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SC Court of Appeals

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STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)))	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2018-CP-21-00227
John Michael Timmons, Jr., d/b/a Tavern on the Loop, Plaintiff, vs. First Reliance Bank, Inc., The Blanton Company, Inc., JBJR Enterprises, Inc. d/b/a The Blanton Company, Inc., WW Plasma II, LLC, Dale Porter, F. R. Saunders, Jr., Hunter Williams, and Joseph B. Blanton, individually, Defendants.	))))))))))))))))	**ORDER GRANTING DEFENDANTS WW PLASMA II, LLC AND HUNTER WILLIAMS' MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF AS TO ALL CLAIMS ASSERTED BY PLAINTIFF**

THIS MATTER came before me on the Motion for Summary Judgment filed by Defendants WW Plasma, II, LLC ("Plasma") and Hunter Williams ("Williams") (hereinafter collectively "Plasma"). After considering the oral arguments, briefs, exhibits, and pleadings in the case at hand and the Cross-Motions for Summary Judgment by Plaintiff John Michael Timmons, Jr., d/b/a Tavern on the Loop (hereinafter "Timmons") against Defendants The Blanton Company, Inc., JBJR Enterprises, Inc. d/b/a The Blanton Company, and Joseph B. Blanton (hereinafter collectively "Blanton") and Defendants First Reliance Bank, Inc., Dale Porter, and F.R. Saunders, Jr. (hereinafter "FRB" and collectively "First Reliance"), I find that Plasma is entitled to summary judgment as to all claims asserted by Plaintiff.

UNDISPUTED FACTS

This case arises out of Plasma's purchase of a commercial piece of property known as the Sweetbriar Shopping Center (hereinafter "Sweetbriar") from FRB on January 27, 2017. The

undisputed facts in the case are as follows: At the time of Plasma's purchase of Sweetbriar, there were no leases recorded at the Florence County Register of Deeds for Sweetbriar.[1] Prior to the purchase by Plasma of Sweetbriar a Lis Pendens and foreclosure action was filed on July 20, 2015 against Atlantic Regional, LLC (hereinafter "Atlantic").[2] Thereafter, Blanton, acting as a property manager for Atlantic executed a Lease with Timmons on August 20, 2015.[3] The Lease term was for 3 years with 15 years of renewal.[4] This Lease was never recorded at the Florence County Register of Deeds[5] even though it was a term in excess of one year. On December 3, 2015, the Court entered a Judgment of Foreclosure ordering Sweetbriar be sold at public auction.[6] The Judgment extinguished Timmons's Lease as a matter of law by providing that Atlantic and "all person whomsoever claiming under him, them or it be forever barred and foreclosed of all right, title, interest, and equity in redemption in the said mortgaged premises so sold, or any part thereof."[7] This foreclosure judgment was never appealed by any party. On February 4, 2016, FRB purchased Sweetbriar at auction[8] and on February 8, 2016 it notified property manager Blanton that all leases were extinguished by the foreclosure auction.[9] On January 27, 2017, Plasma purchased Sweetbriar from FRB.[10] Ten (10) days later on February 6, 2017, Plasma gave written notice to all tenants terminating their month-to-month tenancies.[11] Thereafter, in order to get the holdover tenant, Timmons, to vacate the property, Timmons and Plasma entered into a

[1] (Blanton Depo. Vol. 2, p 54)
[2] (Compl.¶ 25)
[3] (Compl. Exhibit A; Compl. ¶ 40)
[4] (Compl. Exhibit A; Compl. ¶¶ 43-44)
[5] (Blanton Depo. Vol. 2, p 54)
[6] (Compl. Exhibits L; M; Compl. ¶ 55)
[7] (Compl. Exhibit L)
[8] (Compl. ¶ 56)
[9] (Compl. ¶ 56; Compl. Exhibit N)
[10] (Compl. Exhibits P; Q; Compl. ¶ 68; 82)
[11] (Compl. Exhibit R; Compl. ¶ 86; Timmons 8/20/2019 Depo p 110/12-15)

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Termination of Commercial Lease Agreement and Release (hereinafter "Release") whereby Plasma would pay $10,322.58 to Timmons to vacate the premises and for a full and final release of any and all liability on behalf of Plasma only.[12] Timmons was represented at the time of the Release by attorney Clarence Davis and entered into the agreement freely and voluntarily; and Timmons never returned the money to Plasma.[13]

PROCEDURAL HISTORY

On January 29, 2018, Timmons filed a lawsuit against Defendants alleging his Lease was valid and survived the foreclosure of Sweetbriar and also included claims for Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Fraud, Negligent Misrepresentation, Violation of Unfair Trade Practices Act, Declaratory Action (Rescission), Tortious Interference with Contract, Tortious Interference with Prospective Business Opportunities, Breach of Duty of Good Faith and Fair Dealing, and Negligent Supervision.

Plasma previously moved for summary judgment against Timmons on August 29, 2019 only as to the issue of enforcement of the Release, and the Court entered its Form 4 Order denying that motion on February 7, 2020. This motion for summary judgment is allowed because a defendant "can bring a subsequent summary judgment motion after his first motion had been denied." *Blyth v. Marcus*, 335 S.C. 363, 366–67, 517 S.E.2d 433, 434 (1999) (citing *Brown v. Pearson,* 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997); *PPG Indus. v. Orangeburg Paint & Decorating Center,* 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)). In *Brown*, the Court quoted 21 C.J.S. Courts § 149 at 183 (1990) saying "We see no merit in the contentions that summary

[12] (Timmons 8/20/2019 Depo pp 133-134; Depo Exhibit 32)
[13] (Timmons 8/20/2019 Depo pp 105-106; 110-112; 119-125; 127; 133-134; 142-143; 160-161)

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judgment was improper because… an earlier motion for summary judgment, which raised the same issues, had been denied." (emphasis added)

Therefore, Plasma's Motion for Summary Judgment is appropriate and can be heard by this Court.

STANDARD OF REVIEW AT SUMMARY JUDGMENT STAGE

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. S.C.R.C.P. 56(c); *Platt v. CSX Transportation Inc.*, 665 S.E.2d 631 (Ct. App. 2008). "In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party." *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, __ S.E. 2d __, No. 2016-001789, 2020 WL 2182252, at *2 (S.C. Ct. App. May 6, 2020) (citation omitted). "However, it is not sufficient for a party to create an inference that is *not reasonable* or an issue of fact that is *not genuine*." *Id*. (citation omitted) (emphasis added).

Summary judgment is "based on the whole of the evidence, and in making the determination the judge should not select any one morsel of testimony and attach significance to it unless it be genuine or reasonable." *Saluda Motor Lines, Inc. v. Crouch*, 300 S.C. 43, 45, 386 S.E.2d 290, 292 (Ct. App. 1989) (affirming summary judgment on statute of frauds issue because "[t]o deny the motion ... the judge would have been required to attach unusual significance to the self-serving speculations of [the non-movant]) (citing *Witt v. Poole,* 182 S.C. 110, 188 S.E. 496 (1937)). "It is not sufficient that evidence create a far-fetched inference." *Id.* "The question on a motion for summary judgment is whether there is anything of substance to be tried. Therefore, it is incumbent upon the court to search the proof as proffered by affidavits or otherwise, to ascertain

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whether it discloses a real issue, rather than a formal, perfunctory, or shadowy one." *Saluda Motor Lines, Inc. v. Crouch,* 300 S.C. at 46, 386 S.E.2d at 292 (citation omitted) (emphasis added).

"[I]n cases applying the *preponderance of the evidence burden of proof*, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment ... [but] when the evidence is susceptible of only one *reasonable* interpretation, summary judgment may be granted." *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014) (citations omitted) (emphasis added). Breach of contract actions [such as Timmons' Count III] apply the preponderance standard. *Wallace v. Dowling*, 86 S.C. 307, 68 S.E. 571, 572 (1910). But, "only admissible evidence counts in the summary judgment calculus." *In re Eleanor McCarthy Lenahan Tr.*, 428 S.C. 598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019) (citations omitted). "Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence." *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

The "scintilla" required to withstand summary judgment as to the causes of action to which the preponderance burden applies, must be *admissible* evidence of a disputed *material* fact. *See, e.g., Bean v. S.C. Cent. R. Co., Inc.*, 392 S.C. 532, 556, 709 S.E.2d 99, 112 (Ct. App. 2011) (holding that parties' mistaken belief was not a material fact and did not prevent summary judgment)). *also*, *Smith v. Breedlove*, 377 S.C. 415, 421, 661 S.E.2d 67, 71 (2008) (holding that disputed non-material fact did not impact Court's analysis)). “If evidence favoring the non-moving party is merely colorable ... or is not significantly probative ... summary judgment may be granted.” *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp.,* 336 S.C. 53, 59, 518 S.E.2d 301,

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305 (Ct. App. 1999).

In causes of action "requiring a *heightened burden of proof* ... the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Hancock v. Mid–S. Mgmt. Co., Inc.,* 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009) (emphasis added). "The general rule is that *fraud* must be proved by clear and convincing evidence." *Hagy v. Pruitt*, 339 S.C. 425, 432, note 8, 529 S.E.2d 714, 718 (2000) (citation omitted). "[F]raudulent or *inequitable conduct* must be proved by clear and convincing evidence." *Crewe v. Blackmon*, 289 S.C. 229, 235, 345 S.E.2d 754, 758 (Ct. App. 1986). "[I]t devolve[s] upon plaintiff to make the fraud or *misrepresentations* appear by clear and convincing evidence." *Rivers v. Woodside Nat. Bank of Greenville*, 150 S.C. 45, 147 S.E. 661, 663 (1929) (emphasis added).

And *fraudulent intent* must be proved by clear and convincing evidence. See, e.g., *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 40, 737 S.E.2d 857, 862–63 (Ct. App. 2013) holding evidence of fraud presented was insufficient to clearly and convincingly prove fraudulent intent) (citing *Duncan v. Ford Motor Co.,* 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct.App.2009) ("Clear and convincing evidence is: that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. The clear and convincing standard is the *highest burden of proof known to civil law*." (internal citations and quotation marks omitted) (emphasis added)).

Timmons' remaining causes of action against Plasma and/or Williams all characterize Plasma's and Williams' conduct as fraudulent or inequitable[14] and the clear and convincing

[14] (Compl. Count IV, breach of contract accompanied by a fraudulent act (¶¶ 126-136); Count VI, fraud (¶¶ 161-170); Count VIII, negligent misrepresentation (¶179 [incorporating by reference the prior allegations of fraud "as if fully set forth herein"]; and ¶¶ 180-185); Count IX, unfair and deceptive practices (¶¶ 186-193); Count X, rescission (¶¶ 194-197); Count XI, tortious interference with contract (¶¶ 198-208); Count XII tortious interference with prospective

standard applies to them and, thus, more than a mere scintilla of admissible, clear and convincing evidence is required to withstand summary judgment as to them.

"In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights." *Garrison v. Target Corp.*, 429 S.C. 324, 347, 838 S.E.2d 18, 30, 2020 WL 216297 (Ct. App. 2020), *reh'g denied* (Feb. 20, 2020) (citing S.C. Code Ann. § 15-33-135). "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135. Timmons seeks punitive damages on Counts VI and XI-XIII and, thus, *Garrison* applies the clear and convincing standard to the willful, wanton or reckless nature of Plasma' conduct alleged there.

TIMMONS CANNOT PROVE COUNT III, BREACH OF CONTRACT

To prove a breach of contract, the burden is on Timmons to establish the existence of an enforceable Lease contract *between Timmons and Plasma*, breach *by Plasma*, and damages *caused by Plasma' breach*. *See, e.g., McCord v. Laurens Cty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020), *reh'g denied* (Feb. 20, 2020) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)).

Timmons alleges that the Lease automatically became a Lease with Plasma, on the exact same terms as in the Lease with the Bank and Atlantic.[15] This is incorrect, as a matter of law for three distinct reasons in which any one of these reasons is fatal to Timmons' claim that his Lease survived foreclosure.

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business opportunities (¶¶ 209-215); and Count XIII breach of good faith and fair dealing (¶¶ 216-218).

[15] (Compl. ¶ 115)

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First, it is undisputed that Timmons entered into the Lease with Blanton acting for non-party Atlantic[16] after *lis pendens* was filed, and that the Lease was extinguished by the foreclosure judgment and subsequent purchase by the Bank at public foreclosure auction on February 4, 2016. *See Wright v. Home Beneficial Life Ins. Co.,* 155 Ga. App. 241, 242, 270 S.E.2d 400, 401–02 (1980) ("When a lessee Leases property subsequent to the execution of a deed to secure debt [i.e. Atlantic's mortgage] and the grantee of such deed exercises the power of sale, the lessee becomes a tenant at sufferance, and the party acquiring title by foreclosure is entitled to maintain a statutory eviction proceeding against the tenant."). From "the time of filing" of *lis pendens*, "the pendency of the action shall be constructive notice to a purchaser or *encumbrancer* of the property affected thereby, and *every person* whose ... encumbrance is *subsequently executed* or subsequently recorded *shall be ... bound by all proceedings* taken after the filing of such notice to the same extent *as if he were made a party to the action*." S.C. Code Ann. § 15-11-20 (emphasis added). "That [Timmons] lacks actual knowledge of the filing is irrelevant. Perceived equities in favor of a [lessee] are thus of no moment." *MI Co., Ltd. v. McLean*, 325 S.C. 616, 626, 482 S.E.2d 597, 603, (Ct. App. 1997) (citation omitted).

The law also does not help those that do not help themselves. Timmons admits that he did not do any due diligence to discern the existence of the Lis Pendens and foreclosure action prior to signing a Lease with Blanton. Timmons said in his deposition:

> "A… I <u>didn't care</u> who owned the property. Maybe I <u>should have done due diligence</u> I guess as y'all say."[17]

[16] (Compl. ¶¶ 40-41)

[17] (Timmons 8/20/2019 Depo p 81/1-4)

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In South Carolina, a person who executes a lease after the filing of a *lis pendens* in a foreclosure action has no valid lease and cannot imply rights against the foreclosing party. See, e.g., *Pipkin v. Fletcher,* 165 S.C. 98, 162 S.E. 774, 776 (1932) (holding that "one may not rely upon a purchase or incumbrance made after the filing of the *lis pendens*." In *Pipkin* the "incumbrance" was a lease and the tenant "acquired her interest after the filing of the *lis pendens*[.]" *Id*. 165 S.C. 98, 162 S.E. at 777. For this reason the tenant was "bound by the very express provisions of our *lis pendens* statute…as effectively as if she had been made a party to the action." *Id*. "She is bound by the judgment in the action for foreclosure." *Id.*

Second, the Judgment extinguished Timmons's Lease as a matter of law by providing:

> "And it is further ORDERED, ADJUDGED AND DECREED all person whosoever claiming under him, them or it be forever barred and foreclosed of all right, title, interest, and equity in redemption in the said mortgaged premises so sold, or any part thereof."

This foreclosure judgment order was never appealed by any party; therefore, it became the law of the case.

An unappealed ruling is the law of the case and requires affirmance. *Transp. Ins. Co. Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422 (2010). See also *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159 (1970) … "an unappealed ruling, right or wrong, is the law of the case." Also, "Rights consecrated by a final judgment of the probate court are not subject to collateral attack under the guise of a declaratory action seeking construction of the terms of a will in the court of common pleas. *Jackson v. Cannon*, 266 S.C. 198 (1976).

It is clear the law in South Carolina is that when a foreclosure judgment order is not appealed, then the order is the law of the case. In the case at hand, this Court has no jurisdiction

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to overturn or defy the foreclosure judgment order by giving Timmons any rights other than as a month-to-month tenant.

Third, leases for more than one year are only enforceable against subsequent purchasers such as Plasma after they are recorded. S.C. Code Ann. § 30-7-10 states *"[A]ll leases* or contracts in writing made between landlord and tenant for a *longer period than twelve months* ... are valid so as to affect the rights of subsequent creditors ... or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court[.] Also, S.C. Code Ann. § 27-33-30 states "In order to give notice to third persons any Lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate."

The cardinal rule of statutory construction is "the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Clemmons v. Lowes Home Center*, 420 S.C. 282, 803 S.E.2d 268 (2017) quoting *Allen v. S.C. Pub. Emp. Benefit Auth.*, 411 S.C. 611, 616, 769 S.E.2d 666, 669 (2015) (internal quotations omitted). Each statute must be given its full force and effect, and the words must be given their plain, ordinary meaning. *In re Hosp. Pricing Litig., King v. AnMed Health*, 377 S.C. 48, 59, 659 S.E.2d 131, 137 (2008); *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000) (quoting *State v. Baker*, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993)).

The statutes are clear on their face and are not in need of interpretation. A lease for a term longer than a year must be recorded just like a deed to be enforceable. Thus, it cannot be disputed

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that, at all times relevant, Timmons' Lease was not "valid" or enforceable (S.C. Code Ann. § 30-7-10 and § 27-33-30) against Plasma.

As a month-to-month tenant (S.C. Code Ann. § 30-7-10) Timmons' rights extended no longer than thirty days from any given point because such tenancies are terminable upon thirty days' written notice. "A tenancy from month to month may be ended by either party giving to the other *written notice of thirty days* to the effect that such tenancy shall be then terminated. *No such tenancy shall ripen into a tenancy from year to year*." S.C. Code Ann. § 27-35-120 (emphasis added).

Such notice was provided, as Timmons admits: "By letter dated February 6, 2017 ... Plasma ... sent Timmons a "termination notice" in which it notified Timmons that it would not continue his tenancy, giving Timmons until March 13, 2017 to vacate."[18] It cannot be disputed that this letter gave Timmons more than thirty days' written notice to vacate, thereby complying with S.C. Code Ann. § 27-35-120.

Likewise, Timmons cannot prove the element of a *breach* by Plasma because (in addition to the fact that there was no Lease between these parties) Timmons' holdover tenancy could not "ripen into a tenancy from year to year." (S.C. Code Ann. § 27-35-120) and Plasma exercised its "absolute" legal right to evict Timmons by complying with the thirty-day written notice for termination of Timmons' month-to-month tenancy. S.C. Code Ann. § 27-35-30.[19] This exercise is not actionable. Interference with contracts is not actionable if the actor is exercising an absolute right, equal or superior to the right invaded. *See S. Contracting, Inc. v. H.C. Brown Const. Co.,* 317 S.C. 95, 100, 450 S.E.2d 602, 605 (Ct. App. 1994).

[18] (Compl. ¶ 86)
[19] (Compl. ¶ 86)

Finally, Timmons cannot prove the element of *damages* caused *by Plasma*, because there was no contract between them. Moreover, Timmons failed to plead special, consequential damages with particularity. "When items of special damage are claimed, they shall be specifically stated." SCRCP 9(g). Timmons pleads his special damages for breach of contract thusly:

> Timmons's damages include lost profits for the entire multi-term duration of the Lease, financial harm caused by his inability to pay his creditors for opening the Tavern on the Loop, emotional suffering, damage to business reputation and reputation in the community and loss of enjoyment of life.[20]

The above pleading is inadequate to give Plasma notice of his special damages. "Unlike general contract damages ... special damages are recoverable only if, when the contract was formed, the breaching party had reason to foresee (or was clearly warned of) their probable consequence." *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 623–24, 819 S.E.2d 154, 158 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018), *cert. denied* (June 28, 2019) (citations omitted). "Because foreseeability is the key condition of their recovery, special damages must be specifically pled[.]" *Id.* "Special damages must ... be specifically alleged in the complaint to avoid surprise to the other party." *Id.*

Not only are these damages not pleaded specifically, Timmons cannot recover them because, at the time the Lease was formed (2015), Plasma was not in the picture and could not have *foreseen* the damages Timmons now claims. *Id.*

Moreover, it cannot be disputed that all damages result from Timmons' failure to meet his own obligation to act with ordinary due diligence. *See*, *Spence v. Spence,* 368 S.C. 106, 628 S.E.2d 869 (2006). "The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed." *Id.* 368 S.C. at 120, 628

[20] (Compl. ¶ 125)

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S.E.2d at 876. A "party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him[.]" *Id.* at 120–21, 628 S.E.2d at 876 (citation omitted).

Timmons previously represented to the Court that due diligence was exercised by another prospective tenant, Elite Laser Tag, who discovered the *lis pendens* and foreclosure in October 2015, and, for this reason, chose not to lease at Sweetbriar. Had Timmons exercised his own due diligence before he signed the Lease, he could have discovered this information, on which all his claims of damages hinge. Timmons admitted as much in his August 20, 2019 Deposition testimony stating "I didn't care who owned the property. Maybe I should have done due diligence I guess as y'all say. My deal as far as I knew and concerned was between me and Joe [Blanton].[21] "I had put all my eggs in this basket and it didn't work out."[22]

As a result, there is <u>*no basis in fact or law*</u> for Timmons' multiple allegations that Defendants "had superior knowledge" or "special knowledge" of facts material to Timmons' Lease, nor associated with his tenancy, which knowledge was "not available" or "not readily available to Timmons", nor that Plasma "knew that Timmons was acting on the basis of mistaken knowledge."[23]

The *lis pendens* gave Timmons legal notice of the foreclosure *before* he signed the Lease, and he is not entitled to any damages flowing from his claimed ignorance of the foreclosure, as a matter of law. "That the [lessee] lacks actual knowledge of the filing is irrelevant. Perceived equities in favor of a [lessee] are thus of no moment." *MI Co., Ltd. v. McLean*, 325 S.C. 616, 626,

[21] (Timmons 8/20/2019 Depo p 81/1-4)
[22] (Timmons 8/20/2019 Depo p 120/23-24)
[23] (Compl. ¶¶ 105; 106; 109; 110; 129; 130; 132; 133; 175; and 182)

482 S.E.2d 597, 603, (Ct. App. 1997) (citation omitted). See also *Pipkin v. Fletcher,* 165 S.C. at 98, 162 S.E. at 777 ("one may not rely upon a purchase or incumbrance made after the filing of the *lis pendens*.").

Because Timmons cannot prove he had an enforceable rental contract with Plasma, nor that Plasma breached any duty under such contract, nor that Plasma's breach caused any of his damages, Plasma and Williams are entitled to summary judgment on Count III, breach of contract.

TIMMONS CANNOT PROVE COUNT IV, BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT OR COUNT VI, FRAUD

To establish a claim for breach of contract accompanied by a fraudulent act, Timmons must show: (1) a breach of contract [by Plasma or Williams]; (2) fraudulent intent [of Plasma or Williams] relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act [by Plasma or Williams] accompanying the breach. *Conner v. City of Forest Acres,* 348 S.C. 454, 465–66, 560 S.E.2d 606, 612 (2002). "Fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." *Id.* at 466, 560 S.E.2d at 612. "Fraudulent intent is normally proved by circumstances surrounding the breach." *Floyd v. Country Squire Mobile Homes, Inc.,* 287 S.C. 51, 54, 336 S.E.2d 502, 503–04 (Ct.App.1985). "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *Id.* at 54, 336 S.E.2d at 504.

Timmons cannot prove fraud for the same reasons that he cannot prove breach of contract accompanied by a fraudulent act – Timmons cannot present more than a mere scintilla of admissible, clear and convincing evidence of the wrongfulness of any action by Plasma, nor his right to rely on any false or misleading statement by Plasma. "In an action for fraud, a plaintiff

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must prove by clear and convincing evidence ... (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 496, 719 S.E.2d 656, 658 (2011) (citation omitted).

Fraud (*Hagy v. Pruitt*, 339 S.C. at 432, note 8, 529 S.E.2d at 718), inequitable conduct (*Crewe v. Blackmon*, 289 S.C. at 235, 345 S.E.2d at 758), misrepresentations (*Rivers v. Woodside Nat. Bank of Greenville*, 150 S.C. at 45, 147 S.E. at 663) and fraudulent intent (*Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. at 40, 737 S.E.2d at 862–63) must all be proved by more than a "mere scintilla" (*Hancock v. Mid–S. Mgmt. Co., Inc.,* 381 S.C. at 330–31, 673 S.E.2d at 803) of admissible (*In re Eleanor McCarthy Lenahan Tr.*, 428 S.C. at 605, 836 S.E.2d at 797) clear and convincing evidence to withstand a motion for summary judgment.

Timmons admits that he received notice from Plasma within days of Plasma's purchase of Sweetbriar that Timmons was to vacate the Sweetbriar property.[24] There can be no claim for fraud/misrepresentation when it was clear from the beginning that Plasma did not intend to recognize the Timmons' Lease.[25]

Timmons alleges that Plasma's letter dated February 6, 2017 giving written notice to all tenants terminating their month-to-month tenancy was a fraudulent statement.[26] However, First Reliance, as the prior owner, had already sent a letter to the property manager Blanton on February

[24] (Compl. Exhibit R; Compl. ¶ 86)
[25] (Compl. ¶ 86)
[26] (Compl. ¶ 127; 162)

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8, 2016 stating all leases were to be month-to-month.[27] Timmons' assertion is irrelevant since Plaintiff has failed to show a genuine issue of material fact as to falsity of the representations, fraudulent intent, intent that the representations be acted upon, Plaintiff's right to rely on the representations or actual reliance on such representations, South Carolina law is clear that, in the context of a claim for fraud and negligent misrepresentation, "[t]here is no liability for…representations as to matters of law." *AMA Mgt. Corp. v. Strasburger,* 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992); *see also Schnellmann v. Roettger,* 368 S.C. 17, 21, 627 S.E.2d 742, 745 (Ct. App. 2006); *Quail Hill, LLC v. County of Richland,* 387 S.C. 223, 240-241, 692 S.E.2d 499, 508-509 (2010) ("misrepresentations as to matters of law are not actionable."); *Carolina Chloride, Inc. v. Richland Cty.,* 394 S.C. 154, 166, 714 S.E.2d 869, 875 (2011) ("no action will generally lie for a misrepresentation as to a matter of law… All individuals are presumed to know the law"). Here, the alleged misrepresentations by Plasma constituted its understanding of the law and legal position as to the legal effect of the foreclosure on any existing Sweetbriar lease. A party's communication of its legal position to another party under these circumstances is not actionable as the basis for a fraudulent or negligent misrepresentation claim.

Timmons cannot provide any evidence of fraud or any misrepresentation. All allegations in Timmons' Complaint are based upon either Blanton or the Bank's alleged conduct, not Plasma's.

As previously stated, Timmons cannot prove he had an enforceable lease contract with Plasma, nor that Plasma breached any duty under such contract. For the same reasons and more, Timmons cannot prove Plasma committed a fraudulent act of "dishonesty in fact" or "unfair

[27] (Compl. Exhibit N)

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dealing" "relating to the breaching of the contract". *Conner v. City of Forest Acres,* 348 S.C. at 465–66, 560 S.E.2d at 612.

It is irrefutable that, as a matter of law, the Lease was extinguished by the foreclosure judgment before Plasma bought the property and that Timmons had no remaining rights under that lease. (See, S.C. Code Ann. § 15-11-20; S.C. Code Ann. § 30-7-10; S.C. Code Ann § 27-33-30; S.C. Code Ann. § 27-35-30; and *Pipkin v. Fletcher*, 165 S.C. 98, 162 S.E. 774, 777 (1932)).

Timmons seeks to place a duty on the Bank and Blanton (but not Plasma) for "*letting him* sign this lease" but Timmons cannot avoid his failure to do his own due diligence to discover the state of affairs at Sweetbriar before he signed the lease.[28] And, of course, Plasma had nothing to do with "letting him sign this Lease" years before it bought Sweetbriar.

Timmons has not produced evidence even hinting at a fiduciary relationship between these parties - landlord and tenant involved in arms' length transactions. Plasma had no obligation to share its future plans with him. See, e.g., *Florentine Corp. v. PEDA I, Inc.,* 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985) (holding that tenants of space in a shopping mall did not have right to rely on landlord's alleged misrepresentation that competitors would not be allowed into the mall, because there was no confidential or fiduciary relationship between them). "Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely. *This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests*." *Id*. 287 S.C. at 386, 339 S.E.2d at 114 (citation omitted) (emphasis added). "[W]e need only address the failure to show the right to rely on the alleged misrepresentation. The absence of this element alone is enough to defeat

[28] (Timmons 8/20/2019 Depo p 81/1-4)

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the claim of fraud." *Id.*, 287 S.C. at 387, 339 S.E.2d at 114 (citation omitted).

"The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date. Inferences of fact, like fullbacks on football teams, do not ordinarily run backward." *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 440, 339 S.E.2d 142, 146 (Ct. App. 1985) (citations omitted). "[A] future promise cannot constitute a false representation." *State v. Holcomb*, 426 S.C. 557, 565, 827 S.E.2d 367, 371, (Ct. App. 2019), *reh'g denied* (May 23, 2019), *cert. denied* (Sept. 25, 2019). "Evidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform." *Woods v. State,* 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct.App.1993) (citation omitted).Thus, Plasma's silence about the future cannot establish a fraudulent act here.

There has been absolutely no evidence proffered by Timmons that Plasma was dishonest or fraudulent about anything. Timmons' allegations center entirely on Blanton and/or the Bank, not Plasma. Therefore, because Timmons cannot prove Plasma committed a fraudulent act relating to the breaching of an enforceable contract, Plasma and Williams are entitled to summary judgment on Count IV, Breach of Contract Accompanied by a Fraudulent Act and Count VI, Fraud.

TIMMONS CANNOT PROVE COUNT VIII, NEGLIGENT MISREPRESENTATION

To establish liability for negligent misrepresentation, Timmons must show (1) Plasma made a false representation to Timmons; (2) Plasma had a pecuniary interest in making the false representation; (3) Plasma owed a duty of care to see that they communicated truthful information to Timmons; (4) Plasma breached that duty by failing to exercise due care; (5) Timmons justifiably relied on the representation; and (6) Timmons suffered a pecuniary loss as the proximate result of his reliance upon the Plasma representation. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407,

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581 S.E.2d 161, 166 (2003).

Timmons cannot prove negligent misrepresentation because he admits that Plasma did not misrepresent anything.[29] The *lis pendens* put him on notice of the foreclosure before he signed the Lease and he is bound to its results as if he were a party to that action. S.C. Code Ann. § 15-11-20; *McLean*, *supra*, 325 S.C. at 626, 482 S.E.2d at 602; *Cook*, *supra*, 291 S.C. at 532, 354 S.E.2d at 562 (1987); *Poole, supra,* 351 S.C. at 17, 567 S.E.2d at 889; *Pipkin, supra,* 165 S.C. 98, 162 S.E. at 777. The absence of a fiduciary relationship means that Plasma had no duty to disclose the intended redevelopment and Timmons had no right to rely on Plasma's silence. *Florentine, supra,* 287 S.C. at 386, 339 S.E.2d at 114.

Timmons admits that he received notice from Plasma within days of Plasma's purchase of Sweetbriar that Timmons was to vacate the Sweetbriar properpty. There can be no claim for fraud/misrepresentation when it was clear from the beginning that Plasma did not intend to recognize the Timmons' Lease.[30]

Because Timmons cannot prove Plasma made a false representation to him, nor any right to rely on Plasma's silence, Plasma and Williams are entitled to summary judgment on Count VIII, Negligent Misrepresentation.

TIMMONS CANNOT PROVE COUNT IX, UTPA

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. S.C. Code Ann. § 39-5-20(a) (1985). Because Timmons admits that Plasma did not mislead him, force him or do anything illegal, his claim fails. Because there was no fiduciary duty, Timmons had no right to rely on Plasma's silence as to its future plans,

[29] (Timmons 8/20/2019 Depo pp 142/20 – 143/6)
[30] (Compl. ¶ 86)

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Florentine, supra, 287 S.C. at 386, 339 S.E.2d at 114, and Timmons' claim fails. Because it cannot be disputed that Plasma had an absolute legal right to evict Timmons, his claim fails. Actions which are permitted by law are expressly exempt from the Act. *See* S.C. Code Ann. § 39-5-40(a). Interference with contracts is not actionable if the actor is exercising an absolute right, equal or superior to the right invaded. *See S. Contracting, Inc. v. H.C. Brown Const. Co.,* 317 S.C. at 100, 450 S.E.2d at 605.

In addition, Timmons must prove that Plasma's unfair acts adversely affect the public interest. *Singleton v. Stokes Motors, Inc.,* 358 S.C. 369, 379, 595 S.E.2d 461, 466 (S.C. 2004). But all of Timmons' claims spring from an alleged breach of a private contract and the Act does not create an additional right of recovery for contract disputes. "[A] mere breach of a contract does not constitute a violation of the UTPA." *Key Co., Inc. v. Fameco Distributors, Inc.*, 292 S.C. 524, 526, 357 S.E.2d 476, 477 (Ct. App. 1987) (citation omitted).

"The act is not available to redress a private wrong where the public interest is unaffected." *Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.,* 290 S.C. 475, 477–79, 351 S.E.2d 347, 349–50 (Ct. App. 1986). "Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim." *Jefferies v. Phillips,* 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct.App.1994).

Public impact may be shown by the capacity for repetition of the unfair action, but, a showing of public interest impact requires proof of "specific facts" and, without evidence of similar past acts, this element is not proved. *Jefferies, supra,* 316 S.C. at 529, 451 S.E.2d at 23-24. "The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element." *Id*.

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Here, Timmons has provided no evidence of an unfair act by Plasma, let alone public impact. He offers only conclusory allegations.[31] He speculates on impact on other tenants and clientele resulting from what is irrefutably legitimate conduct by Plasma – extinguishing month-to-month tenancies in preparation for redeveloping Sweetbriar after the foreclosure.

> Members of the public were adversely affected by Defendants' unfair or deceptive acts because, among other reasons, the tenants at the strip mall lost their tenancies due to Defendants' acts and lost their clientele who, in turn, lost the businesses, and likely discussed the same with friends, families, and business colleagues, and the Tavern on the Loop's staff and customers discussed the pending closure of the Tavern on the Loop upon learning of the Foreclosure.[32]

"Mere speculation of an adverse public impact, or speculation that the alleged wrongdoer still engages in the same business, is insufficient to establish the potential for repetition." *Simmons v. Danhauer & Assocs. LLC,* 477 F. App'x 53, 56 (4th Cir. 2012).

Because Timmons cannot prove that Plasma committed an actionable unfair or deceptive act affecting the public interest, Plasma and Williams are entitled to summary judgment on Count IX, Unfair and Deceptive Practices.

TIMMONS CANNOT PROVE COUNT XI, TORTIOUS INTERFERENCE WITH CONTRACT

To establish a cause of action for tortious interference with contractual relations, Timmons must prove (1) the existence of a contract; (2) Plasma's knowledge of the contract; (3) intentional procurement by Plasma of its breach; (4) the absence of justification; and (5) resulting damages. See, e.g., *Kinard v. Crosby,* 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993).

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[31] (Complaint ¶¶ 186-193)
[32] (Compl. ¶ 190)

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Timmons claims that unspecified Defendants "intentionally procured the breach of Timmons's tenancy and/or Lease".[33] No evidence supports this claim. The Lease was entered into by Timmons and an agent of a predecessor owner of Sweetbriar (non-party Atlantic) while Sweetbriar was in active foreclosure proceedings subject to a *lis pendens*; and all rights and obligations under the leases were extinguished by foreclosure as a matter of law.[34] See, S.C. Code Ann. § 15-11-20; *Pipkin v. Fletcher,* 165 S.C. 98, 162 S.E. 774, 777 (1932). See also, *Wright v. Home Beneficial Life Ins. Co.,* 155 Ga. App. 241, 242, 270 S.E.2d 400, 401–02 (1980) ("When a lessee Leases property subsequent to the execution of a deed to secure debt [i.e. Atlantic's mortgage] and the grantee of such deed [the Bank] exercises the power of sale, the lessee becomes a tenant at sufferance, and the party acquiring title by foreclosure is entitled to maintain a statutory eviction proceeding against the tenant.").

Another predecessor owner of Sweetbriar, the Bank, obtained the judgment in foreclosure and purchased Sweetbriar by public auction pursuant to that judgment.[35] The Bank gave formal notice of the extinguishment of the Lease by foreclosure before Plasma was involved with the property.[36] Thus, Plasma could not have procured a breach of the already terminated Lease.

Moreover, the Lease was unenforceable against subsequent purchaser Plasma, because Timmons failed to record it. And the month-to-month tenancy carried no right to remain longer than the thirty-day notice period with which Plasma complied. S.C. Code Ann. § 27-35-30; S.C. Code Ann. § 27-35-120.

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[33] (Compl. ¶ 203)
[34] (Compl. ¶¶ 40-41; 56, 68, 82 and Compl. Exhibits N, P, Q)
[35] (Compl. ¶¶ 56, 68, 82 and Compl. Exhibits N, P, Q)
[36] (Compl. ¶¶ 57, 88)

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Timmons claims interference with his various suppliers and clientele, but, because he had no right to remain a tenant beyond the thirty-day notice period in S.C. Code Ann. § 27-35-30, Plasma was within its absolute legal rights to evict him. Interference with contracts is not actionable if the actor is exercising an absolute right, equal or superior to the right invaded. *See S. Contracting, Inc. v. H.C. Brown Const. Co.,* 317 S.C. 95, 100, 450 S.E.2d 602, 605 (Ct. App. 1994). In that decision, appellant argued that this issue of justification was an issue of fact making summary judgment improper. The Court disagreed, *id.*, 317 S.C. at 98, 450 S.E.2d at 604, and it explained:

> Great American had an *absolute right* under its contract with Brown to command compliance with the subcontractor bonding requirement. To do so was nothing more than insistence upon performance of the contract by Brown. SoCon was not a party to that contract and *had no contractual right to require good faith and fair dealing* by Great American. Therefore, any *inquiry into the manner or uniformity with which Great American chose to enforce* its contract with Brown is *irrelevant*.

Id., 317 S.C. at 101, 450 S.E.2d at 605 (emphasis added). Thus, Plasma's "absolute right" to evict Timmons is irrefutable, as a matter of law, by the same events that establish Timmons' lack of rights - *lis pendens* prior to the Lease, followed by the judgment in foreclosure, the Bank's purchase of Sweetbriar at auction, the Bank's formal termination of Timmons' Lease, Plasma's purchase of Sweetbriar, and Plasma's compliance with the thirty-day notice provision applicable to month-to-month tenancies. (S.C. Code Ann. § 27-35-30)

Under *S. Contracting, Inc. v. H.C. Brown Const. Co., supra,* there can be no *material* factual dispute as to whether Plasma's acts, method or "manner" were "justified". The "manner" in which Plasma chose to enforce its absolute right is "*irrelevant*" because Timmons "*had no contractual right to require good faith and fair dealing"* by Plasma. *Id.,* 317 S.C. at 101, 450 S.E.2d at 605.

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Even if he could leap this hurdle, Timmons cannot present more than a mere scintilla of admissible, clear and convincing evidence of any damages caused by Plasma's interference. "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135. But at deposition, the only "contract" he could name as having been interfered with was the Lease which, as a matter of law, had been extinguished by operation of law. Timmons could not name a single supplier, customer or other entity whose contract had been tortiously interfered with.[37]

Because Timmons cannot prove Plasma knowingly interfered with an existing contract between Timmons and a third party, without justification, Plasma is entitled to summary judgment on Count XI, Tortious Interference with Contract.

TIMMONS CANNOT PROVE COUNT XII TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS OPPORTUNITIES

To establish this cause of action Timmons must prove (1) intentional interference with prospective contractual relations; (2) for an improper purpose or by improper methods; and (3) resulting in injury. *Eldeco, Inc. v. Charleston Cty. Sch.Dist.,* 372 S.C. 470, 480, 642 S.E.2d 726 (2007). There can be no finding of intentional interference with prospective contractual relations where, as here, "there is no evidence to suggest any purpose or motive ... other than the proper pursuit of its own contractual rights with a third party." *Id.* As shown throughout this memorandum, Plasma acted within their absolute legal rights and Timmons has produced no evidence of any improper purpose or method.

[37] (Timmons 8/20/2019 Depo pp 98/10-20; 99/2 – 100/12)

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"To satisfy the first element ... for tortious interference with prospective contractual relations, South Carolina law requires Timmons to "demonstrate that he had a truly prospective or potential contract with a third party; that the agreement was a close certainty; and that the contract was not speculative." *First S. Bank v. S. Causeway, LLC,* 414 S.C. 434, 445–46, 778 S.E.2d 493, 499 (Ct. App. 2015). At deposition, Timmons could not identify any "*truly* prospective or potential contract" that had been interfered with,[38] and he agreed with Attorney Houghton's suggestion that his prospective opportunities claim refers "to the fact that your financial condition was worsened and you have lost the opportunity to pursue other entrepreneurial endeavors that you might want to pursue; is that right?" [objection omitted] "A. In my mind that's the way I see it."[39]

This vague speculation is not "a close certainty" (*First S. Bank v. S. Causeway, LLC*, *id.)* It is irrefutable that this cause of action is based on speculation and that Timmons has produced no admissible evidence of the loss of any prospective clients, contracts or business opportunities caused by any intentional interference with any enforceable Lease or tenancy, by Plasma, for any improper purpose.

Because Timmons cannot prove Plasma knowingly interfered with Plasma's prospective contractual relations for an improper purpose or by improper methods, Plasma is entitled to summary judgment on Count XII, Tortious Interference with Prospective Business Opportunities.

SOUTH CAROLINA DOES NOT RECOGNIZE A SEPARATE CAUSE OF ACTION SUCH AS TIMMONS' COUNT XIII, BREACH OF THE DUTIES OF GOOD FAITH AND FAIR DEALING

[38] (Timmons 8/20/2019 Depo pp 98/10-20; 99/2 – 100/12; 101/25 – 102/8)
[39] (Timmons 8/20/2019 Depo p 102/2-8)

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The implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (affirming dismissal of such a claim.) Because Timmons' breach of contract claim must be dismissed, this claim must also be dismissed.

If Timmons were able to present a scintilla of admissible evidence of the elements of his breach of contract claim (Lease with Plasma; breach by Plasma; special damages resulting from Plasma's breach), then this claim would be subsumed into the breach of contract claim. In that event, Timmons would have to present more than a mere scintilla of clear and convincing admissible evidence of the "inequitable conduct" and fraudulent acts and intent he alleges in this claim. But this he cannot do - the "*manner*" in which Plasma chose to enforce its absolute right (to evict holdover tenants on thirty days' notice and redevelop Sweetbriar) is "*irrelevant*" (inadmissible) because Timmons "*had no contractual right to require good faith and fair dealing"* from Plasma. *S. Contracting, Inc. v. H.C. Brown Const. Co.,* 317 S.C. at 101, 450 S.E.2d at 605.

Timmons would have to present admissible evidence of special or consequential damages too. "As with special damages in any contract action, the plaintiff must specially plead and prove consequential losses flowing from breach of the implied covenant of good faith and fair dealing." *Brown v. S.C. Ins. Co.*, 284 S.C. 47, 56, 324 S.E.2d 641, 647 (Ct. App. 1984) (citing *Kline Iron & Steel Co. v. Superior Trucking Co.,* 261 S.C. 542, 201 S.E.2d 388 (1973); *M'Daniel v. Terrell,* 10 S.C.L. (1 N. & McC.) 343 (1818); and *Fuller v. Eastern Fire & Casualty Ins. Co., supra* (attorney's fees incurred in defending third party claim not recoverable as damages because not pleaded and proved), *overruled on other grounds by Charleston Cty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6, 87 Ed. Law Rep. 297 (1993).

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Timmons' special damages were not adequately pleaded: "Each Defendant's breach proximately caused Timmons damages that include, *inter alia,* his loss of the Lease and of his profits from the Tavern on the Loop."[40] This pleading does not even specify which Defendant is alleged to have caused which damages, and it, thus, fails to give Plasma notice. *Norwest Properties, LLC v. Strebler*, 424 S.C. at 623–24, 819 S.E.2d at 158.

Timmons cannot prove bad faith or unfair dealing by Plasma because Plasma evicted him according to its absolute legal right after Timmons lease was extinguished by the judgment in foreclosure. Timmons admits that Defendants did not mislead, force or do anything illegal to get him to sign the Release; he understood the Release; he followed his attorney's advice in signing it; and he kept the money.[41]

Because Timmons cannot prove his breach of contract claim and breach of good faith and fair dealing is not a standalone claim, and because Timmons has produced no evidence of bad faith or unfair dealing, Plasma and Williams are entitled to summary judgment on Count XIII, Breach Of The Duties Of Good Faith And Fair Dealing.

IT IS THEREFORE ORDERED that pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Plasma's Motion for Summary Judgment as to All Claims Asserted by Plaintiff is **GRANTED IN WHOLE**. The Court hereby enters summary judgment against Plaintiff on all of his claims asserted against Plasma in this lawsuit. Defendants WW Plasma II, LLC and Hunter Williams are **DISMISSED** from this lawsuit **WITH PREJUDICE**.

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[40] (Compl. ¶ 218)
[41] (Timmons 8/20/2019 Depo pp 105-106; 110-112; 119-125; 127; 133-134; 142-143; 160-161)

IT IS SO ORDERED on this ____ day of June, 2020.

____
Honorable Judge Michael G. Nettles
Twelfth Judicial Circuit

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Florence Common Pleas

Case Caption: John Michael Timmons Jr , plaintiff, et al VS First Reliance Bank Inc , defendant, et al

Case Number: 2018CP2100227

Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140