

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-07-0052

RECEIVED
 NOV 05 2018
 SC Court of Appeals

Lady Beaufort, LLC and Tideland Realty, Inc.

Hird Island, Investment, Inc.

Sherwood Fender
 DEFENDANT(S)

PLAINTIFF(S)

Submitted by: Michelle N. Endemann, Andrew K. Epting, Jr., LLC, 46A State St., Charleston, SC, 29401, P: 843-377-1871

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Tideland Realty, Inc.	Hird Island Investments, Inc. and Sherwood Fender	\$17,500.17
Lady Beaufort, LLC	Hird Island Investments, Inc. and Sherwood Fender	\$87,578.56
		\$

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

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

ELECTRONICALLY FILED - 2017 May 11 9:38 AM - BEAUFORT - COMMON PLEAS - CASE#2014CP0700052

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA
COUNTRY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH CIRCUIT

LADY BEAUFORT, LLC. & TIDELAND
REALTY INC.,

Case No. 2014-CP-07-0052

Plaintiffs,

v.

HIRD ISLAND INVESTMENTS, INC.
SHERWOOD FENDER,

RECEIVED

ORDER

Defendants.

NOV 05 2018

SC Court of Appeals

This matter came before me on March 1, 2017 for a non-jury trial. After hearing testimony and reviewing the evidence presented by the parties, I find in favor of the Plaintiffs against the Defendants as follows.

I. FINDINGS OF FACT

1. On August 19, 2013, Lady Beaufort, LLC ("Lady Beaufort") and Hird Island Investments, Inc. ("Hird Island") entered into a contract on whereby Hird Island was to sell to Lady Beaufort a 2.99-acre parcel of property located in Beaufort county at 9 Sams Point Rd. (Plaintiffs' Exhibit 1, Contract).
2. Tideland Realty, Inc. ("Tideland") was the realtor representing the buyer in the transaction and was entitled to a 5% commission on the \$260,000.00 purchase price. (Plaintiffs' Exhibit 1, Contract, ¶ 33).
3. Sherwood Fender of Hird Island asked Mr. Trumps of Tideland to approach Mr. Kerr of Lady Beaufort about purchasing the parcel. Mr. Kerr had previously purchased a piece of property from Mr. Fender and he believed Mr. Kerr would have an interest in buying the property. (Testimony of Kerr, Fender, Trumps, and Fender Deposition Designations Pages 16:23 to 18:11).
4. The contract provided for a due diligence period of 30 "Business Days" to begin the day after the "Effective Date" of the Contract. (Plaintiffs' Exhibit 1, Contract ¶ 1.E and ¶ 12). The "Effective Date" as defined by the contract is the day the last signature appeared on the contract, August 19, 2013. (Plaintiffs' Exhibit 1, Contract ¶ 1.D) The due diligence period ended on October 1, 2013.
5. The contract provided the closing was to occur 7 days after the expiration of the Due Diligence Period (Plaintiffs' Exhibit 1, Contract ¶ 33) with a provision allowing an automatic extension of 5 Business Days for unsatisfied contingencies. (Plaintiffs' Exhibit 1, Contract ¶ 4). Accordingly, the "drop dead" date of the contract was October 15, 2013.
6. The buyer began its due diligence and its attorney, D. Carlyle Rogers, began his work to close the transaction and obtain the title insurance policy for the buyer. (Testimony of Rogers).

7. Lady Beaufort secured financing through Palmetto State Bank, which was approved several weeks before the scheduled closing. Further, Mr. Kerr and Mr. Roger's testified that the transaction could have been funded by Mr. Kerr without the loan. (Testimony of Rogers and Kerr).
8. Mr. Rogers soon discovered that the seller entity, Hird Island, had been administratively dissolved in its state of incorporation, Georgia. (Plaintiffs' Exhibit 3, GA Sec. of State). Further, the company had not been domesticated in South Carolina, but was simply authorized to do business in South Carolina. (Plaintiffs' Exhibit 3, SC Sec. of State). The title insurance company was unwilling to write the policy unless this issue was remedied. (Testimony of Rogers).
9. The dissolution of the Seller entity and resulting refusal of the title insurance company to issue the title insurance policy constitute "unsatisfied contingencies" under ¶ 4 of the Contract.
10. Mr. Rogers contacted the Georgia Secretary of State to determine how this issue could be remedied and brought it to the attention of the Seller's principal, Sherwood Fender, several days before the closing. (Testimony of Rogers, Plaintiffs' Exhibit 3, Georgia Sec. of State notes).
11. Pursuant to S.C. Code Section 12-54-124, if a piece of property constitutes more than a majority of the assets of a company, a certificate of tax compliance must be obtained by the seller from the South Carolina Department of Revenue. Hird Island refused to provide the certificate, despite its attorney Derek Gilbert's assertion that the provision of the certificate is customary (See Gilbert Designations Page 12 lines 1-10) and despite the fact that the Section 22 of the contract required the parties to "comply with all local, state, federal laws, and any rules." (Plaintiffs' Exhibit 1).
12. Unbeknownst to Lady Beaufort or its attorney, the Seller's acquiring of the certificate of tax compliance was further complicated by the fact that a tax lien was filed on the property by the state of South Carolina on September 27, 2013. The lien was filed after the initial title search done by Mr. Rogers, and the lien was never disclosed by Hird Island or its lawyer. (See Exhibit 18, Testimony of Rogers, Testimony of Fender).
13. The unsatisfied requirement of the provision of a certificate of tax compliance and the unsatisfied tax lien constitute "unsatisfied contingencies" under ¶ 4 of the Contract.
14. These issues were raised with Hird Island and its attorney at least a week before the closing was scheduled. Hird Island set the closing for October 7, 2013 despite the outstanding issues. (See Plaintiffs' Exhibit 4, email, Testimony of Rogers).
15. In an effort to resolve the issues, Mr. Roger's provided several alternatives to the Seller, Hird Island: (1) the corporation could be reinstated; (2) Hird Island could sign a unanimous written consent that included language inserted by the title insurance company that Hird Island was selling the piece of property as a part of the winding up process (Plaintiffs' Exhibit 5); (3) that Mr. Fender of Hird Island sign an indemnity agreement in favor of Lady Beaufort; or (4) that the seller's attorney obtain the title insurance from his title insurance company, if it was willing to write the policy (Plaintiffs' Exhibits 10, 11). The seller was

unwilling to take any of these actions, so the buyer did not fund the transaction on October 7, 2013. (Testimony of Fender, Kerr, Rogers).

16. Palmetto State Bank and a loan officer named Jan Malinowski had a mortgage on the property at issue, and it was in arrears. In his own words, Mr. Fender was "paranoid" that Lady Beaufort's principal, James Kerr, was in league with Mr. Malinowski to put him in financial ruin as Mr. Kerr and Mr. Malinowski were "citadel boys." (Testimony of Fender, Fender Deposition Designations Pages 11:10 to 12:25).
17. Mr. Kerr had never met Mr. Malinowski, had never done any business with him before, and did not know he attended the citadel. (Testimony of Kerr).
18. Negotiations between the buyer's attorney, Mr. Rogers, and the seller's attorney, Mr. Gilbert continued after October 7 through October 11, 2013 in an attempt to close the transaction. (Testimony of Rogers and Kerr, Plaintiffs' Exhibits 10, 11, 12).
19. Negotiations ended abruptly when the buyer was alerted by Mr. Trumps that Hird Island had sold the property to a third-party, Inverness, LLC on October 10, 2013. Hird Island hired a different attorney, Ms. Eversole, to close the transaction with Inverness. (Plaintiffs' Exhibit 13, Testimony of Trumps, Fender, and Rogers).
20. The sale of the property to Inverness on October 10, 2013 occurred while the contract between Lady Beaufort and Hird Island was still in full force and effect as the Lady Beaufort/Hird Island contract expired on October 15, 2013.
21. The Seller never called a default under the contract or expressed that the contract was terminated. Mr. Rogers and Mr. Gilbert continued trying to resolve the issues even after, unbeknownst to them, the property had been sold to Inverness. (Plaintiff's Exhibit 12, Testimony of Fender and Rogers).
22. As part of the transaction with Inverness, Mr. Fender required Inverness to purchase a second parcel of property owned by Fender personally. (Testimony of Fender). As a result of the sale of this second parcel, Mr. Fender obtained a \$60,000.00 profit in addition to what he made on the sale of the 9 Sams Point parcel. (Testimony of Fender). Mr. Fender needed the income from both parcels to satisfy his financial obligations. (Testimony of Fender). The profit from the sale of the 9 Sams Point parcel alone was not sufficient to do so. (Testimony of Fender, Fender Deposition Designation Pages 35:5 to 36:7, Pages 51:22 to 52:8).
23. Weighing the evidence and considering the testimony of the witnesses, I find that the Lady Beaufort/Hird Island Contract failed to close because the Mr. Fender became in his own words "paranoid" about the Lady Beaufort's motives and because Mr. Fender was in financial trouble and saw a more lucrative deal with another buyer who would purchase a second parcel, the sale of which provided another \$60,000.00 to Mr. Fender. (Testimony of Fender).
24. Mr. Rogers wrote a default letter to Inverness and its principal Robert Sample and Hird Island and filed a *lis pendens* on the property. Soon thereafter, this lawsuit was filed by Lady Beaufort to recover the property. (Plaintiffs' Exhibit 14).

25. Lady Beaufort resolved its dispute with Inverness by way of a settlement agreement that authorized Lady Beaufort to purchase the property from Inverness for \$25,000.00 more than Lady Beaufort's contract with Hird Island. (Plaintiffs' Exhibit 15, 16).
26. Plaintiffs sued Hird Island and its principal Sherwood Fender for breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act. Hird Island counterclaimed for breach of contract.

II. CONCLUSIONS OF LAW

A. The Competing Claims for Breach of Contract

Plaintiffs sued Hird Island for breach of contract. In turn, Hird Island filed a counterclaim against Lady Beaufort for breach of contract. To establish a breach of contract, a party must establish three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage as a direct and proximate result of the breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962).

Mr. Fender claimed that the "drop dead" date of the contract was October 7, 2013 as he claimed that a Federal Holiday, specifically Labor Day, is a "Business Day" and defined by the Contract. Further, Mr. Fender alleged that there were no written contingencies specified in the Contract, so the Contract provision allowing for an automatic extension of five Business Days is not applicable. However, "contingency" is not a defined term in the Contract. I find that the contract between Hird Island and Lady Beaufort expired on October 15, 2013, pursuant to the plain language of the agreement as: (1) contrary to Mr. Fender's assertion, the contract definition of "Business Days" does not include Federal Holidays; and (2) the automatic extension of five Business Days is applicable as there were unsatisfied contingencies, including resolution of the tax lien, provision of a certificate of tax compliance, resolution of the legal status of Hird Island, and resolution of the objections to the provision of title insurance raised by the title insurer. Therefore, Lady Beaufort was not obligated to close on October 7, 2013, especially considering the unresolved issues with the transaction that were raised by Mr. Rogers and the title insurance company.

Mr. Fender further testified that Hird Island was not required to provide a certificate of tax compliance or remedy the issue raised by the title insurance company with regard to the Seller entity's dissolution in its state of incorporation, Georgia. However, I find that the contract requires the passage of marketable title, (which necessitates a valid seller entity), as well compliance "with all local, state, federal laws, and any rules." (Plaintiffs' Exhibit 1). Pursuant to S.C. Code Section 12-54-124, if a piece of property constitutes more than a majority of the assets of a company, a certificate of tax compliance must be obtained by the seller from the South Carolina Department of Revenue. Hird Island refused to provide the certificate, despite its attorney Derek Gilbert's assertion that the provision of the certificate is customary (See Gilbert Designations Page 12 lines 1-10).

As Hird Island refused to take the steps necessary to close and instead sold the property to a third party on October 10, 2015, before the Hird Island Lady Beaufort Contract expired on October 15, 2015, I find that it was Hird Island and not Lady Beaufort that breached the contract. Further, I find that any reasonable seller acting in good faith would have agreed to one of the five different alternatives to remedy the issues with the transaction that were provided by Lady Beaufort's attorney, Carl Rogers, and that Lady Beaufort was ready, willing and able to close. Finally, I find that Plaintiffs have been damaged by Hird Island's breach of the Contract, as will be discussed further, *infra*.

B. Plaintiffs' Tort Claims

Plaintiffs sued Hird Island and its principal Sherwood Fender for negligent misrepresentation and breach of contract accompanied by a fraudulent act.

To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation;

and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010); *McLaughlin v. Williams*, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct.App.2008) (noting the elements of negligent misrepresentation must be established by a preponderance of the evidence). *Turner v. Milliman*, 708 S.E.2d 766, 769 (S.C. 2011).

Here, Mr. Fender represented to Plaintiffs that he was a willing seller and scheduled the closing to occur on October 7, 2013, with full knowledge of the dissolution of Hird Island and the issue it presented for the title insurance company. (Testimony of Rogers, Fender). The defendants had a pecuniary interest in making these representations to Plaintiffs, and had a duty to communicate truthful information. "So long as the defendant 'has a pecuniary interest in the transaction,' he has a "duty to exercise reasonable care in giving information...." 18 S.C. Jur. Negligence § 57 citing *Winburn v. Insurance Co. of North America*, 287 S. C. 435, 444, 339 S. E. 2d 142, 146 (Ct. App. 1985); see Restatement Second, Torts § 552 (1977); *Gilliland v. Elmwood Properties*, 301 S. C. 295, 302, 391 S. E. 2d 577, 580 (1990); *Lawlor v. Schepper*, 232 S. C. 94, 101 S. E. 2d 269 (1957); *First Federal Sav. Bank v. Knauss*, 296 S. C. 136, 370 S. E. 2d 906 (Ct. App. 1988).

As Mr. Fender's lawyer, Derek Gilbert, was negotiating with Mr. Roger's to resolve the issues raised by the title insurance company, and while Mr. Fender's lawyer was making representations about trying to getting the deal done, Mr. Fender was negotiating another deal with another buyer, Inverness. (Testimony of Fender, Rogers, Kerr, Plaintiffs' Exhibits 4, 10, 11, 12, 20). "Clients are bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority." *Koutsogiannis v. BB & T*, 616 S.E.2d 425, 428 (S.C. 2005). These false representations continued even after the deed transferred to the second buyer. (Testimony of Fender, Rogers, Kerr, Plaintiffs' Exhibits 4, 10, 11, 12, 20). Mr. Fender went to another lawyer to close the Inverness transaction, while Mr. Gilbert was still emailing and making calls to Lady Beaufort's counsel in an effort to resolve the issues and close. Id. See also Plaintiffs' Exhibit 13.

Plaintiffs relied to their detriment on these actions and representations, because had they known that Mr. Fender was in the process of selling the property to another buyer, they would have taken steps to protect their rights and filed a *lis pendens* to prevent the sale to Inverness – as Plaintiffs did once the sale was discovered. (Lis Pendens, Testimony of Rogers and Kerr, Plaintiffs’ Exhibit 14). It is of no consequence that Mr. Fender was acting in a representative capacity as South Carolina courts have consistently held, ““An agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity.”” *Gilbert v. Mid-South Mach. Co.*, 267 S.C. 211, 221–22, 227 S.E.2d 189, 193 (1976) (quoting *Lawlor v. Scheper*, 232 S.C. 94, 98–99, 101 S.E.2d 269, 271 (1957)). Finally, I find that Plaintiffs have been damaged by defendants’ conduct, as will be discussed further, *infra*.

An action for breach of contract accompanied by a fraudulent act is not based on the same elements as the action in tort for fraud and deceit. *McCullough v. The American Workmen*, 200 S.C. 84, 20 S.E.2d 640 (1942). In order to state a claim for breach of contract accompanied by a fraudulent act, the plaintiff must plead facts establishing three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502 (Ct.App.1985). It is not necessary to allege the elements of common law fraud and deceit. See *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904); *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921). The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921). As the Court observed in *Sullivan v. Calhoun*, “fraud,” in this sense,

assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.

Harper v. Ethridge, 348 S.E.2d 374, 378 (S.C. App. 1986) citing *Sullivan*. As is discussed more fully above, Hird Island was in breach of the Contract when it failed to remedy the issues raised by Plaintiffs concerning dissolution of the corporation and tax compliance. While Mr.

Fender represented he would close and while his lawyer negotiated with Mr. Roger's to ensure the closing occurred, Mr. Fender saw a more lucrative deal with another buyer who would purchase not only the parcel at issue in this case, but a second parcel, netting him an additional \$60,000.00, per the testimony of Mr. Fender. The sale of the property to Inverness while the Contract was still pending and while the lawyers were still negotiating to close the transaction, constitutes dishonesty in fact and unfair dealing. Further, these actions relate directly to the breach of the Contract, and not merely to its making. *See Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 203 (4th Cir. 1988) (Proof that Goodyear granted an extension and intentionally concealed that information while claiming North Strand's failure to meet the initial completion date as justification for cancellation, would be a separate and distinct, but closely connected, dishonest act). Finally, I find that Plaintiffs have been damaged by the defendants' conduct.

III. DAMAGES

As a result of the defendants' conduct, Tideland was not paid the real estate commission that it earned and which was provided for in the contract. Accordingly, Tideland has suffered damages in the amount of \$13,000.00. (See Plaintiffs' Exhibit 1).

As a result of the defendants' conduct, Lady Beaufort had to file suit in order to obtain the property that it was entitled to pursuant to its Contract with Hird Island. Lady Beaufort filed suit against Hird Island and its principal Sherwood Fender as well as the third-party that purchased the property from Hird Island, Inverness. Lady Beaufort was able to reach a settlement with Inverness. Pursuant to the settlement, Lady Beaufort paid Inverness \$285,00.00 to obtain the property. This represents a \$25,000.00 increase from Lady Beaufort's Contract with Hird Island. (See Plaintiffs' Exhibits 15 and 16). Lady Beaufort has also expended \$53,924.41 in attorney's fees and cost in order to obtain the property it lost because of the defendants' conduct. (See Plaintiffs' Exhibit 2). Attorneys' fees are provided for in the Contract. (See Plaintiffs' Exhibit 1).

I find Plaintiffs are entitled to prejudgment interest; however, Lady Beaufort is entitled to prejudgment interest only as to the \$25,000.00 increase in purchase price and not its attorneys' fees as the amount of attorneys' fees was not certain or capable of being reduced to certainty by

conditions existing at the time the claim arose. The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty. *Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993). The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. *Id.* The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. *Smith-Hunter Const. Co., Inc. v. Hopson*, 616 S.E.2d 419, 421 (S.C. 2005).

Accordingly, I award judgment against Hird Island and Sherwood Fender in the amount of \$17,500.17, representing actual damages and prejudgment interest in favor of Tideland Realty. I further award judgment against Hird Island and Sherwood Fender in the amount of \$87,578.56, representing actual damages and prejudgment interest as described above in favor of Lady Beaufort.

It is so ordered.

The Honorable Marvin H. Dukes, III
Master in Equity

On this ____ day of _____ 2017
Beaufort, SC



Beaufort Common Pleas

Case Caption: Lady Beaufort Llc , plaintiff, et al VS Hird Island Investments Inc ,
defendant, et al

Case Number: 2014CP0700052

Type: Order/Judgment and Form 4

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2017-05-10 14:18:46 page 15 of 15