecting the title to real property. See *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C.App. 2002) (Only an action "affecting the title to real property" allows the filing of a *lis pendens*). A claim for damages or declaratory relief will not support a *lis pendens*. See *Armstrong v. Carwile*, 56 S.C. 463, 476, 35 S.E. 196, 203 (SC 1900) ("An action for money only, even if it relates in some way to specific real property, will not support a *lis pendens*"). As this Court has previously ordered, Pavilion's continued use of the *lis pendens* based upon its amended complaint was improper.

For all of the reasons above, the use of the *lis pendens* against the property was improper.²

B. Ulterior Purpose

Without an ulterior purpose, there can be no abuse of process. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (S.C. 1983). The ulterior purpose usually takes the form of coercion to obtain a collateral advantage, not property involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. *Davis v. Epting*, 317 S.C. 315, 454 S.E.2d 325 (Ct. App. 1994). "The *lis pendens* mechanism is not designed to aid either side in a dispute between private parties." *Harry County v. Ray*, 382 S.C. 76, 81, 674 S.E.2d 519, 522 (S.C. App. 2009).

While there is evidence that McNair and Pavilion were using the lawsuit and the *lis pendens* to compel a better purchase price from DC & Sons and a return of the earnest money

² It does not matter that Pavilion and McNair's actions were through the conduct of their lawyers. See *Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244 (S.C.App. 2007) (Acts of an attorney are directly attributable to and binding upon the client).

deposit (See, Exhibit 3, Exhibit 9, and Exhibit 1 at page 65 line 8 through page 66 line 16 and pages 72-75) this appears to be disputed.³

It is therefore ORDERED, that DC & Sons' motion for summary judgment is denied.

The Honorable Roger M. Young, Sr.

On this ____ day of _____, 2010
Charleston, South Carolina

DC & SONS TRIAL EXHIBIT LIST

³ Though Wallace's email of August 15, 2008 (Exhibit 3) states "As I have told you in the past, if your client will release the escrow money, my client will lift the lis pendens," and McNair in his deposition states:

Q Yeah. Now, why would you seek to prevent the Crowleys from selling the property to someone else after August of '08 if you had decided that you no longer wanted to buy it? MR. DAVID: Object to the form.

A (Continuing) Because I felt like they defaulted on their contract with me and they're still holding my earnest money. I was asked for our earnest money back, they wouldn't give it back to us, and they... they couldn't close. They didn't show up on the closing date. They said they can't close. They defaulted. That's what I feel like. (Page 72, lines 8-15)

Trial #	DATE	Memo	Bates or other ID
1	3/30/1995	03-30-1995 Migwood Lease	
2	1/1/2001	11-01-2001 Lowcountry Capital, LLC Master Lease	09412
3	6/26/2003	06-26-03 Parking Exhibit for Shem Creek Property	PLT-0501
4	10/3/2003	10-03-03 RedWing, LLC Operating Agreement	10683
5	10/3/2003	10-03-03 Commercial Lease between Lowcountry Capital and RedWing, LLC	RWDC 1869
6	10/3/2003	10-03-03 HUD Settlement Statement	18975
7	10/3/2003	10-03-03 Management Agreement	PLT-0745
8	1/1/2004	Tax Receipts & Plat - 2007, 2006, 2005, 2004	PLT-0755
9	1/30/2004	01-30-04 E-mail Memo from Coen to RedWing, LLC	RWSupp3 026;
10	3/6/2004	3-6-04 Red Wing Profit & Loss October 2003 to March 2004	RWSupp3 129
11	3/15/2004	3-15-04 RedWing Transactions by Account	PLT-0001
12	3/15/2004	3-15-04 RedWing Transactions by Account Crowley Capital Account	
13	3/15/2004	3-15-04 RedWing Transactions by Account Due from Coen	
14	3/26/2004	03-26-04 E-mail memo from Coen to Crowley	
15	5/12/2004	05-12-04 Term Sheet from Coen	PLT-0004
16	5/24/2004	05-24-04 Copy of Memo from Dianne Crowley to Coen	NMRS-0144
17	6/4/2004	06-04-04 E-mail memo Yantis to Crowley; Crowley response; Grant to Crowley	10736
18	6/4/2004	06-04-04 E-mail memo from Grant to Dianne Crowley	NMRS-0150; NMRS-0152 20000
19	6/6/2004	06-06-04 E-mail from Grant	00180
20	6/9/2004	06-09-04 Coen ltr to Christ Episcopal Church with note to hold	7943
21	6/10/2004	06-10-04 Membership Interest Purchase and Sale Agreement	28105
22	6/10/2004	06-10-04 Commercial Lease between Lowcountry Capital, LLC and RedWing, LLC	PLT-0442
23	6/10/2004	06-10-04 Sublease Agreement between COENCO & RedWing, LLC for SUIC	RWDC 1788
24	6/10/2004	06-10-04 Fax from Coen to Futrel	PLT-0415
25	6/10/2004	06-10-04 Closing Documents Provided to RedWing, LLC	PLT-0007
26	6/14/2004	06-14-04 Letter from Hedegor to Coen Crowley	RWDC 1746
27	7/28/2004	07-28-04 SCDHEC OCRM Permit for 130 Mill Street	9489
28	8/14/2004	08-14-04 E-mail memo from Coen to Hedegor & Crowley	9355
29	8/21/2004	08-21-04 E-mail memo from Hedegor to Coen Crowley	PLT-1835
30	10/22/2004	10-22-04 Coen ltr to Brownyard	8508
31	12/7/2004	12-07-04 E-mail memo from Coen to Brownyard	8287
32	2/8/2005	02-08-05 Sidney Coen EM Re Mapwood	08155
33	2/8/2005	02-08-05 Brownyard Coen EM Re Mapwood-2	
34	3/3/2005	03-03-05 E-mail memo string from Coen to McPhail	
35	3/14/2005	03-14-05 Letter from Norton to Brownyard	RWDC 0018
36	3/17/2005	03-17-05 E-mail string between Brownyard and Norton	00285
37	3/17/2005	03-17-05 Letter from Brownyard to Coen	80-188
38	3/20/2005	03-20-05 Brownyard EM Re SUIC	09293
39	3/21/2005	03-21-05 Brownyard Letter to Coen (via 03-21-05 Grant e-mail memo to McPhail)	RWDC 0005
40	3/22/2005	03-22-2005 Letter from Ford, TOMP	
41	3/23/2005	03-23-05 Coen Crowley EM	10805
42	3/28/2005	03-28-05 E-mail memo string between Brownyard and Kilgough	90-183
43	4/1/2005	04-01-05 E-mail memo from Coen to Norton, et al - "Leafe Litigate"	90-210
44	4/2/2005	04-02-2005 Agreement for Assignment of Leasehold Interest and Forbearance Agreement among CoenCo, DC & Sons & RedWing	20080
45	4/26/2005	04-26-05 Letter Coen to Ford	
46	5/24/2005	05-24-05 Assignment of Leasehold Interest Skined RB Coen	PLT-0014
47	6/24/2005	06-24-05 HUD Settlement Statement for 130 Mill Street & Parcel 22	RWDC 1928
48	7/28/2005	07-28-05 Plat showing SUIC Parcel and proximity to Rode	9147
49	1/8/2008	01-08-08 Development Impact Assessment	RWDC-1813
50	12/4/2006	12-04-06 Meeting with Billy Simmons	18571

Trial #	DATE	Memo	Bates or other ID
51	3/23/2006	03-23-06 Coen EM to Grant	17073
52	4/1/2006	04-01-06 Lowcountry Capital, LLC Ground Lease with Snowhill, LLC	PLT-2343
53	4/26/2006	04-26-06 Letter from Coen	RWDC 2028
54	5/22/2006	05-22-06 E-mail memo from Grant to Dianne Crowley	PLT-0048
55	6/22/2006	06-22-06 Red Wing LLC Balance Sheet as of May 22, 2008	RWDC 00282
56	5/31/2006	05-31-06 E-mail memo from Coen to the Crowleys	PLT-0018
57	6/4/2006	06-04-06 Rode's Ice House Transactions by Account	PLT-0047
58	6/12/2006	06-12-06 E-mail memo from Grant to Dianne Crowley	PLT-0024
59	6/12/2006	06-12-06 E-mail memo from Dianne Crowley to Grant	PLT 0021
60	6/14/2006	06-14-06 Coen F-mnl	DC SUPP 003
61	6/18/2006	06-18-06 Dianne's sheet showing 38.2mm	PLT-6390
62	7/12/2006	07-12-06 Due Diligence questions and follow up items	
63	7/13/2006	07-13-06 Norton Grant, Coen EM Draft of Notice Letter to Dianne Crowley	PLT 0353
64	7/20/2006	07-20-06 Coen E-mail	PLT-0403
65	7/28/2006	07-28-06 Dillon ltr to Coen	PLT-0406
66	7/28/2006	07-28-06 Draft Sublesor's Estoppel Certificate	RWDC 01916
67	8/5/2006	08-05-06 Own the Landing Internet Page	PLT-0354
68	8/7/2006	08-07-06 E-mail memo from Crowley to Coen	PLT-0415
69	8/8/2006	08-08-06 Letter from Norton to Crowley	Depo Exhibit
70	8/8/2006	08-08-06 Crowley e-mail	RWDC-1838
71	8/18/2006	08-18-06 E-mail memo from McPhail to Grant	Vinzan Depo Ex 5
72	8/18/2006	08-18-06 Contract with Pavilion	PLT-0039
73	8/22/2006	08-22-06 E-mail memo string between Grant and McPhail	
74	8/23/2006	08-23-06 Norton Grant Coen EM Assignment of Leasehold Interest - RedWing, LLC	
75	8/28/2006	08-28-06 Norton - TOMP EM The Landing - Letter to TOMP	
76	8/31/2006	Listing of Cancellations and refund checks	DCSUPP-00152
77	9/1/2006	09-01-06 Plat TOMP-PD-0207 Testy Ex 1	
78	9/7/2006	09-07-06 Letter from Norton to Crowley	19890
79	9/11/2006	09-11-06 Summary Development Budget	15933
80	9/11/2006	09-11-06 Coen Habarak EM Re Meeting	8158
81	9/11/2006	09-11-06 Letter from Brownyard	NP 00024
82	9/13/2006	09-13-06 McPhail ltr to Coen 1	PLT 0074
83	9/15/2006	09-15-06 Letter from Rick Brownyard	
84	9/18/2006	09-18-06 Grant Coen EM RE RHC comments to Redraft of Complaint	0316
85	9/20/2006	09-20-06 Grant E-Mail	38810
86	9/21/2006	09-21-06 TOMP approval if Rode's taken private	
87	9/21/2006	09-21-06 Coen Norton Grant EM RedWing SUIC	10700
88	10/4/2006	10-04-06 Letter from Coen to RedWing, LLC - Notice of Default	10699
89	10/4/2006	10-04-06 E-mail memo from Coen to Ford with Attachment	17518
90	10/17/2006	10-17-06 Coen E-mail	18107
91	10/20/2006	10-20-06 October 2006 Equity Investor Summary	DCSUPP2 00004
92	10/26/2006	10-26-06 Crowley ltr to Coen	DCSUPP2 00005
93	10/28/2006	10-28-06 Crowley ltr to Coen 1	0302
94	10/30/2006	10-30-06 Williams E-mail to Coen	DCSUPP2-00137
95	11/9/2006	11-09-06 Back up Contract Offer from Tim Rogers	
96	11/10/2006	11-10-06 Coen EM to Norton from Docs Produced by Babcock 1.8.10-12	0344
97	11/17/2006	11-17-06 Hollingsworth E-mail to Coen	PLT-0025
98	11/17/2006	11-17-06 Letter from Ford, TOMP	
99	11/20/2006	11-20-06 Letter from Ford, TOMP	Vinzan Depo Ex 1
100	11/27/2006	11-27-06 Pavilion Owners Title Commitment from NP title company	NP 00211
101	11/30/2006	11-30-06 Brownyard ltr to Vinzan	Vinzan Depo Ex 2
102	12/6/2006	12-06-06 Glick letter to Coen	29654
103	12/8/2006	12-08-06 Coen E-mail with Joel Green	18539
104	12/8/2006	12-08-06 Coen E-mail to Henry and Joel	18540
105	12/8/2006	12-08-06 E-mail exchange Brownyard and Vinzan	Vinzan Depo Ex 3

Trial #	DATE	Memo	Bates or other ID
106	12/8/2008	12-08-08 Vinzani ltr to Brownward and Epling	Vinzani Depo Ex 4
107	12/12/2008	12-12-08 Epling ltr to Vinzani	Vinzani Depo Ex 8
108	12/15/2008	12-15-08 Transcript of Hearing, pg 17	Trans Excmpl
109	12/21/2008	12-21-08 Vinzani ltr to Epling and Brownward	Vinzani Depo Ex 7
110	12/21/2008	12-21-08 Payoff Memos from Brownward	NP 00218
111	12/27/2008	12-27-08 Brownward EM to Vinzani	RB 0185
112	12/27/2008	12-27-08 Draft NPI Closing Documents	NP 00219
113	1/18/2007	01-18-07 Brownward E-mail to Vinzani	Vinzani Depo Ex 13
114	1/18/2007	01-18-07 Letter from Sargent, TOMP	10582
115	12/4/2007	02-14-07 E-mail from Coen	18035
116	2/13/2007	02-13-07 Brownward ltr to Vinzani	Vinzani Depo Ex 8
117	2/28/2007	02-28-07 Atlantic Appraisals	07562
118	3/4/2007	03-04-07 Brownward ltr to Vinzani	McNair Depo Ex 3, Vinzani Depo Ex 8
119	3/9/2007	03-09-07 Brownward E-mail to Vinzani	McNair Depo Ex 2, Vinzani Depo Ex 10
120	3/9/2007	03-09-07 Wallace ltr to Brownward	Vinzani Depo Ex 14
121	3/14/2007	03-14-07 Letter from Coen to Crowley	PLT-0142
122	3/23/2007	03-23-07 Wallace ltr to Epling	44614; 44315
123	3/23/2007	03-23-07 AKE Response to letters from Coen	10579
124	3/28/2007	03-28-07 Update to the Development Impact Assessment	PLT-0137
125	4/4/2007	04-04-07 Letter from Coen	PLT-0137
126	4/4/2007	04-04-07 Letter from Coen to Dianna Crowley, RedWing, LLC	PLT-0137
127	4/20/2007	04-20-07 Wallace ltr to Epling	Vinzani Depo Ex 16
128	4/25/2007	04-25-07 Letter from Ford, TOMP	10592
129	4/30/2007	4-30-07 Coen EM from Docs Produced by Babcock 1.8.10	18288
130	5/15/2007	04-15-07 Coen E-mail to Evans Construction	DCSupp2-00075
131	5/25/2007	05-25-07 Signed Affidavit of Dianna Crowley - not filed	
132	12/20/2007	12-20-07 Red's Engineering Inspection Letter Arb Ex 55	
133	1/7/2008	01-07-08 EM Suing leading up to Eviction Letter from Mike Spears Arb Exhibit 67	
134	1/17/2008	01-17-08 Stipulation fully executed	
135	2/21/2008	02-21-08 Motion for Emergency Hearing and Application for ejectment	
136	2/12/2008	02-21-08 Wallace ltr to Epling	McNair Depo Ex 4
137	7/5/2008	07-25-08 Arbitration Order issued by Tom Willis	
138	7/15/2008	07-15-08 Appraisal of COTC Property	
139	4/30/2009	04-30-2009 Closing Statement on Loan Refinance	
140	3/17/2007	03-17-07 Lis Pendens	
141	4/8/2007	04-08-07 Lis Pendens	
142	4/8/2007	04-08-07 Pavilion Summons and Complaint	
143	8/15/2008	08-15-08 Pavilion Amended Summons and Complaint	
144	8/14/2010	08-14-10 COTC NOTE PAYMENT HISTORY	
145	1/11/2007	01-11-07 Parking Substantial from COEN to TOMP	TOMP-PD 0148
146	1/10/2011	Magwood Lease Chart	
147	1/10/2011	Plot for Trial	
	4/13/2009	Deposition of Ellis Lesemann Parker Poo 30(b)8 and Exhibits thereto	
	10/28/2009	Deposition of Matthew Norton and Exhibits thereto	
	10/28/2009	Deposition of James R. Maul, Jr and Exhibits thereto	
	10/28/2009	Deposition of Richard Coen and Exhibits thereto	
	10/30/2009	Deposition of Ocean One Realty 30(b)8 and Exhibits thereto	
	10/30/2009	Deposition of M. Jeffrey Vinzani and Exhibits thereto	
	10/30/2009	Deposition of Bruce Wallace Nesten Prial 30(b)8 and Exhibits thereto	
	11/20/2009	Deposition of Larry McNair and Exhibits thereto	
	11/20/2009	Deposition of Pavilion 30(b)8 and Exhibits thereto	
	1/13/2010	01-13-10 Documents and e-mail produced by Coen Defendants	
	1/18/2010	Documents Produced RB TOMP on 1-18-10	TOMP-PD-00001 at 899
	1/21/2010	Deposition of Christiane Farroll, TOMP and Exhibits thereto	

Trial #	DATE	Memo	Bates or other ID
	8/12/2010	Deposition of Richard Coen and Exhibits thereto	
	12/2/2010	Deposition of Richard Coen and Exhibits thereto	
	1/11/2011	Deposition of Matthew Norton and Exhibits thereto	
		Documents and Exhibits introduced by any party at the Arbitration hearing before Tom Willis	
		Depositions and Exhibits taken by any party to the Arbitration heard by Tom Willis	
		Additional Depositions and Exhibits taken by any party to this litigation	
		Documents produced by any Party or Third Party in this litigation	
		Discovery Responses provided by any Party in this litigation	
		Affidavits served by any Party in this litigation or produced by any party in this litigation	

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Thomas Russo, Circuit Court Judge

CASE NO. 2011-CP-10-05774
APPELLATE CASE NO. 2016-001632

PAVILION DEVELOPMENT CORP. & LARRY MCNAIR,.....Plaintiff/
Appellant,

v.

NEXSEN PRUET, LLC.....Defendant/ Respondent,

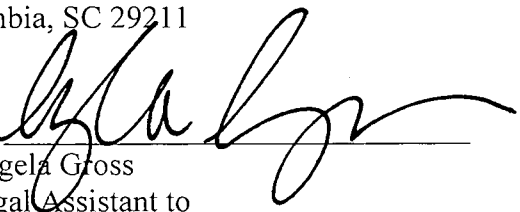
AND

DC & SONS, LLCCounterclaim Defendant.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Reply Brief Motion to Amend/Supplement Their Designation of Matter on Appeal to Include a Document Responsive to Ann Argument Presented in Respondent's Initial Brief by depositing a copy in the United States Mail, Postage prepaid, on July 12, 2017, addressed to Respondent's attorneys of record as follows:

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