STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Sea Island Food Group, LLC d/b/a Squeeze,

Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Charleston Capital Corporation, Thomas M. Ervin, and Michael J. Quillen Family Limited Partnership,

Defendants.

Quillen Enterprises, LLC d/b/a The Brick,

Plaintiff-Intervenor,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith East Bay Company, LTD., and Michael J. Quillen Family Limited Partnership,

Defendants.

Michael J. Quillen Family Limited Partnership,

Third-Party Plaintiff

v.

Top of the Bay, Inc. d/b/a Club Light,

Third-Party Defendant

Top of the Bay, Inc. d/b/a Club Light,

Fourth-Party Plaintiff

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises,

Fourth-Party Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-10-7107

ORDER ON POST-TRIAL MOTIONS

The trial of this case began on January 22, 2017 and ended on February 2, 2017 in Charleston County, resulting in the following verdict against Yaschik Development Company, Inc. ("Yaschik"): (1) Defendant Michael J. Quillen Family Limited Partnership ("FLP") on its Breach of Contract cause of action for $1,112,857.10; (2) Plaintiff Sea Island Food Group, LLC d/b/a Squeeze ("Squeeze") on its Intentional Interference with Contractual Relations cause of action for $738,371.64 actual damages and $469,393.10 punitive damages; and (3) Fourth-Party Plaintiff Top of the Bay, Inc. d/b/a Club Light ("TOTB") on its Intentional Interference with Contractual Relations cause of action for $1.00 nominal damages and $133,333.33 punitive damages.

Following trial, several post-trial motions were made by Yaschik, Squeeze, and TOTB. On February 12, 2018, Yaschik filed a Motion for Judgment Notwithstanding the Verdict ("JNOV"), or, in the alternative, a New Trial, or, in the alternative, a New Trial *Nisi Remittitur*, and also a Motion for Setoff. Also on February 12, 2018, Squeeze filed a Motion for Written Court Ruling regarding this Court's granting Directed Verdict motions against Squeeze in favor of both Yaschik and FLP, or, in the alternative, a Motion to Reconsider said rulings. On February 20, 2018, TOTB filed a Motion for New Trial *Nisi Additur*, and also a Motion for a New Trial. Also on February 20, Yaschik filed a Motion for Stay of Execution of Judgment.

BACKGROUND

This dispute involved the building located at 213 East Bay Street ("213 East Bay"), in Charleston, South Carolina, which was burned by a fire on April 2, 2013. 213 East Bay is owned by Yaschik, and Yaschik's president is Thomas Ervin. 213 East Bay Street is subject to a Master Lease which was held by the FLP. Michael Quillen is the general partner of the FLP. Yaschik purchased the property in 2003 for approximately $1,800,000.00. FLP purchased the Master Lease in March 2012 from Charleston T&T for $500,000.00. 213 East Bay includes four

subdivided units held by three tenants (collectively, "subtenants"): (1) Squeeze, (2) The Brick (which is owned by the FLP), and (3) TOTB. At the time of FLP's purchase of the Master Lease, the subleases between the subtenants and Charleston T&T were assigned to FLP. The Master Lease and subleases were all triple-net leases, meaning the landlord under each lease passes down costs to the tenants. The tenant is required to pay - in addition to rent - the building's property taxes, maintenance, user fees, utilities, and insurance. This meant that Yaschik required the FLP to pay all of the expenses of the building, and the FLP required Squeeze, The Brick, and TOTB to pay the expenses. Ultimately, the subtenants paid for the building upkeep, maintenance, and insurance.

Importantly, Paragraph 20 of the Master Lease read: "If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rent shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence." In conjunction with its purchase of the Master Lease, FLP acquired Charleston T&T's insurance policy, which had as well as $1,000,000.00 in liability insurance as required by the Master Lease.

On the night of April 2, 2013, a fire originated on the second floor of 213 East Bay. Following the fire, FLP and Yaschik agreed that FLP would oversee the shoring and initial repair. FLP contracted with Belfor to secure the building and begin the clean-up process, and contracted with Applied Building Sciences, Inc. ("ABS") to perform architectural and engineering services for the repair of the building. FLP continued to update Yaschik and the subtenants on the repair efforts over the course of the next five months.

In late August 2013, ABS informed FLP and Yaschik that plans for repairs were nearly ready to be submitted to the City. On September 3, 2013, the FLP sent Yaschik a letter advising of several developments, including the insurance company's approval of payment of the policy limits and that structural plans were to be completed that day, and stating that Yaschik- as the building owner- would need to approve those plans. FLP followed up with email correspondence on September 5th and 6th, neither of which were responded to by Yaschik. On September 11, 2013, five months after the fire and after significant headway had been made by the FLP and subtenants towards repairing building, Yaschik sent FLP a letter purporting to terminate the Master Lease pursuant to the above-mentioned "Paragraph 20" on the basis the building was a total loss. The FLP advised Yaschik it did not believe the building had been "totally destroyed" by fire, and therefore, that it's purported termination was ineffective.

As early as May 2013, Yaschik had been negotiating with an entity known as East Bay Company, Ltd. ("EBCO") to purchase the building at 213 East Bay Street. EBCO owns all surrounding buildings on that particular block of East Bay and Cumberland Streets. These negotiations culminated in a December 30, 2013 agreement for the sale of 213 East Bay Street. Per the agreement, the completion of the sale is subject to the cancellation of the Master Lease with FLP and the cancellation of the assignment of rights under the subleases.

The present lawsuit followed. FLP's breach of contract and breach of contract accompanied by a fraudulent act claims against Yaschik were submitted to the jury, along with Squeeze and TOTB's intentional interference with contractual relations claims against Yaschik.

The reason the Court directed the verdicts at trial was the uncontroverted fact that Yaschik sent the letter terminating the lease on the grounds of total destruction due to the fire. Everything in this case flows from that uncontested fact, and no othercause of action by any of the parties against any other party could go forward with that action being taken by Yaschik. It

was either a justified act or an unjustified act, which was for the jury to decide, but there is no disputing it occurred. The lease provided that total destruction was retroactive to the date of the fire loss, which negated anything FLP did to begin repairs in the months between the fire and the declaration of total loss. Despite the fact that FLP may have had a duty to repair the premises so the subtenants could move back in if the fire did not cause a total loss, as a matter of law, FLP was relieved of any obligations it had to repair the property for the subtenants when Yaschik declared it a total loss. Indeed, FLP could not continue its repair efforts. That is why the Court dismissed the subtenants claims against FLP – Yaschik's action made it impossible for them to make any more repairs. The only factual question left for the jury to determine was whether Yaschik was justified in exercising its right to declare it a total loss. The jury found that Yaschik was not justified in doing so, and awarded FLP $1,112,857.10 in compensatory damages. Similarly, the jury also found that Yaschik's actions unjustifiably interfered with the subtenant's leases with FLP. This is a perfectly understandable conclusion, and the verdicts are completely consistent in this regard. In fact, it would have been inconsistent to allow a verdict against FLP by the subtenants because the evidence was uncontroverted that Yaschik declared that the fire damage caused a total loss. At that moment in time, FLP could no longer make repairs. The only question was whether Yaschik's decision was justified or not.

If the jury had found Yaschik's decision to declare the property a total loss, they would have found the Master Lease was not breached. Necessarily, the jury would have had to find Yaschik did not intentionally interfered with the subtenants. Indeed, had they found Yaschik was justified in declaring the property a total loss, but also found that Yaschik intentionally interfered with the subleases, the Court would have had to overturn those verdicts as being inconsistent.

LEGAL STANDARDS

i. New Trial Absolute

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). In other words, to warrant a new trial absolute, the verdict reached must be so "grossly excessive" as to clearly indicate the influence of an improper motive on the jury. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Alternatively, the trial court may grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury's verdict is not supported by the evidence." *Duncan v. Hampton Co. Sch. Dist. No. 2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999). Finally, a new trial may be granted where verdicts are irreconcilably inconsistent. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

ii. Judgment Notwithstanding the Verdict

A motion for judgment notwithstanding the verdict, or JNOV, is a "renewal of the directed verdict motion." *Glover v. N. Carolina Mut. Life Ins. Co.*, 295 S.C. 251, 368 S.E.2d 68 (Ct. App. 1988). "In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them." *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 603 S.E.2d 605 (Ct. App. 2004). "The trial court must deny the motion when the evidence yields more than one inference or its inferences are in doubt." *Id.* at 232. The verdict should be upheld "if there is any evidence to sustain the factual findings implicit in the jury's verdict." *Id.*

iii. New Trial *Nisi Remittitur*

"Compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur*." *Proctor v. Dep't of Health and Envtl. Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). "The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." *Id.*

ANALYSIS

A. Yaschik

i. JNOV

Yaschik claims it is entitled to JNOV because the subtenants cannot establish their claims of intentional interference with a contract. To establish an action for intentional interference with a contract, the plaintiff must establish (1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 336 S.E.2d 472 (1985). Yaschik contends that the third and fourth elements cannot be, and were not, established by the subtenants.

With regard to the third element, this Court did not rule that as a matter of law there was no breach of the sublease, but rather, it was found that there was a valid defense to the breach (namely, impossibility due to Yaschik's conduct). Specifically, it was found that Yaschik's conduct in sending a letter purporting to terminate the Master Lease made it impossible for FLP to perform its obligations to the subtenants. A finding of impossibility of performance is not a finding that the contract was not breached or that it was cancelled. Rather, the finding was that Yaschik interfered with the sublease and rendered FLP's performance impossible – thereby justifying FLP's breach. This finding inherently entails that the subleases were indeed breached,

and, therefore, the subtenants met this third element at trial. With regard to the fourth element, the question of whether Yaschik acted without justification was a factual determination to be made by the jury.

At trial, photographs of the building were shown to the jury showing portions of the premises largely intact. Also, evidence was presented showing that Thomas Ervin did not visit the building during the five months following the fire when FLP was making substantial efforts and rehabilitating the premises. Moreover, expert testimony at trial indicated that the building could have been restored to substantially the same condition. There was sufficient evidence presented at trial for a jury to reasonably conclude that Yaschik acted in bad faith by declaring the premises totally destroyed. The jury here could have reasonably, and based upon the evidence at trial, ultimately did find, that Yaschik knew of the valid and existing subleases, that Yaschik intentionally procured FLP's breach of the subleases by terminating the Master Lease on the basis of "total destruction," and that subtenants suffered damage as a result thereof. As such, Yaschik's Motion for JNOV is denied.

ii. New Trial Absolute

Yaschik also argues that it is entitled to a New Trial Absolute because the jury's verdict is irreconcilably inconsistent. Yaschik argues that the verdicts are "apparently based on different factual conclusions and legal standards despite arising from a common set of facts, agreements, or legal theories." In support of this position, Yaschik points out that the jury awarded FLP damages as if its sublease with Squeeze lasted through 2027, while awarding Squeeze damages only through 2017. However, these two positions are entirely consistent as Squeeze's sublease did indeed end in 2017 while FLP's Master Lease ran through 2027. It is well within the realm of reason to think that FLP would have had Squeeze, or another paying subtenant, in its property

through the end of its Master Lease. This was, after all, one of the most desirable retail locations on the Charleston peninsula.

Yaschik also points out in furtherance of its position the vast discrepancy between TOTB's damages and Squeeze's damages. However, as addressed below, Squeeze made a detailed showing at trial that it was profitable, and had the records to confirm that contention, while TOTB failed to make such a showing. Yaschik also points to the differing punitive damages awarded in this case, but that inconsistency is also addressed below.

Yaschik also contends that this Court erred in directing verdict in favor of FLP against Yaschik on Yaschik's breach of contract claim against FLP. Yaschik argues that the Court failed to consider all of the elements of estoppel when directing verdict in favor of FLP. Specifically, Yaschik points to the third element of estoppel- "knowledge, actual or constructive, of the real facts" as the element that was not considered. *Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condo*, 318 S.C. 535, 458 S.E.2d 561. At trial, it was held that Thomas Ervin, as President of Yaschik, was estopped from alleging a breach of contract claim against FLP on the basis of "adequate insurance" because there was evidence that Mr. Ervin at least constructively knew of the amount of insurance on the building. While FLP was the party responsible for obtaining the insurance, Yaschik was, after all, the owner of the building itself. There was sufficient evidence presented that Mr. Ervin constructively knew the amount of insurance on the building.

Yaschik also contends that the Court erred in interpreting the contractual indemnification language of the Master Lease; specifically Paragraph 23 which states, "[FLP] shall indemnify and save [Yaschik] harmless from any and all claims, damages, costs expenses, including reasonable attorney's fees *arising from the management of the business* conducted by [FLP] at the leased premises." (Emphasis added). FLP argued at trial at this lease provision does not

apply because the "claims, damages, costs and expenses" suffered by Yaschik did not arise from the management of the business. At trial, this Court agreed with this contention by FLP, and no evidence has been presented which changes that position now.

Yaschik also moves for a new trial on the basis that an instruction given to the jury was improper. The instruction at issue is, "A lease is to be construed more strongly against the lessor, and in favor of the lessee." Yaschik argues that a clarifying instruction should have been added which states, "*particularly* where the lease was prepared by the lessor." (Emphasis added). Yaschik contends that it's "case was doomed the second this instruction was given to the jury." First, the challenged jury instruction is not erroneous, and is a correct statement of the applicable South Carolina law. Just because the law doesn't support Yaschik's position does not entail that the instruction is erroneous or prejudicial. Second, this jury instruction is not an outside-the-scope principle of law, and, rather, directly relates to the issues raised in the pleadings and at trial.

Finally, Yaschik's objection centers on the fact that the clarifying instruction of "particularly where the lease was prepared by the lessor" was not added. However, even if that clarifying phrase was added, the gist of the jury instruction remains the same. Yaschik argues that it did not draft the lease, and therefore, the charge is prejudicial. However, the Court of Appeals' use of the word "particularly" is important here because it signifies that a lease is to be more strongly construed against the lessor *especially when* it is prepared by the lessor. Whether the clarifying phrase is added or not does not change the essence of what the instruction conveys. In fact, it could be argued that the addition of the requested clarifying phrase would prejudice Yaschik to a greater degree, since Yaschik's complaint with the instruction is, after all, that it did not draft the lease agreement.

iii. New Trial *Nisi Remittitur*

Yaschik's Motion for a New Trial *Nisi Remittitur* is also denied. The jury verdict amounts are consistent, adequate, and reasonable based upon the evidence presented at trial. The jury awarded Squeeze $738,371.64 in actual damages, an amount equal to 70% of the total damages alleged by Squeeze. This 30% reduction is evidence that the jury considered the proper extenuating factors related to Squeeze's lost earnings calculation, such as future rent escalations, future earnings growth rate percentages, owner salary, and restoration up-fit time.

The jury awarded FLP $1,112,857.10 in actual damages. Yaschik contends that this award is invalid for being too speculative, as it is largely based on lost profits which would have accrued after the subtenants leases expired. This contention fails for two reasons. First, evidence presented at trial indicated that, even though the subtenants leases expired in 2017, they were planning on renewing their respective subleases if given the opportunity. Second, and as mentioned above, 213 East Bay Street is a prime retail location. It is not conjectural or speculative to conclude that- even if Squeeze, TOTB, and The Brick all did not renew their subleases- FLP would have had no trouble finding new subtenants. It is uncontroverted that FLP's Master Lease ran through 2027, and the jury's award reflected that fact. FLP adequately established their lost profits with reasonable certainty at trial. No evidence has been presented which indicates that the jury awards to Squeeze or FLP place them in "a more advantageous position" than they were before the fire. Therefore, Yaschik's Motion for a New Trial *Nisi Remittitur* is denied.

iv. Yaschik Punitive Damages

Yaschik also contends that the punitive damages awarded to the subtenants - Squeeze and TOTB - were improper and contrary to law. Yaschik's first contention in this regard is that the subtenants failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of their rights. The test used to make this determination is whether the tort was "committed in such a manner or under such circumstances that a person of ordinary

reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). There was sufficient evidence presented at trial upon which the jury could have, and did indeed, determine that Mr. Ervin acted in such a way that he was conscious that his behavior would interfere with the subtenants rights under the contract. Indeed, the evidence showed that he conducted negotiations- unbeknownst to and to the detriment of the subtenants- with EBCO and Mr. Hilton Smith to buy 213 East Bay Street. This first factor is heavily in favor of allowing the punitive damages awarded to the subtenants to stand.

Yaschik's second contention is that the award of punitive damages violated Yaschik's due process rights. This is examined by looking at (1) the degree of reprehensibility of the conduct, (2) the disparity between the actual or potential harm and the amount awarded, and (3) the civil penalties authorized or imposed in comparable cases. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011). We will examine these in turn.

First, the degree of reprehensibility is determined by weighing the following factors: (1) the harm caused being physical as opposed to economic, (2) the level of indifference for the health and safety of others, (3) the victim's financial vulnerability, (4) whether the conduct was isolated or repeated, and (5) whether the harm to the victim resulted from a malice or deceit, as opposed to a mere accident. The first two factors here clearly favor Yaschik's position. The tortious conduct did not put anyone's health or safety at risk, and the harm was purely economic. However, the next three factors all favor upholding the imposition of the punitive damages. The victims were small business bar owners whose livelihoods depended on the success of their bars. They were financially vulnerable, and the complained of conduct of Mr. Ervin directly impacted their financial vulnerability. Also, Yaschik was the building owner and the subtenants were merely subtenants- further evidencing the subtenant's vulnerability. The fourth element also favors

upholding the punitive damage award as Mr. Ervin's complained of conduct did not occur within one day, one week, or even one month, and, rather, the evidence indicated the negotiations with EBCO occurred over a period of months. Finally, the fifth element clearly supports the award of punitive damages, as the conduct involved was no mere accident, and the jury could properly infer a degree of deceit from the evidence presented.

The second guidepost in reviewing a punitive damage award takes a look at the disparity, if any, between actual or potential harm and the punitive damages award. To make this determination, a court may consider: (1) the likelihood the award will deter future like conduct; (2) whether the award is reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). Examining the factors, it is reasonable to think that the award of punitive damages will deter Mr. Ervin from future like conduct, the award is directly related to the harm resulting from his conduct, and Yaschik easily has the ability to pay.

The third guidepost compares the punitive award to civil penalties authorized or imposed in comparable cases. Here, there are no civil penalties applicable to this situation. However, an examination of South Carolina case law shows that the highest ratio of actual damages to punitive damages ever upheld in this state was a ratio of 9.9:1. Thus, the award to Squeeze falls within well within this accepted ratio.

Yaschik also claims punitive damages awarded to TOTB are constitutionally excessive. The nominal damages awarded to TOTB were $1.00, while the punitive damages awarded to TOTB were $133,333, representing a 133,333:1 ratio. Courts are leery of upholding punitive damages awards that are "excessive" and South Carolina is no different. *See* 2 Punitive Damages: Law and Prac. 2d § 18:6 (2017). However, this case is novel in South Carolina, so far as case law seems to indicate, because the jury granted a large punitive damage award after only awarding a

nominal damage award of $1.00. A punitive damage award of $9.00 or $10.00 would be absurd. There is no question the two subtenants were similarly situated and similarly impacted by Yaschik's actions. The difference in compensatory damage awards can be attributed to the fact that TOTB did not do a satisfactory job of presenting financial records to back its claim for economic losses, as discussed below. However, because the facts of the case are uniquely postured vis-à-vis two similarly situated subtenants, it seems proper to compare the punitive damage awards to them (which the jury seemed to do), and this Court finds the awards very much compare favorably to each other and in relation to Yaschik. Viewed in that light, the punitive damage award to TOTB is not excessive and, therefore, upheld as well.

v. Setoff

Yaschik seeks a setoff to account for various other payments received by FLP, TOTB, and Squeeze. Specifically, Yaschik seeks a setoff for any monies received by FLP and Squeeze in regards to claims they settled with EBCO, and Hilton Smith (EBCO's President), prior to trial. FLP alleged claims of tortious interference with contract, intentional interference with prospective contractual relations, violation of South Carolina unfair trade practices act, indemnity, and civil conspiracy, with Squeeze alleging intentional interference with a contract, against Mr. Smith and EBCO. All of these claims were settled pre-trial, and Yaschik now seeks a setoff for any monies paid as a result of those settlements.

There "can be only one satisfaction for an injury or wrong." *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). Therefore, "the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." *Id.* at 471-72. "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Id.*

Yaschik is entitled to a reduction in the verdict amounts pertaining to FLP and Squeeze insofar as they received settlement funds relating to the breach of the Master Lease from EBCO and Mr. Hilton Smith. This amount has not yet been identified, so an exact calculation cannot yet be had. The parties have ten days to inform the Court of those amounts so the verdicts can be properly reduced to account for those prior settlements.

Yaschik also seeks a setoff for any funds paid by TOTB to FLP on FLP's causes of action for breach of contract, negligence, and indemnity relating to the fact that the fire started in TOTB's rental unit. However, these causes of actions arose from a separate injury- namely, the fire itself rather than anything relating to the lease agreements- so any settlement monies paid, if any, as a result of this pre-trial settlement will not be applied to the setoff. Therefore, its Motion for Setoff is denied with respect to TOTB.

Additionally, Yaschik's Motion for Setoff is granted insofar as it pertains to the business interruption insurance proceeds received by Squeeze and FLP. Both Squeeze and FLP received $60,000.00 in business interruption insurance proceeds. At the beginning of trial, the parties stipulated on the record that any damages awarded to Squeeze and FLP would be reduced by the amount received from the business interruption proceeds. As such, the award to FLP and Squeeze are both reduced by the amount each received in business interruption insurance proceeds, which amounts to $60,000.00 each. Therefore, Yaschik's Motion for Setoff is granted, in part, with respect to any pre-trial settlement monies paid by EBCO and Hilton Smith to FLP and Squeeze, and with respect to the business interruption insurance proceeds received by Squeeze and FLP. The remainder of Yaschik's Motion for Setoff is denied.

vi. Motion for Stay of Execution

Yaschik also filed a Motion for Stay of Execution of Judgment, pursuant to Rule 62(b), SCRCP, seeking to stay the executions of the judgments against it during the pendency of the

present post-trial motions. As this Order addresses the post-trial motions, the execution of this Order moots Yaschiks Motion for Stay of Execution.

B. Top of the Bay

i. New Trial *Nisi Additur*

TOTB made a Motion for New Trial *Nisi Additur* on the basis that the jury's award of $1.00 in nominal damages to TOTB on its intentional interference with contractual relations claim was excessively inadequate, and that they are entitled to an award of actual damages. The South Carolina Supreme Court has previously stated that, in order for damages to be recoverable, the "evidence presented must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy. Neither the existence, causation, nor amount of damages can be left to conjecture, guess, or speculations." *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 407 S.E.2d 630 (1991).

TOTB relied on its profit and loss statements from 2010 to 2013 in support of its damages. The documents are handwritten, uncertified, contradict other figures submitted to the City of Charleston, and provide no support or explanation for the numbers indicated on them. In support of its motion, TOTB argues that the other "almost identically situated" subtenant (Squeeze) received more than $750,000 in actual damages, and, thus, the award of only $1.00 was "clearly excessively inadequate." However, although Squeeze and TOTB were both subtenants, the evidence indicated they were in very different positions financially, and with respect to the manner in which there financial records were kept. Expert testimony from trial indicated that Squeeze's financial records were maintained in an exemplary fashion. Squeeze was also able to corroborate its records through electronic and other means.

Kelly Tant of TOTB stated the following with regard to the profit and loss statements: (1) her mother drafted them; (2) she is not capable of providing a breakdown of the numbers listed,

(3) she does not have reports from the cash registers, (4) she does not have, nor has she requested, copies of relevant checks from her bank, and (5) she does not know why there are discrepancies between the statements and tax returns. Ann Thode, Ms. Tant's mother, testified that: (1) the statements were drafted after the commencement of litigation and TOTB was served with discovery requests, (2) the statements were extrapolated from other handwritten, unsigned, uncertified, and unfiled copies of TOTB's tax returns, (3) she has no knowledge about the individual entries on the tax returns, and (4) she is not in possession of any receipts or financial records for TOTB. TOTB's damages figures were "not supported with corresponding figures" and were "wholly insufficient to provide the jury with a basis for calculating profits lost with reasonable certainty." *Drews Co. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988). Therefore, TOTB's Motion for *Nisi Additur* is denied.

ii. Motion for New Trial

TOTB also filed a Motion for a New Trial, and argues this Court erred in granting Directed Verdict against TOTB on its breach of contract claim against FLP. As explained above in relation to Squeeze, Yaschik's terminating the Master Lease terminated Squeeze's sublease agreement as a matter of law. Thus, FLP could not have breached a sublease that no longer existed. The breach of the sublease would have had to occur before Yaschik terminated FLP's Master Lease, but the evidence presented indicated no such breach. In fact, the evidence showed that FLP went above and beyond its contractual duties during the five months following the fire in regards to rehabilitating the premises. Once the Master Lease was terminated, it became impossible for FLP to further perform. Therefore, TOTB's Motion for a New Trial is denied.

C. Squeeze

Squeeze filed a Rule 59(e), SCRCP, Motion for Reconsideration with regard to this Court's granting of a Directed Verdict against Squeeze on its breach of contract claim against Yaschik,

and against Squeeze on its breach of contract claim against FLP. At trial, it was held that Squeeze could not pursue its breach of contract claims against Yaschik because Squeeze was not an intended third-party beneficiary of the lease between Yaschik and FLP. Squeeze argues that the language of the Master Lease evidences that it was indeed a third-party beneficiary. Specifically, they point to Paragraph 1 ("Tenant has the right to sublet"), and Paragraph 36 ("if this lease shall be assigned or sublet, shall include also tenant assignees or subleases, as to premises covered by such assignment or sublease"), and the fact that the Master Lease had language removing all restrictions on subletting. However, giving the tenant the right to sublet, or language which indicates a hypothetical subtenant, does not rise to the level of bestowing third-party beneficiary status on an after-the-fact subtenant. Nothing in the Master Lease indicates that the parties thereto intended to confer a direct benefit on Squeeze. In fact, when the Master Lease was executed in 1997, Squeeze would not be in existence for another 12 years. The possibility that a subtenant may come in down the road at some point was certainly contemplated, but no evidence exists which indicates the parties to the Master Lease intended to confer a direct benefit on Squeeze. Therefore, Squeeze lacked third-party beneficiary status, and, as such, lacked standing to bring its breach of contract action against Yaschik. In any event, the verdict against Yaschik on Squeeze's intentional interference cause of action was presumably for the same damages Squeeze suffered relating to its breach of contract claim. On top of that, Squeeze got an award of punitive damages, which would not have been allowed in a breach of contract claim.

At trial, Directed Verdict was also granted against Squeeze on its breach of contract claim against FLP. The basis of that ruling was that, due to Yaschiks terminating the Master Lease, it became impossible for FLP to continue its efforts in rehabilitating the premises. Squeeze argues that it had a separate contract with FLP which required FLP to "restore the premises to substantially the same condition as prior to damage as speedily as practicable" in the event there was a fire.

However, for five months following the fire, FLP undertook rather significant steps toward fulfilling this obligations; including, but not limited to, contracting with Belfor and ABS in furtherance of that goal. It was not until Yaschik terminated the Master Lease, rendering it an impossibility, that FLP ceased its rehabilitation efforts. Therefore, Squeeze's Rule 59(e) Motion to Reconsider is denied.

CONCLUSION

Having considered the arguments, supporting and opposing documents, and based on the same, it is therefore ORDERED, ADJUDGED AND DECREED:

1. Yaschik's Motions for JNOV, New Trial Absolute, and for New Trial *Nisi Remittitur* are denied; and
2. Squeeze's Motion to Reconsider is denied; and
3. TOTB's Motions for New Trial Absolute and New Trial *Nisi Additur* are denied; and
4. Yaschik's Motions for Setoff is granted, in part, and denied, in part. As discussed above, Yaschik's Motion for Stay of Execution has been rendered moot by the execution of this Order.

IT IS SO ORDERED!

Roger M. Young, Sr.
Circuit Court Judge

5/7, 2018