

FINDING OF FACTS

On September 24, 2010, Plaintiff entered into a valid and binding contract with Dunlap, Inc. (“Dunlap”) wherein Plaintiff would provide Dunlap with funding in exchange for receivables. In consideration for entering into the contract, Dunlap gave Plaintiff a security interest in all its accounts receivables and contract rights, represented by a UCC Financing Statement (“UCC-1”) filed with the South Carolina Secretary of State. In April 2014, Plaintiff began purchasing Dunlap account receivables wherein Defendant was the party who owed the balance on the account; otherwise known as the “account debtor”. On all account receivables (hereinafter the “Dunlap Invoices”) relevant herein, Defendant was the account debtor on the account.

For each Dunlap Invoice Plaintiff purchased, the Dunlap Invoice would be provided to Defendant containing the following language:

“For value received, this invoice has been assigned to, owned by and payable to Associated Receivables Funding, Inc. PO Box 16253, Greenville, SC 29606. Any offsets, claims, etc. must be reported to Associated Receivables Funding, Inc. immediately upon receipt of this invoice.”

Each Dunlap Invoice also had a stamp executed by Dunlap which read:

“For value received, we hereby assign and transfer this invoice and its proceeds to Associated Receivables Funding, Inc. who is the owner of this invoice unencumbered by any other security or claims, and pursuant to the master agreement. The undersigned does herewith assign all lien rights, chooses in action, chattel paper or contract rights. We further certify that the goods have been shipped and/or services have been rendered in agreement with all terms and conditions.”

After receiving each Dunlap Invoice, Defendant would email its executed assent of a “Work Completion Form” directly to Plaintiff wherein Defendant would make the following two certifications to Plaintiff:

“This is to certify that the below work as described has been satisfactorily completed and to acknowledge that payment for this invoice is not contingent upon any other work being completed.”; and

“I certify that the above work has been completed in full, all invoicing for material used has been provided to project designee. The work performed has been inspected and complete payment should be processed to PO Box 16253, Greenville, SC 29606.”

Relying on Defendant’s executed assent of the “Work Completion Form” and the certifications therein, Plaintiff would, thereafter, purchase each Dunlap Invoice from Dunlap. At trial, Plaintiff’s Kevin Gilbert testified that but for Defendant’s representations in the “Work Completion Form” it would not have purchased any of the Dunlap Invoices.

From April 2014 until February 2016, Defendant remitted payment to Plaintiff on Dunlap Invoices without any problem. Beginning with two (2) March 28, 2016 Dunlap Invoices, however, Defendant failed to remit payment on fifteen (15) invoices which it had certified to Plaintiff, totaling Two Hundred Two Thousand, Three Hundred Ninety and 92/100ths Dollars (\$202,390.92). Those invoices and related Defendant certifications to each are as follows:

Dunlap Invoice No.	Invoice Date	Amount	Date Defendant signed “Work Completion Form”	Date Defendant emailed “Work Completion Form” to Plaintiff
6933	3/28/2016	\$12,600.00	3/31/2016	3/31/2016
6934	3/28/2016	\$15,223.68	3/31/2016	3/31/2016
6944	4/4/2016	\$5,998.08	4/4/2016	4/14/2016
6945	4/4/2016	\$5,453.60	4/4/2016	4/4/2016
6946	4/4/2016	\$29,387.64	4/4/2016	4/4/2016
6948	4/12/2016	\$18,117.35	4/12/2016	4/13/2016
6949	4/20/2016	\$18,000.00	4/22/2016	4/22/2016
6951	4/20/2016	\$4,422.03	4/22/2016	4/22/2016
6952	4/25/2016	\$18,000.00	4/26/2016	4/26/2016
6953	4/27/2016	\$40,662.14	5/2/2016	5/2/2016
6954	4/27/2016	\$5,998.08	4/28/2016	5/2/2016
6955	4/27/2016	\$5,998.07	4/28/2016	5/2/2016
6956	4/27/2016	\$5,453.59	4/28/2016	5/2/2016
6957	5/2/2016	\$9,000.00	5/2/2016	5/2/2016
6959	5/4/2016	\$8,076.66	5/5/2016	5/9/2016

Total: \$202,390.92

No later than April 2016, according to the trial testimony of Defendant’s Jessica Kirk DeLaune, Defendant learned Dunlap had failed to pay at least two (2) of its suppliers, Hertz and Carboline, and back-charged Dunlap in excess of the Two Hundred Two Thousand, Three Hundred Ninety

and 92/100ths Dollars (\$202,390.92) open invoice balance. Despite learning that Dunlap had failed to pay at least two (2) of its suppliers, Defendant continued to represent to Plaintiff that complete payment should be processed on the Dunlap Invoices until May 9, 2016. It was not until July 2016 that Defendant informed Plaintiff regarding the unpaid Dunlap suppliers and the back- charges.

At the time of trial, the contact balance due and owing Plaintiff from Dunlap was Three Hundred Twenty-Three Thousand, Seven Hundred Eighteen and 31/100ths Dollars (\$323,718.31).

LAW AND ANALYSIS

1. Enforcement of Security Interest

Pursuant to § 9-607 of the Uniform Commercial Code, a secured party may enforce the obligations of an account debtor and exercise the rights of the debtor with respect to the obligation of the account debtor. *See South Carolina Code Ann. 36-9-607*. A secured party's rights, however, are subject to all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract unless an account debtor has made an enforceable agreement not to assert defenses or claims. *See South Carolina Code Ann. 36-9-404*.

In the matter at hand, Defendant, the account debtor, agreed not to assert defenses or claims against payment of each Dunlap Invoice to Plaintiff, the secured party, when Defendant represented to Plaintiff that the work was inspected and "complete payment should be processed" to Plaintiff. *See e.g. Work Completion Forms for Dunlap Invoices 6933, 6934, 6944, 6945, 6946, 6948, 6949, 6951, 6952, 6953, 6954, 6955, 6956, 6957 and 6959*. This Court finds that the ordinary, plain meaning of "should" is the past tense of shall and, accordingly, connotes a duty or obligation. *See e.g. Black's Law Dictionary 4288 (8th ed. 2004)*, *See <https://www.merriam-webster.com/dictionary/should>*, and *See <https://www.merriam-webster.com/dictionary/shall>*. As Defendant obligated itself to process complete payment to Plaintiff, Plaintiff, in accordance with

South Carolina Code Ann. 36-9-607, is entitled to enforce Defendant's obligations under the Dunlap Invoices. *See South Carolina Code Ann. 36-9-607*. Defendant, accordingly, is liable to Plaintiff for the Dunlap Invoices in the amount of Two Hundred Two Thousand, Three Hundred Ninety and 92/100ths Dollars (\$202,390.92).

2. Negligent Misrepresentation

Recovery under negligent misrepresentation is based upon a negligently made false statement, which causes the plaintiff to suffer an injury or loss as a result of relying upon the false statement, as a result of entering into a contract or business transaction. *See Evans v. Rite Aid Corporation*, 324 S.C. 269, 478 S.E.2d 846, 848 (1996). In order to prevail on negligent misrepresentation claim, a Plaintiff must establish the following elements: 1) the defendant made a false representation to the plaintiff; 2) the defendant had a pecuniary interest in making the statement; 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. Cnty. Of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000)).

In the matter at hand, Defendant falsely represented to Plaintiff that "complete payment should be processed" to Plaintiff on the Dunlap Invoices despite having knowledge since April 2016 that Dunlap had not paid its subcontractors or suppliers. Defendant made this representation in the course of its business and, accordingly, had a pecuniary interest in making it. *See e.g. Winburn v. Insurance Co. of North America*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985) (*Proof that the statement was made in the course of the defendant's business, profession, or employment*

is sufficient to show he has a pecuniary interest in making it, although he receives no consideration for it.) Plaintiff, accordingly, has satisfied the first two (2) elements of its negligent misrepresentation claim.

In a cause of action for negligent misrepresentation, the duty of care is not requiring the defendant to take every possible care, much less to be right – it is simply the duty to exercise the care of a reasonable person under the circumstances. *See AMA Management Corp. v. Strasburger*, 309 S.C.213, 420 S.E.2d 868, 874 (Ct. App. 1992). A duty of care is “that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable, and which can be avoided by the defendant’s exercise of reasonable care.” *See Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991). In this instance, Defendant had specialized knowledge regarding its offsets to the Dunlap Invoices and whether it would pay the Dunlap Invoices and the underlying claims thereto. However, despite having that specialized knowledge and knowing that Plaintiff was purchasing the Dunlap Invoices, Defendant did not exercise reasonable care when it represented to Plaintiff that “complete payment should be processed” to it and, thus, breached its duty to see that truthful information was communicated to Plaintiff.

As Defendant had specialized knowledge, Plaintiff justifiably relied on Defendant’s representation that “complete payment should be processed” to it and changed its position in reliance on Defendant’s representation. But for Defendant’s misrepresentation, Plaintiff would not have been damaged in the amount of Three Hundred Twenty-Three Thousand, Seven Hundred Eighteen and 31/100ths Dollars (\$323,718.31), the amount due and owing under Plaintiff’s contract with Dunlap.

3. Promissory Estoppel

The promissory estoppel doctrine holds "an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice." *See Higgins Construction Co., Inc. v. Southern Bell Telephone & Telegraph Co.*, 276 S.C. 663, 281 S.E. 2d 469 (1981) citing 28 Am. Jur. (2d), Estoppel and Waiver, Section 48, pp. 656-657 (1966). The elements of promissory estoppel are: 1) the presence of a promise unambiguous in its terms; 2) reasonable reliance upon the promise by the party by whom the promise is made; 3) the reliance is expected and foreseeable by the party who makes the promise; and 4) the party to whom the promise is made must sustain injury in reliance on the promise. *See Powers Constr. Co., Inc. v. Salem Carpets, Inc.*, 322 S.E.2d 30 (S.C. Ct. App. 1984).

In the matter at hand, Defendant, on each Dunlap Invoice, unambiguously promised that "complete payment should be processed" to Plaintiff. Since Defendant was the payor, it was reasonable for Plaintiff to rely on Defendant's promise that "complete payment should be processed" to it and Plaintiff did, in fact, change its position based on Defendant's representation. As Defendant had knowledge that the Dunlap Invoices had been assigned to Plaintiff and were owned by Plaintiff, for value, it was expected and foreseeable to Defendant that Plaintiff would rely on Defendant's promise that "complete payment should be processed" to it. As the direct and proximate result of relying on Defendant's promise that "complete payment should be processed", Plaintiff has been damaged in the amount of Two Hundred Two Thousand, Three Hundred Ninety and 92/100ths Dollars (\$202,390.92) for the receivables it was unable to collect.

CONCLUSION

Based on the testimony at trial and the parties' Post-Trial Briefs, this Court finds that Plaintiff has met its burden to establish causes of action against Defendant for enforcement of its security interest pursuant to § 9-607, negligent misrepresentation and promissory estoppel and that Plaintiff, accordingly, is entitled to a judgment against Defendant in the amount of Three Hundred Twenty-Three Thousand, Seven Hundred Eighteen and 31/100ths Dollars (\$323,718.31).

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered in favor of Plaintiff Associated Receivables Funding, Inc. against Defendant Classic Industrial Services, Inc. in the amount of Three Hundred Twenty-Three Thousand, Seven Hundred Eighteen and 31/100ths Dollars (\$323,718.31).

IT IS SO ORDERED.

(JUDGE'S SIGNATURE PAGE TO FOLLOW)



Greenville Common Pleas

Case Caption: Associated Receivables Funding Inc vs. Dunlap Inc , defendant, et al
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Type: Order/Other

So Ordered

s/ Edward W. Miller