

EXHIBIT 3

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

BEFORE THE MASTER-IN-EQUITY
MARVIN H. DUKES, III

J&W CORPORATION OF GREENWOOD.)
)
Plaintiff,)

Case No.: 2018-CP-07-1622

vs.)

ORDER AND JUDGMENT

BROAD CREEK MARINA OF)
HILTON HEAD, LLC; BROAD CREEK)
MARINA OPERATIONS, LLC; BROAD)
CREEK MARINA PROPERTIES, LLC; and)
BROAD CREEK MARINA)
DEVELOPMENT, LLC,)

RECEIVED
JUN 04 2020
SC Court of Appeals

Defendants.)

This case came before the Court for a trial on the merits that began May 15, 2019 and concluded May 16, 2019.¹ Having fully considered the record and reviewed applicable law, the Court now enters this Order and Judgment based upon the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

The case arises from a long-term, commercial landlord/tenant relationship. The subject leased premises ("Lease Property") is a portion of the Broad Creek Marina, located on Hilton Head Island. The tenant, Plaintiff J&W Corporation of Greenwood ("Tenant"), operates a

¹ On May 30, 2019, the Court entered an Interim Order Relating to Relocation of Plaintiff's Office Space ("Interim Order"), which addresses the issue of the commercial office space going forward. Presently, a Motion to Alter or Amend the Interim Order (filed by Tenant) and a Motion to Enforce the Interim Order (filed by Landlord) are already pending. These motions, as well as others that may be filed, may result in modification of the Interim Order and/or this Order and Judgment. The parties may also file motions seeking attorney's fees. For these reasons, the Court shall retain jurisdiction until all motions are resolved.

commercial barge and passenger ferries from the marina to Daufuskie Island, among other business activities. The landlord, Defendant Broad Creek Marina Properties, LLC ("Landlord"), is the successor in title to the original landlord, Hilton Head Island Marina, L.P. ("HHIM"). Following a corporate restructuring in 2015, Defendant Broad Creek Marina Operations, LLC ("BCMO"), an entity affiliated with Landlord, now acts as the managing/operating entity for the marina.

The underlying Lease Agreement ("Lease") was initially executed on September 23, 1993, for a lease term of ninety-nine (99) years. *See Lease* (Pl. Ex. 1). The parties agreed to the Lease after Tenant assigned its contract to purchase the marina property to HHIM. The Lease Property leased to Tenant, as defined in Exhibits A and A-1 to the Lease, included the following: (1) 300 square feet of commercial office space (which was a portion of a houseboat that was moored to the docks); (2) barge docking, loading, and unloading facilities; (3) 300 linear feet of commercial dock space; (4) an embarkation and debarkation area; (5) a parking area; and (6) certain access areas. In exchange for the right to occupy and use the Lease Property during the 99-year term, Tenant agreed to pay Rent, Additional Rent and Additional Charges to Landlord as set forth under the Lease and to otherwise comply with all terms of the Lease.

Tenant has successfully operated its business from the Lease Property. However, over the years, various disagreements have arisen between Tenant and Landlord. A prior litigation was resolved through a Release and Confidential Settlement Agreement dated December 13, 2004 ("2004 Settlement Agreement"). Several years later, another set of disputes arose, resulting in the claims and counterclaims asserted in this action. Although several items are in dispute, the primary issues relate to: (1) Tenant's nonpayment of Additional Rent and Additional Charges under the Lease; (2) Tenant's failure to reimburse Landlord for repairs to the Lease Property, and

specifically the dock area; and (3) the adequacy of the commercial office space. Notably, these same issues were also raised in the prior lawsuit, but continue to be a source of dispute.

Tenant asserted a cause of action for breach of contract against Landlord seeking monetary damage relating to the commercial office space. However, Tenant did not present any amount of alleged damages at trial. Conversely, Landlord presented a counterclaim for breach of contract against Tenant seeking monetary damages relating to the amounts due under the Lease, both in terms of unpaid charges and reimbursement for dock repairs relating to the Lease Property following Hurricane Matthew. In support of this counterclaim, Landlord provided evidence of the underlying charges, copies of invoices, and corroborating testimony from witnesses. *See Defs. Exs. 25, 26, 27, 52, 53, 54, and 55; see also Tr. at 527-556* (Testimony of Robbin Rachels).

As set forth during the trial, the total amount claimed by Landlord is \$134,983.73, including claimed prejudgment interest,² itemized as follows:

CATEGORY	AMOUNT	PREJUDGMENT INTEREST	TOTAL
Unreimbursed Lease Charges	\$56,371.27	\$20,348.70	\$76,719.97
Dock Damage Repair Costs	\$44,398.00	\$8,792.88	\$53,190.88
Unreimbursed Miscellaneous Charges	\$2,866.25	\$2,206.63	\$5,072.88
TOTAL	\$103,635.52	\$31,348.21	\$134,983.73

² Landlord has provided itemized calculations of prejudgment interest for each unpaid charge, some of which go back to 2008. *See Defs. Ex. 52*. In making these calculations, Landlord used the statutory prejudgment interest rate of eight and three fourths percent (8.75%). *See S.C. Code §34-31-20; see also Tr. at 527-556* (Testimony of Robbin Rachels).

The first component of Landlord's damages relates to unreimbursed Additional Rent and Additional Charges under the Lease. Under Paragraph 3 of the Lease, Tenant is obligated to pay Landlord for Tenant's share of expenses for utilities, property taxes, lot maintenance, insurance, and additional charges. Tenant is also obligated to pay for other charges incurred for the hauling of vessels or storage of vessels. However, with a few exceptions, Tenant has not paid these charges since 2008, which has required Landlord to continuously fund Tenant's obligations for over a decade. Tenant asserts that it has refused to pay the charges due to Tenant's dissatisfaction with the commercial office space provided after the prior floating office became unusable. *Tr.* at 144:3-11; *Tr.* at 178:14-17; *Tr.* at 182:14-23. The Lease does not include a provision that would allow Tenant to unilaterally withhold amounts due to Landlord whether on this basis or for any other reason. In fact, Tenant's obligations to pay the charges to Landlord are phrased in mandatory language. *See, e.g., Lease, Pl. Ex. 1*, at Paragraph 3(b). Also, it has been established that Tenant has had ongoing use of the barge facilities, dock space, parking, access areas, and office space during this time frame and has been able to conduct its operations but has refused to pay the vast majority of the charges due under the Lease. Nevertheless, it is hard for the Court to ignore the fact that the "office space" (an un-insulated converted boat shed) provided was substandard and questionable in terms of code compliance.

The second category of damages sought by Landlord relates to the cost of repairs to the dock space that is part of the Lease Property following Hurricane Matthew.³ During the storm, Tenant's vessels had remained moored to the docks at the Broad Creek Marina during Hurricane

³ Hurricane Matthew made landfall in South Carolina on October 8, 2016.

Matthew, although Landlord had instructed Tenant to move the vessels.⁴ *Tr.* at 617:18-618:5; *Tr.* at 618:6-10; *Tr.* at 618:11-15. When Mr. Jones returned to the marina to assess the damage caused by Hurricane Matthew, he confirmed that the portions of the dock where Tenant's vessels had been moored were significantly damaged. Mr. Jones testified that Hurricane Matthew caused very little damage to the marina other than to the Lease Property where Tenant's vessels were moored. *Tr.* at 642:13-15. At trial, Landlord provided evidence fully establishing the amounts paid. *See Defs. Exs.* 18 and 19; *Tr.* at 548-552.

In support of its claim to recover the repair costs from Tenant, Landlord points to several provisions within the Lease. The first of those provisions is Paragraph 6 of the Lease, entitled "Dock Repair," which reads as follows:

Dock Repair. As it becomes necessary to repair or replace the dock which is a portion of the Lease Property, Landlord shall complete said repairs or replacement and **Tenant shall pay Landlord all costs attributed to its use,** said costs to be paid as they are incurred by Landlord.

See Lease at Paragraph 6 (emphasis added). At trial, witnesses for Landlord confirmed that the \$44,398 in repair costs related solely to the dock space used by Tenant. These repair costs are attributed to Tenant's use, as no other party was using or was allowed to use this section of the docks at the time. The subject section of the docks remains attributed to Tenant's use until such time as the Lease is amended, expires or otherwise terminates. The evidence presented at trial confirmed that Tenant's vessels were physically moored to the Lease Property during the storm.

Other provisions of the Lease also indicate Tenant's responsibility for the costs of the dock repairs. The Lease addresses Tenant's financial responsibility for any repairs arising due to

⁴ The Lease permits Landlord to make and impose reasonable rules and regulations upon Tenant. *See Lease* at Paragraph 24.

“casualty,” which would include damage arising from a hurricane. Specifically, Paragraph 26 of the Lease provides as follows:

Damages to or Destruction of Property. Tenant shall give immediate written notice to Landlord of any damage to the Lease Property caused by fire or other casualty. Subject to the provisions of paragraph 7, entitled “Cooperation and Good Faith,” Tenant shall apply for all necessary permits and approvals and shall repair, restore, rebuild, or replace the damaged Lease Property to the extent that it shall deem necessary or desirable in connection with the requirements of its business. Any and all insurance proceeds from insurance policies carried by Landlord (or in Landlord’s name) resulting from damage to the Lease Property, shall be held in trust and dispersed for repairs, restoration, rebuilding, or replacement undertaken by Tenant pursuant to this paragraph unless Landlord and Tenant otherwise agree. **If the insurance proceeds are insufficient to pay the damage, then Tenant shall pay for the difference.**

See Lease at Paragraph 26 (emphasis added). No insurance proceeds for the damage were available, as Landlord understood its deductible to be \$50,000.00, which exceeded the amount of the dock repairs (\$44,398.00). As a result, no insurance proceeds were sought. Although testimony was adduced at trial to indicate that the deductible may have been only \$40,000.00, there is no evidence that the Landlord’s decision not to seek insurance proceeds was based on anything other than a good faith belief that the existing policy deductible exceeded the amount of damages.

Tenant has acknowledged its financial responsibility for the repairs, but has refused to pay for them. In a letter sent by Tenant to its insurance carrier, North American Specialty Insurance Company, relating to this specific incident, Tenant admitted that “[u]nder the terms of both [the Lease and the Settlement Agreement], J&W is responsible for repairs to its leasehold property in the event of damage.” *See Defs. Ex. 16.* Additionally, at trial, Mr. Scurry acknowledged that the Lease obligated Tenant to pay for the dock repairs. *See Tr.* at 189-190 (“The cost of the repairs, in my understanding, was for the landlord to make and bill me.”) On

these bases, Tenant does not appear to dispute its underlying obligation to pay for the dock repairs.

Landlord also seeks intervention from the Court to require Tenant to comply with various other obligations under the Lease. One example is Tenant's failure to name Landlord as an additional insured on Tenant's insurance policies and to cause the coverage on the policies "to be upwardly adjusted yearly to reflect inflation rates." *See Lease* at Paragraph 17. Tenant acknowledges that it failed to name Landlord as an additional named insured. Also, Tenant has not adjusted the policy amounts to account for inflation since 1993. *Tr.* at 197:3-6. Furthermore, Landlord alleges that Tenant is in continuing breach of Tenant's obligation to separately meter its utilities, to refrain from using and occupying additional portions of the Landlord's property that are not part of the Lease Property without authorization, and to dispose of its debris and garbage.

The final issue presented to the Court for resolution relates to the applicability of a use restriction within the Lease to an adjoining parcel owned by a different entity that is not a party to the Lease. The adjoining parcel, known as the Lucas tract, is owned by Broad Creek Marina Development, LLC, which is a separate entity from Landlord. The Lucas Tract is not identified or referenced in the Lease and specifically not within Exhibit B of the Lease, where the Landlord's "Property" is defined. On April 17, 2017, Broad Creek Marina Development, LLC received a permit from SCDHEC/OCRM to construct a ferry terminal on the Lucas Tract. Tenant alleges that the construction of a ferry terminal on the separate Lucas Tract would violate Paragraph 12 of the Lease, which prevents the "marina" from "competing with the Tenant's commercial ferry and barge service." However, as noted above, the Lucas Tract is a separate parcel that is not part of the marina, is not referenced in the Lease, and is not owned by Landlord.

II. TENANT'S CLAIMS AGAINST DEFENDANTS

In its Amended Complaint, Tenant had asserted nine causes of action: (1) breach of contract; (2) declaratory judgment relating to the office space and dock space; (3) trespass; (4) private nuisance; (5) negligence; (6) temporary and permanent injunctive relief; (7) sanctions for alleged violation of existing temporary injunction; (8) declaratory judgment regarding a competing ferry service at Broad Creek Marina; and (9) permanent injunctive relief regarding the operation of a competing ferry service at Broad Creek Marina.

On January 18, 2019, the Court granted summary judgment to Defendants on three of these causes of action: negligence, trespass, and private nuisance. Additionally, at the close of trial, Plaintiff withdrew its sixth cause of action for temporary and permanent injunctive relief. *See Tr.* at 652:15-22. Tenant also withdrew the portion of its second cause of action for declaratory judgment relating to dock space, leaving only the portion of the claim that related to commercial office space, which the Court has already addressed in the Interim Order. Tenant did not present evidence or damages in support of its claim for seventh cause of action for sanctions for alleged violation of the temporary injunction, which Tenant admitted had not been a recent issue of concern. For these reasons, judgment is granted in favor of Defendants on the seventh cause of action for sanctions.

As a result, the remaining claims are the first cause of action for breach of contract, the eighth cause of action for declaratory judgment, and the ninth cause of action for declaratory judgment relating to a competing ferry service on the Lucas Tract. These remaining causes of action are addressed below.

A. JUDGMENT IS GRANTED IN FAVOR OF DEFENDANTS ON TENANT'S CLAIM FOR BREACH OF CONTRACT

Tenant's cause of action for breach of contract alleges that Landlord breached the Lease and the 2004 Settlement Agreement by failing to provide Tenant with "an appropriate office space." *See Am. Compl.*, ¶ 14. Landlord asserts that Tenant has been offered replacement space but has declined or interfered with Landlord's efforts to relocate Tenant into a floating office.

The evidence shows that an office space was provided to Tenant, albeit, in fact a converted boat shed. Nonetheless, Tenant confirmed that it has been able to conduct and administer its various businesses, which grew in terms of revenue during the time frame in question. As noted above, the Court has already resolved the claims of both parties for declaratory judgment through the Interim Order. So, the remaining question is whether Tenant has proven a claim for breach of contract for purposes of obtaining an award of monetary damages. Upon review of the record, the Court finds that Tenant has failed to meet its burden of proof on a claim for breach of contract relating to the office space.

Following the ratification of the 2004 Settlement Agreement, various efforts were made to place Tenant in a replacement to the floating office. Landlord presented evidence at trial that a permit was obtained to place a floating office in the location that the parties had mutually chosen in the 2004 Settlement Agreement. *See, e.g., Defs. Ex. 12.* However, through no fault of either party, the intended location for the floating office became infeasible due to the accretion of the marsh bank. For a number of reasons, the parties were unable to agree upon a replacement location for the floating office prior to the trial.

Tenant presented evidence that the office space that it was utilizing prior to trial was not permitted by the Town of Hilton Head Island for that purpose, although it had been openly used for that purpose for a number of years. However, the permitting status of the office space was known to Tenant. Also, according to the terms of the Lease, would be an issue for Tenant to

address. *See Lease* at Paragraph 19 (stating that “[s]ubject to the provisions of paragraph 7, entitled ‘Cooperation and Good Faith,’ Tenant shall procure any and all permits required from local, state and federal governmental agencies, and/or otherwise, which may be required to run its business.”) On this issue, it is important to remember, as was established at trial, that the original office space provided was in the form of a portion of a “floating office” moored to the docks, which was also the intended resolution of the prior dispute relating to office space. To the extent that the office space (or other portion of the Lease Property) requires additional maintenance, repair, improvements, compliance efforts, or replacement, the Lease was written in such a manner to place such obligations upon Tenant, not Landlord. The Court is not at liberty to rewrite these provisions for the parties. *See, e.g., C.A.N. Enters., Inc. v. S.C. Health & Human Servs.*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (stating that courts are “without authority to alter a contract by construction or to make new contracts for the parties” but are “limited to the interpretation of the contract made by the parties themselves”).

Although there has been a delay in Tenant’s return to a floating office, Tenant has not proven a claim for monetary damages arising from its occupancy of the converted shed. Tenant asserted a claim for lost profits, but did not present an alleged amount of lost profits during trial. Proof of lost profits “may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like. *Moore v. Moore*, 360 S.C. 241, 254 (Ct. App. 2004). The crucial requirement in a lost profit determination is that the alleged lost profits be “established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative.” *See S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 336 (1960). Based on the record before the Court, Tenant has not provided an evidentiary basis for

any lost profits claim that the Court could consider. Although the Court could consider an award of nominal damages, Tenant has still failed to prove a breach of contract by a preponderance of the evidence, as Tenant was provided with office space throughout the term. Also, in light of the provisions of the Lease that place obligations upon Tenant for the condition of the office space, the Court is unable to conclude that the circumstances establish a breach of contract by Landlord. *See Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962) (holding that the burden is on the plaintiff to prove the existence of a binding contract, its breach, and damages suffered by the plaintiff a result of such breach). Accordingly, the Court finds in favor of Landlord on Tenant's claim for breach of contract.

B. JUDGMENT IS GRANTED IN FAVOR OF DEFENDANTS ON TENANT'S CLAIMS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF RELATING TO A POTENTIAL FERRY SERVICE ON THE LUCAS TRACT

Tenant seeks a declaratory judgment and permanent injunction that Broad Creek Marina Development, LLC, an entity that is separate from Landlord that is not a party to the Lease, should be prohibited from operating a commercial ferry service on the Lucas Tract. Tenant's claim is based on Paragraph 12 of the Lease, entitled "Use of Property," which provides as follows:

Use of Property. Tenant agrees to use the Lease Property to operate a commercial ferry; to operate a commercial barge operation; to operate tour services; to rent jet ski, boat rental excursion and fishing boats, and for other similar commercial purposes. The Tenant will not compete with the marina in the leasing, sub-leasing or in any way charging a second party for any dockage at the marina and shall not use the Lease Property for any other purposes. It is, however, understood that from time to time Tenant may use its commercial rights at the marina for the purpose of embarkation and debarkation of passengers for business affiliated with Tenant without the constraint of fuel purchases, except when the vessel is docked overnight. **The marina is excluded from competing with the Tenant's commercial ferry and barge service.** Other operations of the Tenant are non-exclusive. Tenant's portion of the floating store is to function as an office for booking charters, running its operations located at the marina, and selling tourist

and novelty items related to its business. The Tenant, affiliated business, and other vessels docked at the marina are barred from selling food, beverages, and items sold in a marina/sports or convenience store, except for novelty and tourist items related to its business. Tenant shall conduct its activities in the jointly utilized embarkation and debarkation area reasonably so as not to unnecessarily interfere with the conduct of Landlord's activities.

See Lease at Paragraph 12 (emphasis added).

Tenant alleges that the term "marina," as used in Paragraph 12 of the Lease, was intended to be binding on any company in any location affiliated with Landlord or its owner, Roger Freedman, as opposed to referring to a physical locality.

Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution. *See Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "Restrictive covenants are contractual in nature," so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. *See Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (1985). In the context of a deed, unless there is a manifest intention to the contrary, a general covenant will be construed as limited to the premises purchased." *Cheves v. City Council of Charleston*, 185 S.C. 544, 549, 195 S.E. 113, 115 (1938). Under South Carolina law, the use restriction must be construed narrowly rather than broadly. "A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). "It follows, of course, that where language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property." *Taylor*, 332 at 4, 498 S.E.2d at 864.

Paragraph 12 of the Lease indicates that "[t]he marina is excluded from competing with the Tenant's commercial ferry and barge service. Other operations of the Tenant are non-

exclusive.” See *Lease* at Paragraph 12. The word “marina” is not a defined term in the Lease but would necessarily be restricted to the property that is encompassed by the Lease, as opposed to other properties, entities, or even people (such as Mr. Freedman, personally).

The term “marina,” as it is commonly understood, is defined as a “a dock or basin providing secure moorings for pleasure boats and often offering supply, repair, and other facilities.” See <https://www.merriam-webster.com/dictionary/marina>. Under applicable law relating to contract interpretation, the Court is unable to adopt an interpretation of the term that would be so inconsistent with the plain meaning of the term “marina” so as to include Roger Freedman, an individual, or a separate entity that owns a separate parcel, as being included within the term “marina” used in the Lease. Accordingly, the Court finds that Tenant is not entitled to a declaratory judgment or permanent injunctive relief.

III. LANDLORD’S COUNTERCLAIMS

In its Answer to the Amended Complaint and Counterclaims, Landlord has asserted three counterclaims for: (1) breach of contract; (2) specific performance; and (3) negligence. The claim for breach of contract seeks monetary damages of \$134,983.73. This amount includes three components: (1) unpaid amounts of Additional Rent, Additional Charges under the Lease, and other miscellaneous charges due from Tenant; (2) unpaid amounts incurred by Landlord for repairs to the Lease Property following Hurricane Matthew; and (3) prejudgment interest on these amounts calculated at the statutory rate of eight and three fourths percent (8.75%). The negligence claim relates to other damage that Landlord alleges Tenant to have caused to the property as a result of Tenant’s operations.

The claim for specific performance against Tenant seeks the following relief: (1) compelling Tenant to accept a replacement of the floating store as its commercial office space;

(2) requiring Tenant to adhere to its obligation to pay Additional Rent and Additional Charges in a timely manner; (3) enforcing Tenant's obligation to name Landlord as an additional named insured on Tenant's insurance policies and to increase the amounts of insurance coverage in accordance with the escalation provision; (4) preventing Tenant's further usage of areas of property that are not part of the Lease Property; and (5) requiring Tenant to separately meter its utilities.

A. JUDGMENT IS GRANTED IN FAVOR OF LANDLORD ON ITS CLAIM FOR BREACH OF CONTRACT AGAINST TENANT

Landlord alleges that Tenant has breached various provisions of the Lease and the 2004 Settlement Agreement resulting in damages incurred by Landlord. Specifically, Landlord seeks an award of \$134,983.73, the amounts payable to Landlord under the Lease, including reimbursement of amounts paid by Landlord for repairs to Tenant's dock, as well as payment of invoices issued to Tenant for maintenance, utilities, and Tenant's share of Landlord's insurance and property taxes. Furthermore, Landlord requests that the Court award prejudgment interest on the outstanding balance, as the amounts due are sums certain.

In support of this claim, Landlord has demonstrated: (1) a binding contract entered into by the parties; (2) breach of the contract by Tenant; and (3) damage suffered by Landlord as a direct and proximate result of the breach. *See, e.g., Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962). Each of these three elements has been proven by a preponderance of the evidence. Although there is some dispute regarding the implications of certain portions of the Lease and Settlement Agreement, Tenant has acknowledged its duty to pay the charges under the Lease, which is an obligation that the parties clearly intended to place upon Tenant based on the wording that the parties have used in the Lease. In a contract dispute, the court's "ultimate duty is confined to interpreting the contractual provisions agreed to by the

parties – regardless of their wisdom or folly, apparent unreasonableness, or any failure of the parties to guard their interests carefully.” *Maybank v. BB&T Corp.*, 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016).

Ultimately, the purpose of all rules of contract construction is to ascertain the intention of the parties to the contract. *See, e.g., Parker v. Byrd*, 309 S.C. 189, 191, 420 S.E.2d 850, 852 (1992). “It is fundamental that[,] in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.” *Id.* at 498–99, 649 S.E.2d at 502. With these principles in mind, the Court can address and resolve the disputed issues under the Lease and 2004 Settlement Agreement raised by Landlord’s claim for breach of contract.

i. Tenant is Obligated to Pay Landlord for Costs Incurred for Tenant’s Use and Possession of Leased Premises

In the Lease, Tenant and Landlord agreed that Tenant shall pay taxes, license fees, insurance, utilities, and all other costs of ownership and possession of the Leased Property, which includes the dock and office space. *See Lease* at Paragraph 5. However, Tenant has not upheld its obligations under Paragraph 3 of the Lease causing Landlord to bear the burden of the out-of-pocket expenses while Tenant has continued to benefit from its use of the Lease Property. *See Lease* at Paragraph 3. Paragraph 1(e) of the 2004 Settlement Agreement, entitled “Common Area Charges,” provides that Tenant “agrees to pay all common area charges as identified in the Lease that come due and payable beginning January 2005. To resolve the prior dispute, the parties agreed to a formula for determining the specific amounts due and payable by the Parties for common area charges that is attached to the 2004 Settlement Agreement as Exhibit F. *See 2004 Settlement Agreement at Ex. F.* However, these obligations have not been upheld by

Tenant. The Court concludes that Landlord is entitled to judgment for the unpaid charges with prejudgment interest.

ii. Tenant is obligated to Reimburse Landlord for Dock Repairs

Landlord has completed the necessary repairs and replacement but has refused to pay Landlord for the repairs. The Lease provides the allocation of these responsibilities. Tenant acknowledges that it is responsible for repairs to its leasehold property in the event of damage, in accordance with the Lease and 2004 Settlement Agreement. *See Defs. Ex. 16.* Tenant further acknowledges that Landlord completed the necessary repairs to the portions of the leased property that were damaged during Hurricane Matthew and that Tenant has not reimbursed Landlord for the repairs to the dock.

In addition to the sections of the Lease already discussed, the parties included a detailed set of provisions regarding "Indemnity and Liability," which also place the burden upon Tenant to reimburse Landlord for any arising from the occupancy or use by Tenant of the Property as a whole, which includes the Lease Property:

Indemnity and Liability. Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorneys' fees arising from the occupancy or use by Tenant of the Property. Landlord shall not be liable, and Tenant waives all claims for damage to person or property sustained by Tenant, its employees or agents, resulting from the condition of the Property or as may result from any accident in or about the Property or which may be the result directly or indirectly from any act or neglect to the Property of which the lease is a part. Landlord shall not be responsible or liable at any time for any loss or damage to Tenant's merchandise, equipment, fixtures or other personal property of Tenant or Tenant's business. Landlord shall not be responsible or liable to Tenant or those claiming by, through or under Tenant for any loss or damage to either the person or property of Tenant that may be occasioned by or through the acts or omissions of persons occupying adjacent, connecting or adjoining Property. Landlord shall not be responsible or liable for any defect, latent or otherwise, in any building constituting the Property or any of the equipment, machinery, utilities, appliances or apparatus therein, nor shall it be responsible or liable for any injury, loss or damage to any person or to any property of Tenant or other person caused or resulting from bursting, breakage, or

by or from leakage, ice, running, backing up, seepage, or the overflow of water or sewage in any part of the Property or from any injury or damage caused by or resulting from acts of God or the elements or for any injury or damage caused by or resulting from any defect or negligence in the occupancy, building, machinery, apparatus or equipment by any person or by or from the acts or negligence or any occupant of the Property. In the event Landlord transfers this Lease, except as collateral security for a loan, upon such transfer Landlord will be released from all liability and obligations hereunder. The indemnities provided in this Lease shall survive the termination or expiration of this Lease or any renewals; provided, however, Landlord shall be liable for the negligent acts of Landlord and its agents.

See Lease at Paragraph 30 (emphasis added). Also, Paragraph 3(c) of the Lease includes amounts incurred by Landlord for repairs done by order of Tenant as "Additional Charges," which shall be payable to Landlord as Additional Rent. *See Lease* at Paragraph 3(c). On this basis, there are at least four different sections of the Lease that establish Tenant's responsibility to repair the docks that are the portion of the Lease Property or to reimburse Landlord for any amounts incurred to make such repairs. Landlord has shown that it has incurred damages for the repair and replacement of the dock for which it is entitled to reimbursement by Tenant based on the terms of the Lease.

During trial, the question arose as to whether Landlord must "prove" that it was Tenant, as opposed to an act of God, that "caused" the damage to the dock which necessitated the repairs. If Tenant were an unrelated third-party, as opposed to a tenant under a binding Lease, Landlord would likely be held to such a standard of proof of causation. However, under the circumstances presented, the duties and financial responsibilities of Tenant and Landlord are spelled out in the Lease. Upon review of the relevant provisions of the Lease, which have been cited above, it is clear that Tenant's responsibility for payment of repairs to the dock is not limited to those situations where Tenant has been the proximate cause of damage to the Lease Property. On the contrary, the various provisions of the Lease lead to a uniform conclusion: Tenant is responsible

for the cost of repairs and maintenance to the docks that are the portion of the Lease Property, regardless of the legal cause of the damage. *See Lease*, at Paragraphs 3(c), 6, 18, 26, and 30. Furthermore, to whatever extent it would be argued that the provisions are ambiguous (which neither party alleged), Tenant's admission of responsibility for the repairs in written correspondence with its insurance carrier is significant evidence of the understanding of the parties on this issue. Similarly, Tenant acknowledged responsibility for dock repairs during Mr. Scurry's testimony at trial. Although insurance proceeds would be applicable to defray the cost of the repairs, ultimately, there were no insurance proceeds obtained from any carrier. For these reasons, if the Court were to decline to hold Tenant responsible for the payment of these repairs, the mutual agreement of the parties as set forth in the Lease would be undermined. It is the Court's duty to enforce, rather than modify, the terms of the Lease. Therefore, the Court enters judgment in favor of Landlord for the unreimbursed repairs to the dock plus prejudgment interest.

iii. Landlord is Entitled to Prejudgment Interest on the dock repair

The amounts paid for the dock repair are a liquidated sum certain. Under South Carolina law, "[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." *See* S.C. Code § 34-31-20. "Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006). Prejudgment interest is not allowed on an unliquidated claim in the absence of an agreement or statute." *Id.* Liquidated damages "are damages the amount of which

B. JUDGMENT IS GRANTED IN FAVOR OF TENANT ON LANDLORD'S CLAIM OF NEGLIGENCE AGAINST TENANT

Landlord's second cause of action for negligence seeks damages from Tenant as a result of damage done to the docks and subject property from Tenant's barge and ferry operations. However, as was the case with Tenant's claim for breach of contract against Landlord, Landlord did not present evidence of a specific amount of damages that it seeks under this cause of action, separate from the \$44,398.00 in damages that have already been awarded to Landlord in connection with its cause of action for breach of contract against Tenant. As a result, judgment will be granted in favor of Tenant on Landlord's cause of action for negligence, as the other damages were not quantified at trial.

C. JUDGMENT IS GRANTED IN FAVOR OF LANDLORD ON LANDLORD'S CLAIM FOR SPECIFIC PERFORMANCE AGAINST TENANT

Landlord seeks an order from the Court compelling Tenant to perform certain obligations and duties of Tenant under the Lease for the remainder of the Lease term. Landlord requests that, going forward, Tenant be compelled to pay the Additional Rent and Additional Charges in a timely manner. Landlord asserts that Tenant has failed to uphold its obligation under Paragraph 17 by failing to name Landlord as an additional insured. Paragraph 17 includes an escalation clause calling for the minimum coverage amounts "to be upwardly adjusted yearly to reflect inflation rates." Tenant has failed to adjust the policy amounts to account for inflation since 1993. *Tr.* at 196:24-197:13.

Specific performance may be granted where there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. *See King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984). In order to compel specific performance, a court of equity must find: (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. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). Specific performance is not an absolute right and a court granting it must follow established principles and carefully consider all circumstances of a particular case. *See Bishop v. Tolbert*, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967). In terms of the character of the underlying obligations, specific performance is an appropriate and available remedy.

Relating to the payment of Additional Rent and Additional Charges, the Court finds that it is appropriate for Tenant to be required to pay the charges due under the Lease within thirty (30) days of receipt of an invoice. The Lease is silent as to the time frame within which Tenant must pay the Additional Rent and Additional Charges due to Landlord, which allows for the Court to imply and impose a reasonable time. *See, e.g., Ebert v. Ebert*, 320 S.C. 331, 341, 465 S.E.2d 121, 126 (Ct. App. 1985). Timelines of payment has been a problem, as many invoices from Landlord to Tenant have gone unpaid for years. Under the circumstances, the Court concludes that a period of thirty (30) days from the date of invoice is a reasonable time for payment by Tenant, which shall be enforceable by Landlord going forward.

Landlord is entitled to an order of specific performance to compel Tenant to name Landlord as an additional named insured on Tenant's insurance policies. Although Tenant concedes that it is bound by the obligations in Paragraph 17, Tenant's corporate representative testified that Tenant is unaware of whether it has named Landlord as an additional insured on the policies as required by Paragraph 17 of the Lease. *See Pl.'s 30(b)(6) Dep. at 77:5-25*. The Lease provides Landlord the "right to demand exact compliance with the terms of the Lease." *See Lease at Paragraph 23*. With regard to insurance policies, Tenant is required to "keep in full force

and effect at Tenant's expense, insurance for personal property, trade fixtures and property damage as well as environmental coverage and a public liability policy all in form and substance reasonably satisfactory to Landlord, in which Tenant and Landlord shall be named as the insured." Also, the minimum coverage of one million dollars for the policies were to be "upwardly adjusted yearly to reflect inflation rates." Tenant concedes that it is bound by the obligations in Paragraph 17 but was unaware whether Tenant has caused Landlord to be named as an additional insured on the policies as required by Paragraph 17 of the Lease. *See Pl.'s 30(b)(6) Dep.* at 77:5-25. Tenant was also unaware whether the amount of coverage had been adjusted for inflation. The Court also grants Landlord's claim in order to require Tenant to include the coverage amounts in accordance with the terms of the Lease.

Other aspects of Landlord's claim for specific performance relate to Tenant's use of portions of the Landlord's property that are not part of the Lease Property and Landlord's allegation that Tenant is failing to dispose of its garbage. At trial, Landlord presented pictures of the placement of picnic tables, umbrellas, and vehicles by Tenant in locations that are not authorized under the Lease. *See, e.g., Defs. Exs. 71 and 74.* The Court finds that it is appropriate for Tenant to be limited to the use and occupancy of the Lease Property, as opposed to other portions of the Property that are reserved to Landlord. Therefore, within 15 days of the date of this Order, Tenant shall remove its personal property from any areas of the Property that are not a portion of the Lease Property. Tenant shall park its vehicles within the fifty (50) spaces that are allocated to Tenant under the Lease. Additionally, effective as of the date of this Order and Judgment, Tenant shall dispose of its own garbage and shall not leave garbage or debris on the Property or Lease Property.

For these reasons, the Court finds that Landlord is entitled to an order compelling specific performance of Tenant's obligations under the Lease.

IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that judgment is hereby granted in this matter as follows:

- Judgment is granted in favor of Landlord on Tenant's first cause of action for breach of contract;
- As to Tenant's second cause of action for declaratory judgment and Landlord's second counterclaim for specific performance regarding the commercial office space, no further findings or conclusions are needed, as these matters were addressed in the Interim Order;
- Judgment is granted in favor on Defendants on Tenant's third cause of action for sanctions, eighth cause of action for declaratory judgment relating to a competing ferry service, and ninth cause of action for permanent injunctive relief relating to a competing ferry service;
- Judgment is granted in favor of Landlord on Landlord's first counterclaim for breach of contract under the Lease and 2004 Settlement Agreement against Tenant in the amount of **\$112,428.40**;
- Judgment is granted in favor of Landlord on Landlord's second cause of action for specific performance relating to Tenant's obligations under the Lease such that Tenant: (1) pay Additional Rent and Additional Charges due to Landlord within thirty (30) days of receiving invoices; (2) name Landlord as an additional named insured on Tenant's insurance policies and increase the amounts of insurance coverage in accordance with annual inflation; (4) refrain from further usage of areas of the Property that are not part of the Lease Property; and (5) separately meter its utilities;
- Judgment is granted in favor of Tenant on Landlord's third cause of action for negligence; and
- The temporary injunction previously entered in this case by the Court in this case is hereby dissolved.

The Lease includes a provision allowing for an award of all costs, including reasonable attorney's fees to the prevailing party. *See Lease* at Paragraph 36. Any motions seeking an award of attorney's fees under this provision should be filed within fifteen (15) days of the date of this Order and Judgment.

IT IS SO ORDERED.

The Honorable Marvin H. Dukes, III
Master-in-Equity and Special Circuit Judge for
Beaufort County

_____, 2019
Beaufort, South Carolina

**COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS**

CASE NO. 2018 CP-07-1622

J&W CORPORATION OF GREENWOOD

BROAD CREEK MARINA OF HILTON HEAD, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Ellis R. Lesemann, Esq.

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)
Defendant Broad Creek Marina Properties, LLC	Plaintiff J&W Corporation of Greenwood	\$112,428.40
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		



Beaufort Common Pleas

Case Caption: J W Corporation Of Greenwood , plaintiff, et al VS Broad Creek
Marina Of Hilton Head Llc , defendant, et al
Case Number: 2018CP0701622
Type: Order/Form 4

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2020-01-09 14:33:15 page 27 of 27

ELECTRONICALLY FILED - 2020 Jan 09 4:05 PM - BEAUFORT COMMON PLEAS - CASE # 2018CP0701622