THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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Aug 28 2020
SC Court of Appeals

Civil Court Appeal Case No. 2018-CP-08-00266
Civil Court Appeal Case No. 2018-CP-08-01008

Appellate Case No. 2019-001169
Appellate Case No. 2019-001170

Aracelis Santos, ... Appellant,

v.

Harris Investment Holdings, LLC, ... Respondent.

RESPONDENT'S RETURN TO APPELLANT'S MOTION TO REMAND

Respondent Harris Investment Holdings, LLC ("HIH"), submits this return in opposition to Appellant Aracelis Santos' ("Santos") motion to remand filed August 20, 2020.

Santos noticed these consolidated appeals after the circuit court affirmed the magistrate's order evicting her from a commercial property, which she leased from HIH to operate a night club. Following a trial, the magistrate concluded Santos repeatedly facilitated, and participated in, criminal activity at the leased property in violation of her lease. Santos does not appeal the lower courts' conclusion that she breached the lease and that ejectment was proper. (*See* Appellant's Initial Br.) Instead, she appeals only the circuit court's orders affirming the magistrate's award of attorney's fees to HIH as the prevailing party and dismissing without prejudice a second civil appeal filed by Santos in the circuit court (Case No. 2018-CP-08-00266), in which she purported

to assert tort claims against HIH. (*Id*.) More than a year after she filed the appeals in this Court, Santos now requests that the Court remand this case to the magistrate without a decision to allow her to pursue allegations related to HIH's demolition of the property.[1]

The Court should deny the motion to remand for three primary reasons. *First*, remand for the reasons cited by Santos is improper.[2] Santos cites no authority that would allow her to delay a decision on the appeals in this Court until resolution of claims in the lower court that she has not yet asserted. Moreover, HIH is entitled to timely resolution of this appeal and, assuming a decision affirming the lower courts, to proceed with execution on its award of attorney's fees.

Second, remand is unwarranted because nothing prevents Santos from presenting her allegations regarding demolition of the building to the lower courts while this appeal is pending. The magistrate's court retains jurisdiction to enforce the order that Santos alleges HIH violated by repossessing and demolishing the building, and the circuit court would have jurisdiction to resolve any claim for damages.

Third, Santos is not entitled to any relief in connection with the allegations in her motion. HIH demolished its building in March of 2019 after making the decision to redevelop the property following the discovery of significant levels of asbestos in the building, remediation of which would have been prohibitively expensive. What Santos conveniently failed to mention in her

[1] HIH demolished its building on March 22, 2019, four months before Santos noticed the appeals in this Court. Thus, it is curious that Santos commenced the appeals after the demolition, only to request remand of the appeals seventeen months later (at the same time she filed the Initial Brief), ostensibly to allow her to pursue allegations related to the demolition.

[2] Presumably, Santos intends for this Court to review the issues currently on appeal—the attorney's fee award and dismissal of the second appeal—after a decision by the magistrate on remand regarding the allegations discussed in her motion. However, her motion is unclear on this point. If that is not the case, and Santos intends to abandon appellate review of the issues raised in the current appeals, the appeals should not be remanded, but rather dismissed with prejudice.

motion is that the demolition occurred four months *after* the term of Santos' lease expired. HIH's conduct in retaking possession and demolishing the property after expiration of the lease term was authorized by the lease agreement and South Carolina law and did not contravene any court order.

FACTUAL & PROCEDURAL BACKGROUND

On November 14, 2016, HIH filed an action for ejectment in the magistrate's court seeking to evict Santos from a property located at 5901 Loftis Road, Hanahan, South Carolina, known as "El Alamo." (11/14/2016 Application for Ejectment, **Exhibit A**.) Santos and her partner, Benjamin Reyna ("Reyna"), operated El Alamo as a nightclub. The lease agreement for the property dated December 15, 2015 (the "Lease"), stated that the term commenced on December 1, 2015, and expired on November 30, 2018. (12/15/2015 Lease, **Exhibit B**.) The Lease contained no right of renewal, and it expressly required Santos to surrender the property to HIH in "broom clean" condition upon expiration of the term. (Lease, Sec. 22.) HIH's remedies for Santos' failure to surrender the premises upon expiration of the term included the right to "re-enter and forthwith repossess the entire Premises." (Lease, Sec. 30.)

In the ejectment action, HIH argued to the magistrate that Santos should be ejected from the property, among other grounds, because she and Reyna repeatedly committed and facilitated criminal activity at El Alamo in violation of the terms of the Lease and created a public nuisance.[3]

[3] Prior to the eviction action, the Hanahan City Council voted unanimously to revoke the business license for El Alamo due to persistent criminal activity at the location. Reyna (the license holder), represented by the same counsel who represents Santos in these appeals, appealed the license revocation to the circuit court, which affirmed the council's decision. (11.15.2016 Order, **Exhibit C**.) Reyna appealed the circuit court's decision to this Court, but he subsequently dismissed the appeal before this Court rendered a decision on the merits. (See *Reyna v. Town of Hanahan*, COA Case No. 2017-000796.) El Alamo continued to operate despite the revocation of its license while the matter was on appeal.

The parties waived their right to a jury trial, and the magistrate held a bench trial on October 11, 2017.

Following trial, the magistrate issued an order dated December 7, 2017 (the "Ejectment Order"), in which he granted HIH's application for ejectment.[4] (12/7/2017 Order, **Exhibit D**.) The magistrate concluded that Santos repeatedly violated local laws in violation of Section 10 of the Lease and created a public nuisance on the property. (*Id*. at 13-21.) The Ejectment Order stated "Santos has maintained El Alamo as a place where the laws are publicly, repeatedly, persistently, and intentionally violated, thus disturbing the public peace." (*Id*.) In addition to granting the application for ejectment, the magistrate awarded HIH its attorney's fees incurred in connection with the lawsuit in the amount of $34,608. (2/9/2018 Order, **Exhibit E**.)

Santos filed a motion for a new trial, which the magistrate denied via written order dated February 2, 2018. On February 2, 2018, the magistrate issued a warrant of ejectment. (2/2/2018 Warrant of Ejectment, **Exhibit F**.) On February 8, 2018, Santos appealed the magistrate's orders to the circuit court (Case No. 2018-CP-08-00266).[5]

After several months of litigation over the amount of the appeal bond, on May 17, 2018, the magistrate issued an Amended Bond to Stay Execution on Appeal (the "5/17/2018 Bond Order," **Exhibit H**). The Bond Order provided that, once Santos posted bond, execution of the

[4] The Magistrate also grated HIH's application to eject Santos from another nearby property at which Santos operated a convenience store known as "Latino Mix." Santos vacated Latino Mix voluntarily after trial, and that property is not at issue in this appeal.

[5] Santos subsequently filed a second civil appeal in the circuit court (Case No. 2018-CP-08-1008), in which she not only sought to appeal the magistrate's order of ejectment and related rulings, but also purported to assert various tort claims against HIH. With Santos' consent, the circuit court ordered her to dismiss this second action without prejudice. When she failed to comply, the circuit court dismissed the action on its own. That ruling is the subject of Appellate Case No. 2019-001170. (6/6/2019 Order, **Exhibit G**.)

ejectment warrant would be stayed pending appeal. Santos subsequently posted the bond and continued to occupy the property.[6]

On November 30, 2018, while Santos' appeals remained pending in the circuit court, the Lease expired according to its terms. (Lease, p. 1.) On October 16, 2018, HIH sent Santos notice via certified mail directing her to vacate the property and remove her belongings by midnight on November 30. (10/16/2018 Ltr. from Merritt Abney, **Exhibit J**.) Santos did not vacate the property and continued to operate El Alamo in violation of the Lease. On February 26, 2019, HIH again instructed Santos to vacate the property and notified her that her refusal to do so constituted a breach of the lease and trespass. (2/26/2019 Ltr. from Merritt Abney, **Exhibit K**.)

In the meantime, HIH decided to redevelop the property following its discovery of significant levels of asbestos in the building and preliminary efforts at remediation. On or about March 22, 2019, when the building was vacant, contractors retained by HIH demolished the building in accordance with a permit obtained from the Town of Hanahan. Although Santos alleges restaurant equipment remained in the building when it was demolished, this equipment was affixed to the building before Santos leased the property and belonged to HIH.

ARGUMENT

The Court should deny the motion to remand because 1) remand is improper under the circumstances and would prejudice HIH, 2) nothing prevents Santos from presenting her

[6] The appeal remained pending in the circuit court for 16 months because Santos repeatedly failed to order a transcript of the proceedings before the magistrate. Santos' counsel was instructed by multiple circuit court judges to prepare the transcript and was eventually ordered to do so. Nevertheless, Santos ignored the order for several more months to delay these proceedings so that she could remain in the property for as long as possible before the appeal was decided. This maneuvering is detailed more fully in HIH's motion for a rule to show cause and to dismiss the appeal for lack of prosecution filed on December 5, 2018. (12/4/2018 Motion, **Exhibit I**.)

allegations related to demolition of the building to the lower courts while this appeal is pending and, 3) the allegations do not state a claim for relief against HIH.

A. Remand for the purpose of delaying resolution of the appeals is improper and would prejudice HIH.

Santos seeks to avoid a decision by this Court regarding the matters properly on appeal until after resolution by the lower courts of claims she has not formally asserted in any court. Santos cites no authority that authorizes such relief, and the motion appears designed solely for the purpose of delay, which is prohibited (and sanctionable) under Rule 269, SCACR. HIH obtained its award of attorney's fees more than two years ago, but due to Santos' delays in the lower courts and in this Court, HIH is nowhere near being able to enforce its judgment. (*See, e.g.*, 12/5/2018 Motion, **Exhibit I**.) Granting Santos' motion would force HIH to wait several more years, until after resolution of claims Santos has not even plead, to collect its judgment. This Court should not further delay resolution of this matter by remanding for that purpose. Rule 1, SCRCP (stating the rules of court "shall be construed to secure the just, speedy, and inexpensive determination of every action).

Moreover, Santos' argument that demolition of the building prevents this Court from meaningfully reviewing the magistrate's order of ejection and award of attorney's fees is frivolous. To review the lower court's rulings, this Court requires access only to the record on appeal, not to the subject building. As the circuit court correctly concluded, and HIH will outline in its forthcoming Respondent's brief, the record fully supports the magistrate's rulings.

B. Remand is unnecessary for Santos to present any claims based on demolition of the building to the lower courts.

Nothing prevents Santos from presenting her allegations related to demolition of the building to the lower courts while this appeal is pending. The magistrate retains jurisdiction to

address compliance with the Bond Order. Rule 205 of the Appellate Court Rules grants the lower courts continuing jurisdiction over matters unaffected by the appeal. Rule 205, SCACR ("Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."); *Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997) ("Although service of notice of an intent to appeal divests the lower court of jurisdiction over the order appealed, the lower court retains jurisdiction over matters not affected by the appeal."). The Bond Order is not on appeal and has no bearing upon the matters which are properly on appeal—the attorneys' fee award and dismissal without prejudice of the second appeal. Thus, the magistrate retains jurisdiction to decide matters related to the Bond Order. *Bakala v. Bakala*, 352 S.C. 612, 631-632, 576 S.E.2d 156, 166 (2003) (lower court retained jurisdiction to enforce unstayed contempt during appeal of order dividing marital estate).

C. Remand is unwarranted because Santos' allegations fail to state a claim for relief against HIH.

HIH's conduct in retaking possession and demolishing the property after expiration of the lease term did not contravene any court order and was authorized by the Lease and South Carolina law.

1. HIH did not violate the Bond Order.

Santos claims HIH violated the terms of the Bond Order dated May 7, 2018, which stayed the warrant of execution issued in connection with the Ejectment Order. But HIH did no such thing. The relevant portion of the Bond Order states as follows:

> Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

(**Exhibit H**.) The Bond Order merely stayed the sheriff's execution of the warrant of ejectment. Nothing in the Bond Order precluded HIH from retaking possession of the property in accordance with South Carolina law upon the subsequent expiration of the Lease. The Bond Order does not direct HIH to do, or to not do, anything, and it does not address what should or should not happen upon expiration of the Lease. HIH therefore did not violate any provision of the Bond Order.

2. HIH had the right to under the Lease and South Carolina law to retake possession after expiration of the lease term.

HIH had the right under the Lease and South Carolina law and to retake possession at the conclusion of the Lease term without an order of any court. The Lease expressly granted HIH the right, upon Santos' failure to surrender the premises, to "re-enter and forthwith repossess the entire Premises." (Lease, Sec. 30.) Moreover, under South Carolina law, where a tenant has no right to continue in possession upon expiration of the lease term, the landlord may expel him from the premises without legal process and may not be held liable for doing so. *Rush v Aiken Mfg. Co.*, 58 S.C. 145, 36 S.E. 497, 499 (1900) (holding that the landlord could retake possession upon expiration of the lease term without process of law); *Barbee v. Winnsboro Granite Corp.*, 190 S.C. 245, 2 S.E.2d 737, 738 (1939) (affirming that "the rule in this state is that, where the tenancy has terminated, the landlord may enter upon and retake possession of the premises, and he commits no trespass upon the real estate in so doing, even if force is used in making such entry, and therefore, in such a case, he is not liable to a civil action for trespass.").[7] Furthermore, nothing in the

[7] South Carolina is not alone in this regard. Despite the widespread existence of ejectment statutes, a majority of jurisdictions permit a commercial landlord to exercise self-help in retaking possession of the leased property upon expiration of the term. *Restatement of the Law of Property* 2d § 14.2, Reporter's Note (1977) ("[A]n apparent majority of jurisdictions still permits the landlord to use some degree of self-help to recover possession of the leased property from a holdover tenant" and "maintain that the existence of the statutory remedy does not prohibit the

commercial ejectment statutes indicates the legislature intended to make ejectment remedy exclusive. *See* S.C. Code Ann. § 27-37-10, et. seq.

Here, there is no genuine dispute that the Lease term ended on November 30, 2018. (Lease, p. 1.) In fact, although the Lease had not yet expired when the Magistrate issued the Ejectment Order, the Magistrate expressly recognized in the order that the Lease was set to expire on November 30, 2018. (12/7/2018 Order at 2.) The Lease contained no right of renewal, and it expressly required Santos to surrender the property at the conclusion of the term. (Lease, Sec. 22.) Santos does not argue otherwise. Thus, because Santos failed to surrender the property upon expiration of the term as required by the Lease, HIH had the right to retake possession of the property and cannot be held liable or sanctioned for attempting to do so. *Rush*, 58 S.C. 145, 36 S.E. at 499; *Barbee*, 190 S.C. 245, 2 S.E.2d at 738.

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landlord from using self-help."); *Shorter v. Shelton*, 33 S.E.2d 643, 647 (Va. 1945) (holding landlord has a common law right to retake possession from a holdover tenant and summary ejectment statutes are not the landlord's exclusive remedy); *Laney v. State*, 842 A.2d 773, 785 (Md. 2004) ("The right of peaceable self-help, therefore, is a viable mechanism for a title owner of property to obtain actual possession of real property from a holdover mortgagor."); *In re Estate of Sauder*, 156 P.3d 1204, 1216 (Kan. 2007) ("Generally, courts enforce clauses in commercial leases that reserve a landlord's right to peaceably reenter commercial premises and regain possession if a tenant breaches a material obligation."); *Watson v. Brown*, 686 P.2d 12 (Haw. 1984) (holding that a summary eviction proceeding is not exclusive remedy available to landlord for breach of lease and landlord may resort to self-help to repossess premises); *Rucker v Wynn*, 441 S.E.2d 417, 420 (Ga. App. 1994), *disapproved of on other grounds by George v. Hercules Real Estate Servs., Inc.*, 795 S.E.2d 81 (Ga. App. 2016) (holding that where terms of commercial lease gave a landlord the right to reenter and take possession of premises without recourse to legal proceedings, he may do so if this can be accomplished without breach of peace); *Martinez v. Ulloa*, 22 N.Y.S.3d 787 (N.Y. App. Term 2015) (holding a landlord may utilize self-help to regain possession of the demised commercial premises where permitted by lease agreement); *In re 1345 Main Partners, Ltd.*, 215 B.R. 536 (Bankr. S.D. Ohio 1997) (holding that, under Ohio law, a commercial lessor may resort to self-help repossession, pursuant to a valid lease provision, as remedy for lessee's breach of lease agreement, absent a breach of peace); *Brown v. State Cent. Bank*, 459 F. Supp. 2d 837 (S.D. Iowa 2006) (holding that, under Iowa law, landlord could resort to self-help where commercial tenant failed to vacate leased premises after expiration of term and there was no dispute about landlord's entitlement to possession or breach of the peace).

CONCLUSION

For the reasons set forth above, the Court should deny the motion to remand and proceed with resolution of the matters properly on appeal.

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Attorneys for Respondent, Harris Investment Holdings, LLC

Charleston, South Carolina
August 28, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA	)	CIVIL CASE NUMBER 2016CV0810605290
	)	IN THE MAGISTRATE'S COURT
COUNTY OF BERKELEY	)	
	)	
Harris Investment Holdings, LLC	)	AFFIDAVIT AND APPLICATION OF
	)	EJECTMENT AND RULE TO SHOW CAUSE
PLAINTIFF	)	
	)	
VS.	)	
	)	
Aracelis Santos,	)	
	)	
	)	
DEFENDANT	)	

Harris Investment Holdings, LLC ("Landlord"), plaintiff in this action, is the lessor of the premises within the jurisdiction of the Berkeley County Magistrate's County, which is described as:

5901 Loftis Road, Hanahan, South Carolina (the "Premises").

Defendant Aracelis Santos ("Tenant") is a tenant-lessee with regard to the above-described premises, as evidenced by the following documents attached hereto as Exhibit A:

Lease Agreement dated December 1, 2015 (the "Lease")

Grounds for this ejectment are one or more of the following:

☐ The tenant fails or refuses to pay the rent when due or when demanded; or
☐ The term of tenancy or occupancy has ended; or
☒ The terms or conditions of the lease have been violated as follows:

Tenant violated Section 10 of the Lease by failing to comply with local laws and ordinances, resulting in revocation of the business license issued by the City of Hanahan in connection with the business operated by Tenant (or with her consent) on the Premises. The transcript from the hearing for the Hanahan City Counsel at which the business license was revoked is attached hereto as Exhibit B.

Tenant further violated Section 10 by continuing to operate the business without a valid business license.

Tenant violated Section 10 of the Lease by repeatedly violating the International Fire Code, adopted by the City of Hanahan, regarding the maximum capacity for the building located on the Premises.

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NOV 14 2016
Goose Creek
Magistrate's Office

Tenant violated Section 8 of the Lease by failing to provide evidence of increased insurance coverage as demanded by Landlord pursuant to Section 15 of the Lease and the Notice of Default attached hereto as Exhibit C.

Tenant violated the Lease by creating a nuisance and threat to others as determined by the City of Hanahan in revoking the business license for the business operated by Tenant (or with her consent) on the Premises. According to the City, Tenant has maintained and utilized the Premises in a manner that poses an unreasonable risk to others, all as described in Exhibit B and the evidence submitted at the hearing.

Sworn to before me)
this 14th day of November , 2016)
)
)
Magistrate or Notary Public for South Carolina)
)
My Commission expires October 22, 2023)

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Attorney for Plaintiff

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NOV 14 2016
Goose Creek
Magistrate's Office

EXHIBIT B

COMMERCIAL LEASE

In consideration of the covenants herein contained, Aracelis Santos, hereinafter called **"Tenant"** and Harris Investment Holdings, LLC, Landlord, or Agent for the Landlord, hereinafter called **"Landlord"**, agree as follows:

For the period of time beginning on December 1 ,2015 , and ending at midnight on November 30 , 2018 , Landlord hereby grants to Tenant the sole and exclusive right to lease the real property known as:

Lot _____ Block _____ Section _____ Subdivision _____

Address 5901 Loftis Rd

Tax Map # 265-02-15-068 City Hanahan Zip 29410-2663

County of Berkeley , State of South Carolina.

THE ☐ LANDLORD ☐ TENANT IS LICENSED UNDER THE LAWS OF SOUTH CAROLINA AS A REAL ESTATE LICENSEE.

1. **RENT.** Tenant shall pay to the Landlord, a Monthly Base Rental and Additional Rent as follows:
   (a) MONTHLY BASE RENTAL. Tenant shall pay a Monthly Base Rental to Landlord for each month during the term of this lease or any renewal thereof, in advance on or before the 1st day of each month during the term of this Agreement. The amount of the Monthly Base Rental for the first year of this Agreement shall be Two Thousand, One Hundred Seventy-Six 30/100 Dollars ($ 2,176.30).
   (b) The rental for the first month of this lease shall be paid at the date of execution thereof. The Monthly Base Rental shall be increased as follows: 2% per year, for 2 additional Years.
   (c) ADDITIONAL RENT. In addition to the Monthly Base Rental and any accumulative adjustments, Tenant shall pay Additional Rent as indicated herein below (check all that apply):
      ☒ 1. PROPERTY TAXES (choose one):
         ☐ TAX INCREASE. Tenant shall pay annually a sum equal to any increase in real estate taxes (ad valorem, special assessments and any other government charges to include any solid waste disposal user fees) over those assessed for the year of 2015 , on a pro rata basis. Presentation of copies of tax bills shall constitute sufficient evidence of additional rent due and shall be payable within fifteen (15) days after receipt thereof. Tenant shall be charged additional rent only for the portion of the calendar year during which this lease was in effect.

         ☒ NET LEASE. Tenant shall pay annually the real estate taxes (ad valorem, special assessments and any other government charges) upon presentation by the Landlord of tax bills on the property. These charges shall be payable by the Tenant within fifteen (15) days after receipt thereof. So long as Tenant shall not be in default, Tenant shall be responsible for the portion of the calendar year during which this lease was in effect.

      ☐ 2. PERCENTAGE OF GROSS SALES. Tenant shall pay annually a sum equal to _____ % of gross sales, as herein defined, in excess of _____ Dollars, ($ _____), in any lease year. Gross sales as used herein shall be the amount of the gross sales as indicated on the Tenant's South Carolina Tax Report (Form ST-3). Tenant shall deliver to Landlord a certified copy of each

[AS] TENANT, [___] TENANT, AND [___] LANDLORD HAVE READ THIS PAGE.

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monthly report within ten (10) days after report is due to the South Carolina Tax Commission. Lease year as used herein shall be the period of one year's duration commencing on the effective day of the lease and each successive period of one full year commencing on the anniversary of said effective date. Tenant shall deliver to Landlord within days following the end of each lease year written statement signed and certified by Tenant to be a true and correct statement of the amount of gross sales during the proceeding lease year. Tenant shall at the same time pay the amount of Additional Rent due (if any) as a percentage of the excess over the amount herein stated.

☒ 3. COMMON AREA MAINTENANCE. Tenant shall pay on the first day of each month, in advance, a fee equal to the Tenant's pro rata share of the cost of maintaining common areas. Tenant's common area maintenance fee for the remaining portion of the calendar year in which this lease became effective shall be 0 52/100 _____ Dollars ($ 0.52) per month. Said fee shall be adjusted at the end of each calendar year to reflect any increase in cost during said year. Common areas include all areas used in common with the other Tenants of the property of which the Premises is a part, for the convenience or welfare of all tenants' customers collectively. Common area maintenance shall mean and include all amounts paid or incurred by Landlord for operating, managing and maintaining the Property, including the buildings, improvements and common area facilities of the Property in a manner deemed by Landlord reasonable and appropriate and for the best interest of the Property, including, without limitation, all costs and expenses of 1) operating, repairing, lighting, cleaning, painting and securing the Property and the common areas of the Property, and water and sewer charges; 2) paying all personnel employed on a part time basis or full time basis in the operation, maintenance, or repair of the Property, including the common areas; 3) removing rubbish and debris from the Property; 4) repair and maintenance of walkway, landscaping, and lighting facilities, other than such costs and expenses of a capital nature; 5) management fees paid to the property management firm to manage the Property; 6) planting, replanting and replacing flowers, shrubbery, and planters and the supplies required therefore; 7) all utilities used in connection with the operation of the common area facilities; 8) seasonal decorations, including installation and removal thereof and electricity therefore; 9) leasing or renting equipment used in connection with the operation and maintenance of the common areas; 10) fountain maintenance and repairs, when applicable; 11) security, fire and crime prevention services; 12) utility charges for the common area including without limitation, storm water, sewer and pollution control fees.

☒ 4. INSURANCE. Landlord shall keep the Premises adequately insured at a reasonable rate as indicated below (choose one):

☐ INSURANCE INCREASE. Tenant shall pay annually a sum equal to any increase in insurance premium for the year of _____ , on a pro rata basis. Presentation of copies of insurance bills shall constitute sufficient evidence of additional rent due and shall be payable within fifteen (15) days after receipt thereof. Tenant shall be charged additional rent only for the portion of the calendar year during which this lease was in effect.

☒ NET LEASE. Tenant shall pay annually the insurance premium upon presentation by the Landlord of bill on the property. These charges shall be payable by the Tenant within fifteen (15) days after receipt thereof. So long as Tenant shall not be in default, Tenant shall be responsible for the portion of the calendar year during which this lease was in effect.

☒ 5. PRORATION OF CHARGES. If the Premises described herein are less than the entire property, the increases in Monthly Base Rental adjustments, Additional Rent and all other charges required by this lease shall be determined by proration on the same ratio that the rentable floor area of the Premises bears to the rentable floor areas of the entire property. Landlord and Tenant hereby deem that the Premises contains approximately 3780 square feet of rentable area of the entire property which is approximately 7200 square feet, resulting in a percentage ratio factor of Fifty-Two Point Zero percent (52.000 %).

☐ 6. ADDITIONAL CHARGES. Any charges due Landlord by Tenant, including but not limited to, damage to Premises, legal fees, cost of default remedies, and past due charges for utilities, insurance, cleaning, maintenance and repairs, etc. or for work done on the Premises by order of Tenant, shall be considered as Additional Rent due (in addition to all other rent payable) and shall be included in any lien

for rent. In the event any documentary stamp tax, or tax levied on rental or leasing of the Premises is required, the cost shall be paid by tenant upon demand. The cost of the credit report on the Tenant which may be requested at the Landlord's option shall be paid by the Tenant.

☒ 7. LATE RENT. If rent is not paid within 5 days after due date, the Tenant is subject to a one-time late fee of Ten Point Zero (10.000 %) percent of all rents due at that time.

2. **SECURITY DEPOSIT.** Upon execution of the lease by the Tenant, the Tenant shall pay to Landlord a Security Deposit in the amount of ($ 2,800.00) Two Thousand, Eight Hundred Dollars. Any security deposit required by Landlord and paid by Tenant shall be retained as security (interest free) for the faithful performance by Tenant of all terms, covenants and conditions herein. Landlord may at any time apply said deposit or any part thereof against any default by Tenant of any of the terms, covenants and conditions of this lease. In such event, Tenant shall upon demand deposit with Landlord the amount so applied that Landlord shall have the full amount of the deposit on hand at all times during the terms of this lease. Upon the expiration of this lease the Tenant shall surrender possession of the Premises as required in paragraph 24 herein. Landlord is given permission to deduct from said security deposit the cost of any unusual cleaning or repairs to the property, upon vacating of Tenant. Security deposit is not a part of the rental and subsequently cannot be deducted from the rent of the last month of this tenancy. Security deposit or any remaining portion will be returned within 30 days after the termination of this Agreement or completion of the repairs necessitated by Tenant's misuse of the Premises. In the event the security deposit is not sufficient to pay all charges due, Tenant shall pay said charges within three days after receiving written notice from the Landlord or Agent.

3. **TENANTS UTILITIES.** Tenant shall pay all charges or bills for the utility and services used by the Tenant, EXCEPT: _____

4. **USE OF PREMISES.** Tenant agrees not to abandon or vacate the Premises and to use entire leased Property for Cafe, Restaurant, Discoteque. and for no other purposes without the express written consent of the Landlord. Pets, animals or birds may not be kept on the Premises without the landlord's permission. These Premises may not be used for sleeping quarters or apartments, immoral conduct or any illegal activity.

5. **EXAMINATION OF PREMISES.** Tenant has examined the Premises and is familiar with their present condition. Tenant, relying solely on said examination, agrees to accept Premises in their present "as is" condition, unless otherwise agreed to in writing by Tenant and Landlord.

6. **DELAY OF POSSESSION.** If Landlord is unable to deliver possession of Premises on the effective date of this lease, by reason of the holding over of a prior Tenant or for any other reason, this lease shall not be affected or impaired in any way and landlord shall not be liable to Tenant for any loss or damage resulting therefrom. The effective date of this lease however, shall not begin until the delivery of possession. If Landlord, however, is unable to deliver possession of the Premises to Tenant by _____ , and if Tenant in fact shall not have accepted possession of the Premises, and if Tenant shall not be in default, Tenant shall have the right to cancel this lease upon written notice delivered to Landlord and upon such cancellation Landlord and Tenant shall each be released and discharged from all liability under this lease. In such case any deposit or prepaid rent shall be promptly returned to Tenant.

7. **TENANT'S PARKING.** Parking of vehicles owned or operated by Tenant or Tenant's employees is hereby limited, restricted or prohibited, as follows: Tenant may park any where in parking lot around building.

8. **LIABILITY INSURANCE.** Tenant shall not carry any stock of goods or do anything in or about the Premises which in any way restrict or invalidate any insurance coverage of the Premises. Tenant agrees to pay upon demand as

additional rent any increase in premiums of insurance carried by the Landlord on the Premises resulting from the Tenant's occupancy or improvements. Tenant shall keep in full force and effect, at Tenant's expense, insurance for plate glass, personal property, trade fixtures, and property damages, as well as a public liability policy in which both Tenant and Landlord shall be named as the insured with the following minimum coverage:
Single Limit $ 1,000,000.00 Aggregate $ 2,000,000.00 .
A certificate of insurance showing the Landlord and Landlord's Agent as an additional insured shall be provided to the landlord not later than the commencement date of this lease and prior to the expiration of such insurance policy during the term of this lease.

9. **MAINTENANCE AND REPAIRS.** Landlord shall repair and maintain the foundation, roof, outer walls and structural members of the Premises. Tenant shall, at Tenant's sole expense make all other repairs necessary to maintain the Premises, both interior and exterior, ordinary and extraordinary including window glass, plate glass, storefronts, doors, windows, screens, awnings, locks, keys, weather stripping and thresholds, as well as all interior walls, floors, ceilings, and floor coverings. Tenant's responsibility to maintain the Premises shall also include the servicing, repair and maintenance of plumbing, electrical, heating, ventilating and air conditioning systems, including all pipes, wiring, fixtures, filters, equipment, machinery, boilers, furnaces, compressors and appliances, and for the replacement of any of the aforementioned systems if their failure is due to Tenant's neglect. Notwithstanding anything contained in this Lease to the contrary, during the term of this Lease, Landlord shall warrant the major components of the heating, ventilating, and air conditioning (HVAC) equipment servicing the Premises, to include the compressors, condensing units, and air handlers, which warranty shall be contingent upon Tenant maintaining the HVAC equipment and ductwork by entering into a contract with a reputable HVAC services company approved in writing by Landlord. Said contract shall include a minimum of monthly filter changes, routine testing for Freon leakage, cleaning, and other customary periodic maintenance. In the event a major component shall need replacement and Tenant is unable to provide written documentation to the Landlord of the required maintenance as set for in this paragraph, Tenant shall be responsible for the replacement of said component at Tenant's sole cost and expense. Tenant shall also repair and be responsible for any caused by stoppage, breakage, leakage, overflow, discharge or freezing of plumbing pipes, soil lines, or fixtures. If any part of the Premises is damaged by the Tenant, or Tenant's employees, agents or invitees, Tenant shall provide Landlord with immediate written notification of all damages to the property. After notification and approval of the Landlord, repairs shall be made promptly at Tenant's expense so as to restore said Premises to its previous condition. If Tenant refuses or neglects to commence necessary repairs within ten (10) days after written demand, or does not complete such repairs within a reasonable time thereafter, Landlord may make said repairs without liability to Tenant for any loss or damage that may accrue to Tenant's stock, business or fixtures by reason thereof and if Landlord makes such repairs, Tenant shall pay to Landlord, on demand, as Additional Rent, the cost thereof. Tenant's failure to pay shall constitute a default of this lease. Repairs that are the Landlord's responsibility shall be made within a reasonable time after written notice from the Tenant. Tenant's failure to give or unreasonable delay in giving notice of needed repairs or defects shall make Tenant liable for any loss or damage resulting from delay of needed repairs.

10. **REGULATIONS AND SANITATION.** Tenant shall keep the Premises clean, safe, sanitary, and in compliance with laws, ordinances and requirements of any legally constituted public authority. Tenant shall keep broom clean all areas in and around Premises that are not included in Common Area Maintenance, such as front sidewalks and area behind building. Cleaning includes removing of any trash or refuse deposited on the lease Premises or adjacent public area by Tenant, Tenant's customers', invitees, or agents. In the event of non-compliance by Tenant, Landlord shall have the right to have said areas cleaned, trash and refuse removed and charge the expense to Tenant as Additional Rent which shall be due and payable upon demand. Nonpayment of which shall constitute default of this Agreement. Tenant shall not allow loitering on Premises. Tenant shall employ if Landlord determines it is necessary, a reputable pest extermination company at regular intervals.

11. **ALTERATIONS.** Tenant shall make no alterations, additions, improvements, or rewiring in or to the Premises without the written consent of Landlord. All additions, or improvements to the Premises including carpeting, tile, other floor covering, wall covering, ceiling tile, etc., made with or without Landlord's written consent shall become part of the Premises, and the property of Landlord upon installation. Trade fixtures and office furniture shall be installed so as to be readily removable without injury to the Premises and any injury caused by said removal shall be repaired forthwith at Tenant's expense. Said trade fixtures shall be removed from the Premises before the end of this lease or shall become part of the Premises and the property of Landlord. Tenant shall not install or maintain any equipment, partitions, furniture, etc. which the weight or operation thereof would tend to injure, or be detrimental to the Premises or would unreasonably annoy or disturb other Tenants.

12. **ASSIGNMENT OR SUBLEASE.** Tenant shall not, without written consent of Landlord, in each case, assign, transfer, mortgage, pledge or otherwise encumber or dispose of this lease, or sublet the Premises or any part thereof or permit the Premises to be occupied by other persons. Such consent shall not be unreasonably withheld, conditioned, or delayed. If this lease be assigned, or if the Premises or any part thereof be sublet or occupied by any other person, firm, office or corporation with or without written permission of Landlord, it will not relieve Tenant of any obligations under the terms of this lease, and if sublet, assigned or occupied without the Landlord's permission, this lease may, at the option of the Landlord, be terminated by a seven day written notice. In the event Tenant shall sublease the Premises in accordance herewith for rentals in excess of those rentals payable hereunder, Tenant shall pay to Landlord monthly in advance as Additional Rent hereunder, one-half of all such excess rent. Any proposed assignee or sublessee that proposes to assume Tenant's obligations hereunder shall execute a satisfactory assumption or sublease agreement before consent shall be given. Other provisions of this Paragraph to the contrary notwithstanding, Landlord shall have the right in its absolute and sole discretion to withhold consent to any sublease or assignment if Tenant shall be in default or breach of this Agreement or if the proposed assignee or sublessee or its business will cause Landlord to incur any costs of whatever kind or nature.

13. **SIGNS OR AWNINGS.** Tenant shall place no signs, notices, pictures, or advertising matter upon the exterior of the lease Premises except with the written consent of the Landlord. Any and all signs placed on the Premises by Tenant shall be maintained in compliance with rules and regulations governing such signs. The Tenant shall be responsible to Landlord for any damages by installation, use, maintenance or removal of said signs. Any electrical service needed for signs shall be installed at the Tenant's expense. Tenant shall, at Tenant's expense, remove signs at the expiration of the Agreement.

14. **WAIVER OF RIGHTS.** No failure of Landlord to exercise any power given Landlord hereunder, or to insist upon Tenant's strict compliance with Tenant's obligation hereunder and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of Landlord's right to demand exact compliance with the terms of this Agreement at a future time. The rights and remedies created by this Agreement are cumulative and the use of one remedy shall not be taken to exclude the right to the use of another.

15. **RULES AND REGULATIONS.** Landlord reserves the right at any time to make further rules and regulations as in Landlord's judgment that may be necessary for the safety, care, appearance, and cleanliness of the Premises and the entire property, and the preservation of good order herein, and such other rules and regulations shall be binding upon the parties hereto with the same force and effect as if they had been contained herein at the time of execution hereof.

16. **RIGHT OF ENTRY.** Landlord, without being liable for trespass or damages, shall have the right to enter Premises during reasonable hours, with reasonable prior notice, to examine same or to make repairs, additions, or alterations as Landlord may deem necessary for the safety, comfort, appearance, or preservation thereof or to exhibit said Premises. Entry shall also be allowed to post "FOR RENT" notice, during the 90 days before the expiration of this lease. Said right of entry shall likewise exist for the purpose of removing placards, signs, fixtures, alterations or additions which do not conform to this Agreement. In accordance with this right, Tenant shall give Landlord a key to any and all locks, security systems and burglar alarms. Tenant shall not change or install new locks or security systems without the written consent of Landlord.

17. **LIENS.** Tenant shall not create or allow to be created any liens for labor or materials against Landlord's interest in the Premises. All persons contracting with the Tenant for the erection, installation, alteration, repair or demolition of any building or other improvements on the Premises, and all material suppliers, contractors, mechanics, and laborers are hereby charged with notice that they must look to the Tenant and to the Tenant's interests only in the Premises to secure the payment of any bill for work done or material furnished during the rental period created by this Agreement. In the event that liens are placed on record against the Premises by contractors, mechanics, laborers, material suppliers, etc., of Tenant it will constitute a default of this Agreement. The Tenant shall indemnify, hold harmless, and defend the Landlord from any liens and encumbrances arising out of any work performed or materials furnished by or at the direction of the Tenant. Such indemnity shall include, without limitation, all attorney's fees and costs incurred by the Landlord due to the filing of such mechanic's lien or notice thereof. In the event that the Tenant, within twenty (20) days following the imposition of any such lien, shall not cause such lien to be released of record by payment or posting of a proper bond, in addition to all other remedies provided herein and by law, the Landlord shall have the right (but not the obligation) to cause the same to be released by such means as it shall deem proper, including bonding or payment of the claim giving rise to such lien. All such sums paid by the Landlord and all expenses incurred by it in connection therewith, including attorney's fees and costs shall be payable to the Landlord by the Tenant on demand with interest at the rate of eighteen (18%) percent per annum.

[AS] TENANT, [___] TENANT, AND [___] LANDLORD HAVE READ THIS PAGE.

18. **DAMAGE OR DESTRUCTION OF PREMISES.** If Premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If Premises are damaged but not wholly destroyed by fire or other casualty, rental shall abate in such proportion as use of Premises has been lost to the Tenant. Landlord shall restore Premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence. Insurance proceeds, if paid to Tenant, shall be assigned to Landlord to restore Premises and replace any covered contents owned by Landlord.

19. **DAMAGE TO PERSONAL PROPERTY.** All personal property, merchandise, fixtures and equipment placed or moved into the Premises shall be at the risk of Tenant or the owners thereof and Landlord shall not be liable for any damages, loss or theft of said personal property, merchandise, fixtures, or equipment, from any cause whatsoever.

20. **CONDEMNATION.** If the whole of the Premises, or such portion thereof as will make said Premises unusable for the purpose herein leased, be condemned by any legally constituted authority, this lease shall terminate on the date when possession thereof is taken by public authorities, and rental shall be accounted for as between Landlord and Tenant as of that date. Such termination, however, shall be without prejudice to the rights of either Landlord or Tenant to recover from the public authority compensation for damage caused by condemnation. Neither the Tenant nor Landlord shall have any rights in any award made to the other by any condemnation authority. In the event only such portion of the Premises is acquired by condemnation as will leave the remaining Premises, after alteration and repairs, in condition suitable for use by Tenant, the monthly rental payments from the day of such acquisition to the end of the original or any extended term of this lease shall be reduced in proportion to the resulting loss of use of Premises by Tenant. In the event of such partial acquisition and reduction in rent, Landlord shall make promptly at Landlord's expense, all necessary alterations and repairs that shall be required, to restore the Premises to a safe and usable condition.

21. **INDEMNITY AND LIABILITY.** Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorney's fees, arising from the management of the business conducted by Tenant on the Premises. 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 Premises, or any equipment, or, such as may result from any accident in or about the Premises or which may result directly or indirectly from any act of neglect of any other Tenant of the property of which the Premises is a part.

22. **HOLDOVER.** Tenant shall surrender to Landlord, at the end of the term of this lease or upon cancellation of this lease, said Premises broom clean and in as good condition as the Premises were at the beginning of the term of this lease, ordinary wear and tear and damage by fire and windstorm or other acts of God excepted, or Tenant will pay to Landlord all damages that Landlord may suffer because of Tenant's failure to do so. Tenant will indemnify and save Landlord harmless from and against all claims made by any succeeding Tenant of said Premises against Landlord because of delay in delivering possession of Premises, so far as such delay is occasioned by failure of Tenant to so surrender Premises. If Tenant remains in possession of the Premises or any part thereof after the expiration of the Agreement, such holdover places the Tenant in default and the Monthly Base Rental shall be increased to one hundred fifty percent (150%) of the last month's Monthly Base Rental unless given a month to month tenancy in writing from the Landlord.

23. **EFFECTIVE DATE OF LEASE.** This Agreement shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this Agreement is signed by one party and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party and delivery of a fully executed copy of the submitting party.

24. **NOTICES.** Tenant hereby appoints as Tenant's agent to receive service of all notices required under this Agreement as well as all dispossessory distraint notices, the person in charge of Premises or occupying said Premises, at the time notice is delivered. A copy of all notices under this Agreement shall also be sent via certified mail, return receipt requested, or via recognized overnight delivery company, to Tenant's and Landlord's last known address as follows (or to such other address as either party may specify by written notice):

Tenant Address: 28 Lighthouse Dr.
Goose Creek, SC 29445

Landlord Address: 2650 Holcomb Bridge, Suite 630
Alpharetta, GA 30022

[AS] TENANT, [ ] TENANT, AND [ ] LANDLORD HAVE READ THIS PAGE.

25. **BANKRUPTCY.** If Tenant shall be adjudicated bankrupt or as insolvent or take the benefit of any Federal reorganization or make a general assignment or take the benefit of any insolvent law, or if a Trustee in bankruptcy or a receiver be appointed or elected for Tenant, under Federal or State law, this Agreement at the option of the Landlord shall expire and end seven (7) days after Landlord gives Tenant written notice, UNLESS, the Tenant's Trustee immediately cures any default of Tenant hereunder and provides (in compliance with Federal and State laws) adequate assurance of future performance of Tenant's obligations hereunder.

26. **BEYOND LANDLORD'S CONTROL.** None of the acts, promises, covenants, or obligations on the part of the Tenant to be kept, performed or not performed as the case may be, nor the obligation of the Tenant to pay Monthly Base Rental. Additional Rent or other charges or payments shall be in anywise waived, excused or affected by reason of the Landlord being unable at any time during the term of this Agreement, to supply, or to delay in supplying heat, light, elevator service or any other service expressed or implied on the part of the Landlord to be supplied; or by reason of the Landlord being unable to make any alteration, repairs, or decorations, or to supply any equipment or fixtures, or any other promise, covenant, or obligations on the part of the Landlord to be performed, if the Landlord's inability or delay is caused by circumstances or events beyond the Landlord's control.

27. **KEYS.** Landlord shall provide Tenant with one key per lock, and the Tenant is responsible for accounting for all keys provided or duplicated and shall return all keys of Premises to the Landlord upon termination or cancellation of this Agreement and/or Tenant vacating said Premises. Landlord shall have the right, if in the Landlord's sole judgment it is necessary, to require the Tenant at Tenant's expense to replace locks, and to supply Landlord with one key to the new locks. The Landlord shall retain a master key or pass key to the Premises, including all security locks and systems. Tenant shall not change or install new locks or security systems without written approval from Landlord.

28. **ESTOPPEL.** Tenant shall from time to time, within ten days following written notice from Landlord, execute, acknowledge and deliver to the Landlord a written statement certifying that this Agreement is in full force and effect. This statement should also state whether or not the Landlord is in default in performance of any covenant or condition of this Agreement or other such reasonable terms required by the Landlord, purchaser, or lender for either. The failure of the Tenant to execute, acknowledge and deliver to the Landlord a statement in accordance with this covenant shall constitute an acknowledgment by the Tenant that this lease is unmodified and in full force and effect, and shall constitute a waiver of any defaults by the Landlord which may have existed prior to the date of such notice.

29. **PEACEFUL POSSESSION.** Subject to the terms, covenants and conditions of this lease, the Tenant shall have, hold and enjoy possession of the Premises, subject to the rights of the holders of any mortgage which now covers said Premises or which may hereafter be placed on Premises by Landlord. Tenant's rights are also subject to any underlying lease now or later covering the entire property of which the leased property is a part. Tenant shall execute any necessary lease subordination agreement at the Landlord's request.

30. **DEFAULT.** If Tenant fails to pay Monthly Base Rental including Additional Rent on or before the due dates as herein stated (TIME IS OF THE ESSENCE) this Agreement shall be in default. If Tenant fails to cure such default within five (5) days after written notice from Landlord; or if Tenant shall be in default in performing any of the terms, covenants and conditions of this Agreement, other than the provision requiring the payment of Monthly Base Rental and Additional Rent, and fails to cure such default within thirty (30) days after the receipt of written notice of default from Landlord; or if Premises shall be abandoned or deserted for fifteen (15) days, or if this Agreement is assigned to any other person, firm, office or corporation, without the permission of Landlord as required in Paragraph 15 herein, this lease at the Landlord's option shall expire and terminate seven (7) days after Landlord delivers written notice to Tenant of such condition or default and Tenant shall immediately quit and surrender said Premises to Landlord. In the event of any such default or breach of performance, the Landlord without any further notice or demand of any kind to the Tenant, may terminate this lease and re-enter and forthwith repossess the entire Premises and without being liable for trespass or damage shall re-let, lease or demise the Premises to another Tenant without any hindrance or prejudice to Landlord's right to distrain for any past due rent, Additional Rent, and rent from the time of such default or termination until the Premises were leased or rented to another Tenant.

31. **ASSIGNMENT OF CHATTELS.** Tenant hereby pledges and assigns to Landlord all the furniture, fixtures, goods, equipment and chattels of Tenant which shall or may be brought or put on said Premises as security for the payment of said rent, and tenant agrees that said lien may be enforced by distraint or foreclosure, at the election of Landlord. It is understood and agreed that any merchandise, fixtures, furniture, or equipment left in the Premises when Tenant vacates

shall be deemed to have been abandoned by Tenant and by such abandonment, Tenant relinquishes any right or interest therein and Landlord is authorized to sell, dispose of or destroy same.

32. **ATTORNEY'S FEE.** In the event Landlord successfully defends any action by the Tenant, or if it is necessary for Landlord to employ an attorney for the collection of rent or any other sum due hereunder, or to enforce any covenant of this lease, or the termination of this lease, or for the possession of the Premises or any part thereof the Tenant shall pay all costs, including reasonable attorney's fees.

33. **AGENT.** Tenant acknowledges that I Martinez/Boulevard Company is the leasing/managing agent for the Landlord of the Premises. Tenant shall pay all rent payable under this lease to said agent. The right to collect said rentals shall be governed by the written agreement between Landlord and agent for the management of the Premises and shall terminate with the expiration of said management agreement or any renewal thereof.

34. ***BROKER LIABILITY LIMITATION.*** *Parties agree Brokers provided Parties with benefits, services, assistance, and value in bringing about this Contract. In consideration and recognition of the risks, rewards, compensation and benefits arising from this transaction to Brokers, Parties each agree that they shall pay Brokers' attorneys fees and that Brokers, shall not be liable to either Party or both, either jointly, severally or individually, in an amount exceeding that Broker's Compensation by reason of any act or omission, including negligence, misrepresentation, errors and omissions, or breach of undertaking, except for intentional or willful acts. This limitation shall apply regardless of the cause of action or legal theory asserted against either Broker, unless the claim is for an intentional or willful act. This limitation of liability shall apply to all claims, losses, costs, damages or claimed expenses of any nature from any cause(s), except intentional or willful acts, so that the total liability of either Broker shall not exceed the amount set forth herein. Parties will indemnify and hold harmless and pay attorneys fees for Brokers from beach of contract, any negligent or intentional acts or omissions by any Parties, Inspectors, Professionals, Service Providers, Contractors, etc. including any introduced or recommended by Brokers. Parties each agree that there is valid and sufficient consideration for this limitation of liability and that Brokers are the intended third-party beneficiaries of this provision.*

35. **SUBORDINATION, ATTORNMENT, AND NON-DISTURBANCE.** Tenant agrees that this Agreement shall be subject and subordinate to any mortgages, deeds of trust or any ground lease now or hereafter placed upon the Premises and to all modifications thereto, and to all present and future advances made with respect to any such mortgage or deed of trust; provided however, that such mortgagee or ground lessor agrees not to disturb Tenant in its possession of the Premises so long as Tenant shall not be in breach or default under any of the terms and conditions of this Agreement. Tenant agrees to attorn to the mortgagee, trustee, or beneficiary under any such mortgage or deed of trust, and to the purchaser at a sale pursuant to the foreclosing thereof, and to the lessor in the event of a termination of any such ground lease.

36. **DEFINITIONS.** "Landlord" as used in this Agreement shall include the owner or owners of the property and/or the aforementioned managing agent as well as the Landlord's heirs, representatives, assigns and successors in title to Premises. "Tenant" shall include Tenant, Tenant's heirs and representatives, and if this lease shall be assigned or sublet, shall include also Tenant assignees or subleases, as to Premises covered by such assignment or sublease. "Agent" shall include agent, agent's successors, assigns, heirs and representatives. "Landlord," "Tenant," and "Agent," including male and female, singular and plural, corporation, partnership or individual, as may fit the particular parties. "Property" is defined as the land, lots, building improvements, and common areas as may be further defined herein, in which the Premises is included.

37. **ENVIRONMENTAL MATTERS.** Tenant represents, warrants and covenants to Landlord throughout the Term of this Agreement as follows that Tenant is and agrees to remain in compliance with all applicable federal, state and local laws relating to protection of the public health, welfare, and the environment ("Environmental Law") with respect to Tenant's use and occupancy of the Premises. Tenant agrees to cause all of its employees, agents, contractors, sublessees, assignees, and any other persons occupying or present on the Premises ("Occupants") to comply with all Environmental Laws applicable to their activities in and around the Premises.

38. **AMERICANS WITH DISABILITIES ACT.** Any other provision of this Agreement notwithstanding, the parties hereby agree that the Premises may be subject to the terms and conditions of the Americans with Disabilities Act of 1990 (hereinafter the "ADA"). The parties further agree and acknowledge that it shall be the sole responsibility of Tenant to comply with any and all provisions of the ADA, as such compliance may be required to operate the Premises. Tenant further agrees to indemnify, depend and hold Landlord harmless against any claims, which may arise out of Tenant's

failure to comply with the ADA. Such indemnification shall include, but not necessarily be limited to reasonable attorney's fees, court costs and judgments as a result of said claims. Within ten (10) days after receipt, Tenant shall advise the Landlord in writing and provide with copies of (as applicable), any notices alleging violation of the Americans with Disabilities Act of 1990 ("ADA") relating to any portion of the Property of the Premises, any claims made or threatened in writing regarding noncompliance with the ADA and relating to any portion of the Property or of the Premises, or any governmental or regulatory actions or investigations instituted or threatened regarding noncompliance with the ADA and relating to any portion of the Property or of the Premises.

39. **SPECIAL STIPULATIONS.** Insofar as the following stipulations conflict with any of the provisions herein, the following stipulations shall control (use addendum if necessary): NNN or additional expenses will be: Taxes: $1.20 psf $378.00, Insurance: $.26 psf or $81.90, CAM $0.52 psf or $163.80

40. **SOUTH CAROLINA LAW TO GOVERN.** Tenant and Landlord agree that South Carolina law will govern the interpretation and enforcement of this Agreement.

41. **ENTIRE AGREEMENT.** This lease contains the entire agreement between the parties hereto and all previous negotiations leading thereto, and it may be modified only by a dated written agreement signed by both Landlord and Tenant. No surrender of the Premises or of the remainder of the term of this lease shall be valid unless accepted by Landlord in writing. TIME IS OF THE ESSENCE WITH REGARD TO ALL TERMS AND CONDITIONS IN THIS AGREEMENT.

42. **FACSIMILE.** The parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax and the signatures, initials, and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

43. **MEGAN'S LAW.** The Tenant and Landlord agree that the Property Manager or Real Estate Broker representing Tenant or Landlord and all affiliated agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry. The Tenant and Landlord agree that no course of action may be brought against the Property Manager or Real Estate Broker representing Tenant or Landlord and all affiliated agents for failure to obtain or disclose any information contained in the South Carolina Sex Offender Registry. The Tenant agrees that the Tenant has the sole responsibility to obtain any such information. The Tenant understands that Sex Offender Registry information may be obtained from the local sheriff's department or other appropriate law enforcement officials.

44. **NON-RELIANCE CLAUSE.** Both Tenant and Landlord hereby acknowledge that they have not received or relied or could have relied upon any statements or representations or promises or agreements or inducements by either Broker or their agents which are not expressly stipulated herein. If not contained herein, such statements, representations, promises, or agreements shall be of no force or effect. This general non-reliance clause shall not prevent recovery in tort for fraud or negligent misrepresentation or intentional misrepresentation unless specific non-reliance language is included in this agreement. This is a non-reliance clause and is neither a merger clause nor an extension of a merger clause. The parties execute this agreement freely and voluntarily without reliance upon any statements or representations by parties or agents except as set forth herein. Parties have fully read and understand this Agreement and the meaning of its provisions. Parties are legally competent to enter into this agreement and to fully accept responsibility. Parties have been advised to consult with counsel before entering into this agreement and have had the opportunity to do so.

THE UNDERSIGNED HEREBY WARRANT THAT THEY OWN THE PROPERTY AND/OR HAVE THE AUTHORITY TO EXECUTE THIS AGREEMENT. THIS IS A LEGALLY BINDING AGREEMENT. OWNER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. OWNER ACKNOWLEDGES RECEIPT OF A COPY OF THIS AGREEMENT. OWNER AGREES TO RECEIVE COMMUNICATIONS FROM BROKER AT THE EMAIL ADDRESS, PHONE AND FAX NUMBER LISTED BELOW.

[AS] **TENANT, [___] TENANT, AND [___] LANDLORD HAVE READ THIS PAGE.**

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IN WITNESS WHEREOF, this agreement has been duly executed by the parties.

12-22-15

Tenant Aracelis Santos Date Witness to Tenant

Tenant's Email Address: 28 Light House DR Goose Creek SC 29445

Phone: 843-460-5934 Fax:

Aracelis Santos

Tenant Date Witness to Tenant

Tenant's Email Address:

Phone: Fax:

Landlord Date Witness to Landlord

Landlord's Email Address:

Phone: Fax:

LANDLORD'S AGENT AND COMPANY

TENANT'S AGENT AND COMPANY

GUARANTEE

As an inducement and, thus, a further consideration for the Landlord entering into this Agreement with the Tenant, the undersigned (jointly and severally, if more than one) hereby guarantees full performance by the Tenant and its heirs, successors, or assigns of all of the terms and conditions of the Agreement. The Landlord is not required to provide the Guarantor(s) with any notice provided for in the Agreement. In addition, this Guarantee is not waived by any delay that the Landlord has permitted the Tenant in satisfying its obligations under the Agreement. This Guarantee runs to the Guarantor's heirs, successors, and assigns and ensures to the benefit of the Landlord and its successors, and assigns. The Landlord and Tenant may agree to a modification of the Agreement without the approval of the Guarantor(s), provided that the obligation of the Guarantor(s) is not increased beyond the financial conditions contained in the Lease. This is a guarantee of payment and performance and not merely of collection of any term or condition of the Agreement that requires the Tenant to pay the Landlord any sum of money.

Aracelis Santos

GUARANTOR Date Witness to GUARANTOR

GUARANTOR Date Witness to GUARANTOR

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[AS] TENANT, [___] TENANT, AND [___] LANDLORD HAVE READ THIS PAGE.

EXHIBIT C

STATE OF SOUTH CAROLINA	)	APPEAL FROM HANAHAN CITY COUNCIL
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
		CIVIL ACTION NO.: 2016-CP-08-1261
BENJAMIN REYNA, d/b/a EL ALAMO RESTAURANT,	)	
Appellant,	)	**ORDER AFFIRMING DECISION OF HANAHAN CITY COUNCIL**
vs.	)	
THE TOWN OF HANAHAN,	)	
Respondent.	)	

FILED
16 NOV 15 PM 3:04
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

Date of Hearing: **August 30, 2016**
Presiding Judge: **Dale E. Van Slambrook**
Attorneys for Appellant: **Thomas R. Goldstein**
Attorneys for Respondent: **Stafford J. McQuillin III**
Court Reporter: **Karen V. Anderson**

This matter came before the Court as an appeal from Hanahan City Council's decision to revoke Appellant's business license. The City of Hanahan's ("the City") revocation hearing was held on May 26, 2016. Appellant filed his appeal on June 3, 2016. On June 29, 2016, the Clerk for Hanahan City Council filed the Original Record[1] ("Record") from Hanahan City Council's hearing with the Berkeley County Clerk of Court. Appellant has made no objection to the record. This Court held a hearing on August 30, 2016, to hear appellate arguments. Notice of the hearing was duly given to all interested persons. For the reasons set forth below, the Court hereby affirms the decision of Hanahan City Council.

[1] The May 26, 2016 revocation hearing was recorded by a court reporter that was requested by Appellant. The Record includes transcribed testimony from the hearing as well as numerous exhibits. The City of Hanahan obtained the Original Record from counsel for Appellant prior to filing it with the Berkeley County Clerk of Court.

APPLICABLE STANDARD

"When the city council of a municipality has acted after considering all of the facts, [the] court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion." *Amrik*, 384 S.C. at 590, 681 S.E.2d at 299 (quoting *Gay v. City of Beaufort*, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct. App. 2005)). "[I]n reviewing the discretionary decision of a legislative body, our courts have been hesitant to substitute their judgment for that of elected representatives." *Amrik Singh & SBPS, Inc. v. City of Greenville*, 384 S.C. 365, 370, 681 S.E.2d 921, 922 (citing *McSherry v. Spartanburg C'ty Council*, 371 S.C. 586, 590, 641 S.E.2d 431, 434 (2007)). *See also, City of Greenville v. Bozeman*, 254 S.C. 306, 315, 175 S.E.2d 211, 215 (1970) ("the Courts will not interfere with the exercise of discretionary powers by a municipal body except in cases of fraud or clear abuse of power"); *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) (affirming a municipality's decisions so long as calibrated for public good, morals, and general welfare of municipality and citizens); *Sloan v. Greenville Cty*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) ("Discretionary decisions of a legislative body should not be upset on appeal unless they are arbitrary, unreasonable, in obvious abuse of discretion or in excess of lawfully delegated power.").

FINDINGS OF FACT

1. Appellant Benjamin Reyna held the business license (license No. 9692) for El Alamo ("the Night Club"). Appellant operates a "Late Hour, Adult Night Club," which stays open several nights a week until 5:00 a.m.

2. Citizens, neighboring businesses and patrons of the Night Club complained to the City about frequent criminal activity associated with the Night Club.

3. Due to citizen complaints and frequent criminal activity associated with the Night Club, it was determined that Appellant's business license should be brought before Hanahan City Council to determine whether the license should be revoked.

4. On April 8, 2016, City officials delivered a revocation hearing notice to Appellant. The hearing was originally scheduled for April 30, 2016. However, on April 14, 2016, attorney Thomas Rode contacted the City and indicated that he represented Appellant and requested that the hearing be rescheduled due to scheduling conflicts.

5. Counsel for the City, Stafford J. McQuillin III, worked with Mr. Rode to find a suitable date for all parties and counsel involved in the matter.

6. After finding an agreeable date on April 25, 2016, the City served Appellant's counsel with a Citation/Notice of Suspension and Hearing for Revocation of Business License ("Citation/Notice"). The Citation/Notice was made part of the Record and is attached to this Order as **Exhibit A**.

7. The Citation/Notice is detailed and provided Appellant with actual notice of the revocation hearing sufficient to permit Appellant to attend the hearing and present his views. Despite the Citation/Notice, Appellant did not attend the hearing or call any witnesses; instead, Appellant sent only his lawyer and a court reporter. Specifically, the Citation/Notice provided Appellant's counsel with the following pertinent information regarding the hearing:

> As you know, El Alamo and Latino Mix's business licenses are being presented for revocation before Hanahan City Council. **The revocation hearing for your client's licenses will be held on May 26, 2016 at 6:30 pm in Council Chambers at 1255 Yeamans Hall Road, Hanahan, South Carolina 29410.** The purpose of the hearing is to determine whether your client's business licenses should be revoked pursuant to Section 10-9 of the Code of Ordinances of City of Hanahan, which states:
>
> **Sec. 10-9. - Council may revoke or refuse to issue license.**

(a) Council may, after citation to the proposed licensee and hearing thereon, refuse to issue a license or may revoke a license of any person whenever, in its judgment, the public welfare makes such action necessary.

(b) Decision of council shall be final unless appealed to a court of competent jurisdiction within ten days after the date of the council's decision.

(c) No license to carry on any business in violation of the city's zoning ordinance shall be issued to any person.

At the hearing, City Council will hear testimony and be presented with evidence to determine the following: (1) whether your clients' licenses were mistakenly or improperly issued or issued contrary to law; (2) whether your clients have breached any condition upon which the licenses were issued; (3) whether your clients obtained the licenses through a fraud, misrepresentation, a false or misleading statement, evasion or suppression of a material fact in their license applications; (4) whether your clients have been convicted of an offense under a law or ordinance regulating the businesses, a crime involving moral turpitude, or an unlawful sale of merchandise or prohibited goods; and/or (5) whether your clients or its customers have engaged in unlawful activities or a nuisance related to the business. After examining each of the above issues, City Council will make a determination as to whether the public welfare makes revocation of the licenses necessary.

Your clients' business licenses are being considered for revocation because a preliminary determination has been made that (1) the businesses are in breach of the conditions upon which the business licenses were issued; (2) the operation of your clients' businesses constitutes a nuisance; (3) your clients have failed to comply with sections of the business license ordinance; and (4) your clients and its customers have engaged in unlawful activities related to the business. More specifically, El Alamo is operating under conditions that were not presented and approved under the preliminary zoning review on March 4, 2013. Additionally, Latino Mix's business operations are outside the scope of the approved business license because it subleased space to an additional business and is operating under conditions that were not presented at the preliminary zoning review on March 17, 2014. Finally, your clients' business operations constitute a nuisance. Specifically, the nuisance is due to numerous citations issued and repeated criminal activity associated with the businesses' operations, including but not limited to weapons incidents, possession and sale of narcotics, assault, physical domestic violence, theft, public intoxication, physical disturbances, verbal disturbances, and noise disturbances.

Due to the City's preliminary findings, your clients' licenses are being temporarily suspended until the revocation hearing is completed. No licenses will

be re-issued during the suspension period; however, your clients' may still conduct business during this probationary, suspension period.

If you have any questions or concerns with the information contained in this Citation and Notice, please direct all communications to Stafford J. McQuillin III, Esq., who has been retained by the City to assist with this matter.

8. Prior to City Council's Revocation Hearing on May 26, 2016, ("revocation hearing") counsel for Appellant requested that the City provide a Spanish interpreter for the revocation hearing. Per Appellant's request, the City, at a cost to taxpayers, provided a Spanish interpreter at the revocation hearing; however, the record reveals that neither Appellant (who was not present at the revocation hearing) nor his counsel utilized the interpreter's services.

9. In addition to Appellant's request to reschedule the hearing and request to provide a Spanish interpreter, Appellant also sent 22 voluminous Freedom of Information Act Requests to the City and its various divisions. Despite the overbroad and voluminous nature of the requests, the City coordinated with its various divisions, searched for, prepared and produced all approximately 542 pages of documents as well as 911 calls and dash cam video in an expedited manner to Appellant's counsel in advance of the hearing.

10. The City complied with Appellant's pre-hearing demands, and the hearing was held on May 26, 2016.

11. At the Revocation Hearing, Appellant's counsel made another request to delay and reschedule the duly noticed hearing citing the need for more time to prepare. Counsel for the City argued that Appellant was not entitled to an "elongated pseudo-criminal trial" and publically discussed a Fourth Circuit Court of Appeals decision discussing due process in the context of a business license, which held "due process does not require that in every instance of a deprivation of property . . . a full-blown evidentiary hearing." *Richardson v. Town of Eastover*, 922 F.2d 1152, 1160 (4th Cir. 1991). After hearing arguments from Appellant and

the City's counsel, City Council voted to proceed with the Revocation Hearing on the agreed upon, rescheduled date of May 26, 2016.

12. At the hearing, the City and Appellant were each provided with ninety minutes to call and cross-examine witnesses and present arguments and evidence to City Council. The City provided Appellant with additional time to present. (Record, p. 155, "I believe you gave us more time to present, and I appreciate that.") The entire hearing, including City Council's ultimate decision to revoke Appellant's license, was transcribed by a court reporter requested by Appellant. Appellant's counsel, Christopher Romeo, Esq., ordered and obtained an original and one copy of the hearing transcript following the hearing. A copy of Appellant's order and invoice from the court reporter is attached to this Order as **Exhibit B**.

13. The City and Appellant submitted various previously exchanged exhibits at the revocation hearing, which are included in the Record.

14. The City called the following witnesses in this order: (1) City of Hanahan Chief of Police, Dennis Turner; (2) Detective Cliff Driggers, Hanahan Police Department; (3) Chief Deputy Sherriff, Mike Cochran, Berkeley County Sherriff's Office, formerly Chief of Police for the City of Hanahan; (4) Hanahan Resident Ron Newman; (5) Hanahan Resident Chad Chinners; (6) Maria Carval, patron Night Club; and (7) Hanahan Business License Official for the City of Hanahan, Joy Krutek.

15. The City of Hanahan Chief of Police Dennis Turner went through numerous incidents reports arising from and connected to the operation El Alamo from 2014 to 2016. These incidents included, *inter alia*: (1) numerous physical altercations; (2) numerous alcohol/intoxication arrests; (3) numerous drug arrests; (3) arrests of Night Club employee for pointing and presenting fire arm on premises; (4) reports of employee assaulting patron; (5) and

noise violations. All of the indent reports discussed by the Chief of Police were previously provided to Appellant's counsel in advance of the revocation hearing, submitted as exhibits, and made part of this Record.

16. The Chief of police, provided the following pertinent testimony:

> Since 2014 the El Alamo had proved to be a nuisance because of the criminal activity arising from and associated with the business. It is clear that the business has knowingly promoted overconsumption of alcohol, intoxication, and other criminal activities on the premises.
>
> The license holder for El Alamo, Mr. Reyna, is well aware of the criminal activity associated with the business. In the past numerous officers have discussed the criminal activity with him. I have -- Officer Reyes -- I will put point out Officer Reyes is fluent -- or Detective Reyes now is fluent in Spanish and also Sergeant Lanphear among others.
>
> Mr. Reyna has also witnessed several of the arrests that have taken place at this location. However, the criminal activity has not stopped. For these reasons I have great concern for the safety of not only the residents who live near the establishment but also the safety of the patrons who visit the establishment.

(Record, pp. 30-32)

17. The Chief of Police also discussed an incident that occurred on May 22, 2016, which occurred after Appellant received the Citation/Notice and during the probationary license suspicion period discussed in the Notice/Citation. On May 22, 2016, at approximately 6 a.m., an intoxicated patron of Night Club assaulted a Hanahan Police Officer. After the arrest, the individual signed a statement indicating that he "went to El Alamo at 2:30 a.m. in the morning, left the El Alamo at 5:00 a.m. . . . [w]hile at El Alamo – I drank Model and Corona beers." (Record, p. 73) The May 22, 2016 Incident Report and Statement are part of the Record.

18. Detective Cliff Driggers with the Hanahan Police Department provided City Council with statistical data that compared events and incidents from 2014 to May of 2016 for the Night Club and other establishments within the City that allow for on-premises consumption

of alcohol. In addition to the Night Club, the City has three other establishments that allow for on-premises consumption of alcoholic beverages (LG's, Buccas, and Hanahan's). Detective Driggers indicated that the Night Club had a total of forty-four arrests from 2014 to May of 2016 and that the other three establishments combined had a total of only two arrests. The following is a summary of the comparative data presented by Detective Driggers to City Council:

Incident	Alamo	Hanahan's	LG's	Bucca's
Disturbance	30	1	10	4
Assaults	7	0	0	1
Narcotics	10	0	0	0
Weapons	2	0	0	0
Disorderly	21	1	1	2
Resisting	5	0	0	0
ABC	2	0	0	0
Minors/Fake ID	6	0	0	0
Agg. Assaults	1	0	0	0
Prop. Crimes	9	0	3	0
Reports	49	0	12	2

(Record, pp. 92-93)

19. Ron Newman, a resident of Hanahan that owns a business and property adjacent to the Night Club, provided the following testimony:

> I'm adjacent to the property that we're talking about over there.I have a mobile home park.I have a lot of children that live there and I'm personally proud of it, but I'm not proud of my tenants being disturbed.I don't like them cutting through, tearing the fence down, and walking through and urinating and throwing beer bottles as they leave the property and go through the fence. I don't like that.

But the noise -- I don't know how many complaints I've had about the noise and the fighting.I am fearful, ladies and gentlemen. I am fearful for my residents.

I think everybody ought to have a chance to run a good business, but I don't thinkthere's anything good about this except somebody making money.I can stand here and talk about this all day long and y'all can talk about it all day long but when it gets down to it I'm being abused. Other Citizens are being abused.

I ask you gentleman and lady -- ladies, I ask y'all to do something about this.We can't have some of our Citizens bekilled.Although they live over there in thetrailer park they don't want to be killed, you know.They want to have restful sleep. Whenever this starts disrupting my customers and I start losing business because of that then something's got to change.It's like thepossum and the raccoon up there fighting in the tree.You've got to shoot up there amongst them because one of them needs some relief.I'm the one that needs the relief just like all the Citizens in Hanahan.

(Record, pp. 98-99)

20. Chad Chinners, a resident of Hanahan who owns a business across the street from the Night Club, provided the following testimony:

Now, as a business owner I own Blackwood True Value.I'm a partner.The mostdirect contact I've had with it is they – a customer of [the Night Club] ran into the sign and causedabout $12,000 in damage.It wasn't a big concern of mine.I mean, it happened.There's property damage, but it could have been anyone.

It could have been that someone got killed in that incident.My warehouse managerwitnessed the incident.It happened about 5:00 a.m. on a Sunday morning.I got a call at about 5:30 and he directly witnessed them coming out of that parking lot.

(Record, pp. 100-101)

21. The next witness was Maria Carval, who testified that she was attacked with a pistol while a patron at the Night Club. Ms. Carval (through a Spanish interpreter) provided the following pertinent testimony:

Interpreter Aldrich: Her name is MariaCarval and she's was one of the victims in this incident where she was at the bar and a man attacked her with a pistol, threatened her with apistol.

> She asked for help and nobody [from the Night Club] wanted tocall the police or tell her anything.So she said, you know, how is it possible that you're not going to call the police or I'm not going to get any help on this.She said she was a nervous wreck.Shc isnow receiving help from a psychiatrist and counselors because she's just not well after that incident. So she is getting help at West Ashleyfrom the mental health department.She is also going to MUSC.So she gets therapy every Monday from 9:00 to 11:00.

(Record, pp. 102-103)

22. Appellant's counsel presented arguments before City Council, including arguments that a limited number of incident reports were unrelated to El Alamo. Appellant was not present, and did not call any witnesses at the hearing.

23. After both sides presented at the hearing, City Council unanimously voted to revoke the business license of El Alamo. Specifically, Councilman Dan Owens made the following motion, which was unanimously approved, 6-0, by City Council:

> After careful consideration of all of the facts presented by both sides at this hearing – and thank you both – I move that we revoke the license of El Alamo/Benjamin Reyna (license No. 9692) pursuant to Hanahan City Ordinance Section 10-9. The public welfare makes this revocation necessary due to the fact that the operation of El Alamo's business creates a nuisance attributable to the frequent and persistent suspected criminal activity associated with the operation of the business including repeated acts of unlawful possession or sale of controlled substances, multiple intoxication and alcohol incidents, and continuous breach of the peace.

(Record, pp. 157-158)

24. City Council's ruling was transcribed by the court reporter requested by Appellant, as was the rest of the hearing.

CONCLUSIONS OF LAW

1. The City provided Appellant with sufficient notice and an opportunity to be heard.

Appellant was afforded due process, including notice and an opportunity to be heard. In *Richardson v. Town of Eastover*, 922 F.2d 1152, 1160 (4th Cir. 1991), the Fourth Circuit

discussed due process requirements in the context of a municipality's revocation of a business license. In *Richardson*, the Town of Eastover refused to renew Mr. Richardson's business license. "The ordinance, on which the council relied in refusing to renew Richardson's license, provides that the license may be withheld when an occupation would be detrimental to the 'security, welfare, convenience, health, peace, or good government of the town.' *Richardson v. Town of Eastover*, 922 F.2d 1152, 1157–58 (4th Cir. 1991). "The concededly broad ordinance grants Eastover significant discretion in determining whether to withhold or not to renew licenses." *Id.* In discussing due process, the Court held:

> Due process, at a minimum, requires that a person be given notice of impending action and afforded a hearing. The nature of the notice and the quality of the hearing are determined by the competing interests involved. Thus, when the property interest that is subject to the deprivation is of minor value, fairness requires a less formal hearing.

Richardson v. Town of Eastover, 922 F.2d 1152, 1159 (4th Cir. 1991) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950); *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975)). When applying the due process requirements in the context of revoking a business license, the Court held:

> Here, the value of any property interest that a licensee receives from Eastover is diminished by the broad right given by South Carolina to the Town of Eastover to regulate licenses under S.C. Code Ann. § 5-7-30 (Law. Co-op. 1989 Supp.), and the broad discretion reserved by the Town of Eastover in its ordinances to revoke or refuse licenses. The ordinance of Eastover provides that a business license may be revoked or refused if operation of the business would be detrimental to the "security, welfare, convenience, health, peace, or good government of the town." A license that is issued subject to conditions which permit its revocation on such a broad range of contingencies as is contained in the Eastover ordinance is less valuable than one that is subject to revocation only on a stringent showing of cause.
>
> The minimal value, therefore, of the property interest that Richardson held in the license from Eastover is a factor to be considered in determining the quality of notice and the formality of any hearing that is required by due process.

Id. at 1159–60.

The City's ordinance at issue in this appeal is undistinguishable from the ordinance involved in Town of Eastover appeal. Specifically, the City's ordinance regulating business licenses states, "[c]ouncil may, after citation[2] to the proposed licensee and hearing thereon, refuse to issue a license or may revoke a license of any person whenever, in its judgment, the public welfare makes such action necessary." The ordinance of Eastover provides that a business license may be revoked or refused if operation of the business would be detrimental to the "security, welfare, convenience, health, peace, or good government of the town." Thus, applying the law of *Richardson* to this appeal, this Court concludes that Appellant's property interest holds "minimal value" when determining the quality of notice and the formality of any hearing that is required by due process.

A. The City's Notice/Citation fulfilled the requirements of due process.

In *Richardson*, the Fourth Circuit held that "informal" notice was sufficient in the context of a business license. Specifically, the mayor of Eastover orally advised Richardson prior to the meeting that the town council intended to discuss the issue of closing the nightclubs on Main Street. *Id.* at 1160. Although the mayor did not invite Richardson to the meeting on his own initiative, he did so when Richardson called the mayor after the renewal of his license had been refused. *Id.* Pursuant to this "informal notice of the meeting," Richardson appeared at the meeting. *Id.* During the period thereafter and before the vote by the town council, Richardson was "informally notified" of two more meetings during which he had the opportunity to present his views on the issue, and he did so. *Id.* Finally, about a month before Richardson was required to close the Apollo Club, he received written notice. *Id.* The Fourth Circuit held, "[s]ince

Richardson received actual notice, he can claim no prejudice or even unfairness for its having been informal." *Id.*

Here, the City's Citation/Notice was written and formal. The Citation/Notice was detailed and provided Appellant with actual notice of the revocation hearing sufficient to permit Appellant and his counsel to attend the hearing and present Appellant's views. Indeed, Appellant's counsel attended the hearing and presented arguments on his client's behalf. When considering the "minimal value" of property interest involved and the formal, written and detailed Notice/Citation, this Court concludes that the City's Notice/Citation fulfilled the requirements of due process.

B. The City's hearing fulfilled the requirements of due process.

"On the issue of a hearing, due process does not require that in every instance of a deprivation of property, however insignificant, a full-blown evidentiary hearing must be conducted before an impartial tribunal." *Id.* "A hearing need only be provided 'at a meaningful time and in a meaningful manner' in the context of all the circumstances." *Id.* (*quoting Armstrong v. Manzo,* 380 U.S. 545, 552, (1965)). The *Mathews* case explains that three factors should be considered in determining the nature and timing of a hearing.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S.319, 335 (1976).

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[2] The City provided Appellant with the required citation on April 25, 2016, when it served the "Citation/Notice of Suspension and Hearing for Revocation of Business License" on Appellant's Counsel. (Exh. A)

After considering the *Mathews* factors and applying the factors in the context of a business license revocation, the Fourth Circuit held, "Richardson may have had a property interest at stake, *i.e.*, his business license, but the risk that the procedures used could result in an erroneous deprivation of his interest was minimal." *Richardson* at 1160. "Moreover, the probable value of a more formal hearing cannot be supported." *Id.* at 1161. The Fourth Circuit held the following under the third factor of the *Matthews*:

> The circumstances relevant to the third *Mathews* factor-the government's interest and the additional burdens that a more formal process would entail-also weigh against Richardson. The government of Eastover had a legitimate interest in "cleaning up" Main Street. It was properly reacting to complaints of shootings, drug use, fights, and noise. Moreover, Eastover is a small town, and its ability to provide formal hearings is limited. The town council meets only once a month, in the evening, and the council members have other full-time professions.

Id.

When applying *Richardson* and the *Matthews* factors to the case at bar, this Court concludes that that the City's hearing fulfilled the requirements of due process in light of the Appellant's "minimal" property interest. Indeed, Appellant was provided with a formal hearing that lasted more than three hours. The City also provided Appellant's counsel with more time to present arguments. (Record, p. 155, "I believe you gave us more time to present, and I appreciate that"). At the hearing, Appellant's counsel was also provided the opportunity to present evidence and call and cross-examines witnesses. In this appeal, Appellant's counsel does not complaint about the hearing itself; rather, Appellant complains that the city did not issue a "written order" to review for error. Because the entire hearing was transcribed and provided to Appellant's counsel, this Court concludes that Appellant's argument is immaterial and

disingenuous.[3] Based on the foregoing, this Court concludes that the City complied with due process, and provided Appellant with sufficient notice and an opportunity to be heard.

II. The Record contains ample evidence supporting City Council's decision to revoke the business license of Appellant.

In addition to the City fulfilling the requirements of due process, the record is replete with evidence and testimony supporting the City's decision to revoke Appellant's business license. Citizens, neighboring businesses and a patron of the Night Club all complained to the City at the revocation hearing about the criminal activity associated with the Night Club. The Hanahan Police department also went through voluminous incident reports connected to the operations of the Night Club and provided comparative statistical data relating to events and incidents from 2014 to May of 2016 for the Night Club and other establishments within the City that allow for on-premises consumption of alcohol. Based on the evidence and testimony in the Record, this Court concludes that the decision of City Council was sound, reasonable, and supported by abundant evidence and testimony.

For the reasons set forth above, the Court hereby affirms the decision of Hanahan City Council.

AND IT IS SO ORDERED.

November 15 2016

Honorable Dale E. Van Slambrook
Berkeley County ~~Master-in-Equity~~
SPECIAL CIRCUIT CT. JUDGE

[3] Appellant also cites to *City of Columbia v. Abbott*, 269 S.C. 504, 507, 238 S.E.2d 177, 179 (1977) and argues that the City was required to issue a written order. *Abbott* is distinguishable because the City of Columbia's ordinance expressly required a written order. Specifically, the City of Columbia ordinance stated, "City Council . . . shall issue a written finding of fact and an order to carry out its finding." The City of Hanahan Ordinance has no such requirement.

EXHIBIT D

STATE OF SOUTH CAROLINA)	IN THE MAGISTRATE COURT
)	
COUNTY OF BERKELEY)	CASE NUMBERS: 2017-CV-08-10600019
)	2016-CV-08-10605290
)	
HARRIS INVESTMENTS)	
HOLDINGS, LLC,)	
)	
Plaintiff,)	
)	
v.)	**ORDER**
)	
ARACELIS SANTOS,)	
)	
Defendant.)	
)	

THIS MATTER comes before the Court on October 11, 2017, upon the Plaintiff's Applications for Ejectment filed in the above-captioned actions. The Plaintiff (hereinafter "Harris" or "Landlord") sought to eject the Defendant (hereinafter "Santos" or "Tenant") from two units in the same shopping center located at 5901 Loftis Road, Hanahan, South Carolina.

I. Findings of Fact and Conclusions of Law

A. BACKGROUND

Harris and Santos are parties to a lease dated May 22, 2014, for an 1,807 square foot shopping center unit operated as a convenience store known as "Latino Mix." [Plaintiff's Exhibit 23, Defendant's Exhibit 1], hereinafter "the First Lease." The term of the First Lease was for two (2) years, provided that in the event the "commencement date" of the First Lease was a date other than the first date of a calendar month, the term would extend for the number of days remaining in the calendar month following the commencement date. The commencement date for purposes of the First Lease was August 1, 2014.

Harris and Santos are parties to a lease dated December 2, 2015, for a 3,780 square foot shopping center unit operated as a restaurant/discotheque/night club known as "El Alamo." [Plaintiff's Exhibit 2, Defendant's Exhibit 2], hereinafter "the Second Lease." The term of the Second Lease was from December 1, 2015, until November 30, 2018.

The First Lease sets forth the "demised premises" as 5901 Loftis Road, Suite #2, 4, Hanahan, South Carolina. The Second Lease provides that the leased premises is 5901 Loftis Road, Hanahan, South Carolina. However, it is clear from the evidence presented, and undisputed by the parties, that the First Lease involves "Latino Mix" and the Second Lease involves "El Alamo." The business license for El Alamo is held in the name of Benjamin Reyna (hereinafter "Reyna").

Harris filed an Application for Ejectment and Rule to Show Cause, Case Number 2016-CV-08-10605290, on November 14, 2016, alleging that Santos had violated the terms or conditions of the Second Lease. A Rule to Vacate or Show Cause was signed by the Honorable D. Mark Stokes and served on Santos on November 17, 2016. Santos filed a Motion for Removal, Answer to Rule to Show Cause, and Counterclaims on November 28, 2016. Harris filed a Reply to Counterclaim on December 15, 2016. Harris submitted a Memorandum in Opposition to Santos's Motion to Remove on or about January 6, 2017[1]. Judge Stokes held a hearing on Santos's Motion for Removal on January 9, 2017, and ultimately issued an order on January 13, 2017, denying the Motion. On March 31, 2017, the Harris filed a Motion for Summary Judgment in Case Number 2016-CV-08-10605290. On June 14, 2017, Harris filed a Supplemental

[1] While Harris's Memorandum in Opposition to Santos's Motion to Remove was submitted to the Court on January 6, 2017, said Memorandum was not actually filed until January 13, 2016.

Memorandum in Support of Motion for Summary Judgment in Case Number 2016-CV-08-10605290.

Harris filed a second Application for Ejectment and Rule to Show Cause, Case Number 2017-CV-08-10600019, on January 5, 2017, alleging that the terms of tenancy or occupancy had ended under the First Lease and further that Santos had violated the terms or conditions of the lease. A Rule to Vacate or Show Cause was signed by the undersigned on January 6, 2017, and a constable attempted service upon Santos two (2) times, posting a copy of the Rule to Vacate or Show Cause on Santos's door. Santos's attorney acknowledged that Santos received a copy of the Rule to Vacate or Show Cause and indicated that he would be filing a response thereto.[2] Santos filed a second Motion for Removal, Answer to Rule to Show Cause, and Counterclaims on February 23, 2017. Harris filed a second Memorandum in Opposition to Santos's Motion to Remove and Reply to Counterclaim on March 3, 2017. On April 3, 2017, the Plaintiff filed a Motion for Summary Judgment in Case Number 2017-CV-08-10600019.

Following Judge Stokes' January 13, 2017, Order denying Santos' Motion for Removal as to Case Number 2016-CV-08-10605290, this Court determined that Judge Stokes' rulings became the "law of the case" for purposes of Case Number 2017-CV-08-10600019, and therefore denied Santos' Motion for Removal in the latter action. After the Court's decision, Santos moved to voluntarily dismiss her counterclaims against Harris over Harris' objection. The Court issued an Order granting Santos' Motion to voluntarily dismiss her counterclaims on July 18, 2017.

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[2] On March 9, 2017, the undersigned held a pretrial hearing at which time the Court inquired of Santos's attorney as to whether there were any service issues pertaining to either matter in light of Santos's Answer which asserted an affirmative defense under South Carolina Rules of Civil Procedure (SCRCP) Rule 12(b)(2). The acknowledged to the Court that no service issues existed. As such, the Court finds that Santos voluntarily withdrew her affirmative defense under SCRCP 12(b)(2) and acquiesced to the Court having personal jurisdiction over her for both matters.

Santos waived her right to a jury trial and the matters were heard by bench trial on October 11, 2017.

B. FINANCIAL DEFAULT

Despite having not pled the issue in either Application for Ejectment, Harris alleges Santos repeatedly defaulted on her obligation under the First and Second Leases to pay rent timely for both El Alamo and Latino Mix.

Rule 15(b) of the South Carolina Rules of Civil Procedure allows for amendments of pleadings to conform to the evidence presented at trial, providing in pertinent part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). The decision whether to allow the amendment of pleadings to conform to the evidence is left to the sound discretion of the trial court. Id. Amendments should be allowed if no prejudice occurs to the opposing party. Id.

Rule 15(b) covers two situations involving amendments to conform to the evidence. Id. First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary. Id. Express consent may be demonstrated by a stipulation but implied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial. Id.

As was the case in Dunbar, no objection was made in this case to the evidence pertaining to financial default. As such, the second part of the rule is inapplicable. In

addition, there was no express consent. However, the Court finds that the parties tried the issue of financial default by implied consent. It appears from the evidence in the record that counsel for both Harris and Santos questioned witnesses extensively regarding the issues of Santos' alleged financial default. In fact, this issue was the basis for Harris' Motion for Summary Judgment prior to the trial which was granted in part.

Both leases in the instant case require payment of rent on a monthly basis and rent is due on the first day of each month. Failure to pay rent on or before the due date constitutes financial default. If Tenant fails to cure the default via payment of the past due rent and all late fees within 5 days of receiving notice of default, Landlord is authorized to immediately terminate the lease and oust Tenant. [Plaintiff's Exhibit 2, Defendant's Exhibits 1 and 2].

In February of 2017, Santos submitted a check dated February 4, 2017, for the monthly rental payment for El Alamo, but the check was returned due to insufficient funds. [Plaintiff's Exhibit 12]. On March 10, 2017, Harris' counsel notified Santos' counsel of the default orally and in writing. [Plaintiff's Exhibit 13]. No replacement check or any other payment for February 2017 rent was delivered within the 5-day cure period as required. [Plaintiff's Exhibit 17].

On March 20, 2017, the rent check for El Alamo was also returned due to insufficient funds. [Plaintiff's Exhibit 14]. On April 4, 2017, Harris provided notice to Santos that the March rent check was returned due to insufficient funds and stated that although Santos was already in default (due to failure to pay February rent and other breaches described in the Complaint), the failure to pay March rent constituted further financial default under the terms of the Lease. [Plaintiff's Exhibit 15]. Santos failed to

provide a replacement check or otherwise cure the breach within the 5-day cure period as required. [Plaintiff's Exhibit 17].

On May 3, 2017, counsel for Harris informed counsel for Santos that Harris had terminated the Second Lease due to Santos' failure to timely pay rent and failure to timely cure financial defaults after notice. [Plaintiff's Exhibit 17].

Santos subsequently failed to pay rent timely for August of 2017 for El Alamo. Via letter dated August 15, 2017, counsel for Harris notified Santos of this further financial default. [Plaintiff's Exhibit 18]. Santos failed to cure the defaults within the 5-day cure period as required. Santos again failed to pay rent timely for September of 2017 for El Alamo. Counsel for Harris sent a letter dated September 22, 2017, notifying Santos of this further financial default and Santos did not cure the breach within the 5-day cure period. [Plaintiff's Exhibit 19].

It is clear that Santos repeatedly failed to make timely rental payments under both the First and Second Leases. In fact, the Court previously granted partial summary judgment in that there was no issue of material fact as to whether Santos was in default for "failure to pay rent when due or demanded" and whether she received notice of the default. Mr. DeLuca testified at trial that he had no information about rent and that as far as he was aware, including whether or not there remains an unpaid balance and that Harris had sent the rent payments to held in escrow by new counsel. Nonetheless, Santos had at the time of trial caught up all back owed rent.

Having determined that Santos was in financial default, the Court must next determine whether said breach was material under the analysis set forth in Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994).

In determining whether Tenant's breach of the Lease was material, the Court must consider (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Kiriakides, supra.

Harris contends that it was deprived of the benefit of its bargain in purchasing the shopping center and assuming the Leases, having based its analysis of what it was willing to pay for the premises in part on the expectation of timely rental payments. Mr. DeLuca testified that Santos' repeated failure to make timely payments frustrated Harris' ability to manage cash flow for the shopping center. However, Mr. DeLuca admitted that he was unaware of the status of Santos' account and testified that the late rent payments remained in Harris' counsel's trust account. The Court finds that while the late rent was an inconvenience to Harris for sure, it did not rise to the level of depriving Harris of the benefit of its bargain and that the only benefit Harris reasonably could have expected was the past due rent which could be adequately compensated by damages. Santos' damages to the extent the Leases would be forfeited include the length of time remaining on the Leases. As to factor (d), the Court finds that Santos has in fact cured her default by paying all amounts past due. Finally, there is no evidence in the record that Santos' breach was willful or in bad faith. Although Santos did provide Harris with

checks that were returned for insufficient funds, nothing presented suggests that she did so purposefully.

As the Court has applied all Kiriakides factors in favor of Santos, the Court finds that forfeiture based on financial default alone in this particular case would be inequitable under the totality of the circumstances surrounding the financial breach.

C. FIRST LEASE

(1) Term of Tenancy or Occupancy Has Ended

In Case Number 2017-CV-08-10600019, Harris argues that the First Lease expired and that Harris delivered notice to Santos to vacate the premises and, as such, the ejectment should be upheld.

It is unequivocal that the term of occupancy for Santos under the First Lease ended August 1, 2016. On December 1, 2016, counsel for Harris notified Santos the term of the First Lease had expired and directed Santos to vacate the premises on or before December 31, 2016. [Plaintiff's Exhibit 24]. Santos refused to vacate and continued to occupy the premises. As indicated previously herein, it is clear from the evidence presented, and undisputed by the parties, that the First Lease involves "Latino Mix" and the Second Lease involves "El Alamo."

During the trial, Santos introduced evidence of a purported new lease agreement for Latino Mix as Defendant's Exhibit 3 (hereinafter "the Third Lease"). Whereas Harris denied ever having agreed to renew or extend the term of the First Lease, Santos argues that all negotiations pertaining to the Third Lease took place with Isabella Martinez acting as agent for Harris and that she believed the Second Lease and the Third Lease were extensions of the First Lease. Santos claims that she signed the Second Lease on December 22, 2015, and the Third Lease on August 1, 2016. The

Third Lease provided a term beginning on August 1, 2016 (the expiration date of the Second Lease), and ending on August 1, 2018. Santos argues that after she signed the Third Lease, she received text messages from Isabella Martinez explaining that the Landlord would not sign the Third Lease following a meeting with the City of Hanahan.

The Third Lease provides in Section 23 thereof, entitled "Effective Date of Lease," that "This Agreement shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this Agreement is signed by one party and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party and delivery of a fully executed copy of the submitting party." [Defendant's Exhibit 3]. It is undisputed that the Third Lease was never executed by Harris or any agent of Harris. By the express terms of the Third Lease, even if Santos signed the Third Lease and delivered it to Harris, this act merely constituted an offer to lease subject to revocation at any time prior to execution by Harris. As such, the Third Lease did not become a binding agreement as there was never an execution and delivery thereof by both parties.

Moreover, the Third Lease does not satisfy the statute of frauds because it was never signed by Harris or any agent thereof. S.C. Code Section 32-3-10(4) provides that any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (holding a lease agreement for a period greater than one year, or any modification thereof, must satisfy the statute of frauds).

Finally, the Court finds that Santos failed to exercise her option to renew the First Lease which required delivery via certified mail of written notice of her intention to renew at least one hundred eighty (180) days before the expiration of the First Lease. [Plaintiff's Exhibit 23].

The Court finds that the credible evidence in the record demonstrates that the Third Lease is ineffective and therefore the First Lease expired on August 1, 2016, leaving Santos as a month to month tenant since that date. [Plaintiff's Exhibit 23]. As such, Harris is entitled to ejectment under Case Number 2017-CV-08-10600019.

(2) Failure to Provide Evidence of Insurance Coverage

In Case Number 2017-CV-08-10600019, Harris next argues that Santos defaulted as to Sections 14 and 16 of the First Lease by failing to provide evidence of insurance coverage as demanded by Harris.

Section 14 of the First Lease provides that Santos was to carry at her own expense, public liability insurance coverage on the premises with a company qualified to transact business in South Carolina with liability limits of not less than $1,000,000.00 per occurrence and $2,000,000.00 aggregate. Santos was to have Harris and its managing agent named as additional insureds with a certificate of such coverage from the insurer giving thirty (30) days' notice to Harris and its managing agent prior to cancellation or termination was required to be provided to Harris and its managing agent prior to Santos' possession of the premises.

Section 16 of the First Lease provides that Harris carry all-risk insurance coverage on the premises and other buildings in the shopping center and if during the term of the lease, the premises are used for any purpose or in any manner which

causes an increase in the rates of such insurance, Santos shall pay as additional rent the additional premium caused thereby upon ten (10) days written notice to Santos.

On December 21, 2016, counsel for Harris sent an email to counsel for Santos indicating that it was his understanding the insurance certificates for both Latino Mix and El Alamo were set to expire on December 30, 2016. [Plaintiff's Exhibit 9]. Counsel for Harris further indicated that Harris needed to obtain new certificates as soon as possible but no later than December 30, 2016.

Costa DeLuca, employed by Harris, testified that no insurance certificates were ever provided demonstrating that Santos maintained the public liability insurance coverage up to the limits required by the First Lease subsequent to December 30, 2016. Santos did not testify at trial and produced no evidence that insurance certificates were ever provided subsequent to the purported expiration of the initial insurance certificate on December 30, 2016.

Section 18(b) of the First Lease provides that "Lessee shall be in general default if it shall fail to keep or shall violate any other conditions, stipulations, or agreements contained" in the First Lease "on the part of the Lessee to be kept and performed." Section 18(d) provides that "In the event Lessee is in general default, it shall have a grace period of thirty (30) days to cure such default after Lessor shall have mailed, by U.S. Postal Service, Lessee written notice thereof; provided however, if Lessor shall have mailed to Lessee a notice of such default, even though the same shall have been cured and this Lease not terminated, and within twelve (12) months from the date which said notice of default has been mailed by Lessor to Lessee, Lessee shall again be in general default, the same shall be deemed an event of default without any notice or grace period."

While Harris provided Santos with a letter titled "Notice of Default and Right to Cure" on October 13, 2016, regarding liability insurance for the Second Lease, Harris did not provide Santos with notice of default pertaining to her failure to maintain insurance on the First Lease.

The purpose of a notice of default is to give the party allegedly in default an opportunity to cure the default and meet his obligation. Hammond v. Tilghman Lakes, Inc., 295 S.C. 152, 367 S.E.2d 446 (Ct. App. 1988). Forfeiture provisions of a lease are strictly construed and when a forfeiture depends upon giving a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to time and content. Litchfield Co. of South Carolina, Inc., v. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986).

Although counsel for Harris requested new certificates of insurance from Santos on December 21, 2016, Santos was not in default at that time as Harris admits the certificates of insurance expired December 30, 2016. The Court finds that Harris may have had grounds to send a Notice of Default to Santos on December 31, 2016, as result of Santos' potential breach of the First Lease for failing to maintain public liability insurance on the premises. However, nothing in the record evinces that Harris ever provided Santos with the opportunity to cure any such potential breach as provided for in Section 18(d) of the Lease. Whether the Court were to conclude that Santos breached the First Lease by failing to maintain public liability insurance is immaterial as the Court finds that Harris failed to comply with the Notice of Default provisions of the First Lease in giving Santos the opportunity to cure the breach.

Therefore, Harris' request to uphold the eviction of Santos based on the alleged violations of the First Lease as to liability insurance is denied.

D. SECOND LEASE

(1) Failure to Comply with Local Laws and Ordinances

In Case Number 2016CV0810605290, Harris argues first that Santos breached Section 10 of the Second Lease by failing to comply with local laws and ordinances, resulting in revocation of the business license issued by the City of Hanahan in connection with the business operated by Santos and/or Mr. Reyna on the premises. Harris argues that continuing to operate the business without a valid business license also violated the terms and conditions of the Second Lease. Harris further argues that Santos repeatedly violated the International Fire Code regarding the maximum capacity for the building located on the premises, thus violating the terms and conditions of the Second Lease.

The Second Lease prohibits Santos from using the premises for any immoral conduct or illegal activity. [Plaintiff's Exhibit 2, Section 4]. While Santos herself did not testify at trial, her sister, Arelis de Santos Gomez testified that she understood the Second Lease to require her sister to maintain the premises in compliance with local law. Ms. de Santos Gomez acknowledged that violations of local ordinances limiting building occupancy and prohibiting after-hours consumption of alcohol would constitute breaches of the Second Lease. However, she denied that she or her sister had allowed any unlawful activity on the premises.

The Second Lease further requires Santos to keep the premises "in compliance with all laws, ordinances, and requirements of any legally constituted public authority." [Plaintiff's Exhibit 2, Section 10].

At trial, Hanahan Police Chief Dennis Turner testified as to voluminous incident reports prepared by the Hanahan Police Department arising from and connected to the

operation of El Alamo from 2014 to the present day, including alleged violations of local ordinances regarding occupancy, after-hours consumption of alcohol, and selling alcohol without a license.[3] Chief Turner further testified about incident reports related to various physical altercations, including assaulting a police officer, numerous arrests related to alcohol/intoxication, possession of drugs, arrests of an employee of El Alamo for pointing and presenting a firearm on the premises, and noise violations.

While the incident reports do reflect that a substantial amount of criminal activity of third parties has occurred in and around the premises of El Alamo over the last three (3) years to which the City of Hanahan Police Department has responded, most of these incidents involve purported customers of El Alamo rather than the owners, operators, and employees thereof.

Nevertheless, several incident reports detail incidents during which officers cited El Alamo for substantially exceeding its maximum occupancy of ninety-nine (99) persons in violation of the International Fire Code as adopted by the City of Hanahan pursuant to S.C. Code Section 6-9-80. [See Plaintiff's Exhibit 27, pages 44-45, 53, 372, 380]. Officer Cliff Driggers testified that he personally participated in a count of all persons within El Alamo in 2016 in which the occupancy exceeded ninety-nine (99). Driggers further testified that he personally observed patrons of Latino Mix bringing alcohol from Latino Mix to El Alamo and that El Alamo was a "BYOB club" and that nothing was unlawful about customers bringing their own alcohol to El Alamo. It is clear from the evidence presented that Santos' establishment did on at least one occasion permit more persons that allowed by the International Fire Code as adopted by the City

[3] Plaintiff's Exhibit 27, the compilation of incident reports involving El Alamo, was admitted into evidence over Santos' hearsay objection pursuant to Rule 803(8) of the South Carolina Rules of Evidence.

of Hanahan. Thus, the Court finds that Santos violated the Code of Ordinances for the City of Hanahan constituting default under Section 10 of the Second Lease.

Moreover, several incident reports document incidents of El Alamo violating Hanahan Ordinance 4-2 which prohibits onsite consumption of alcohol after 2:00 a.m. [See Plaintiff's Exhibit 27, pages 372, 380, 402, 415, 424, 437, 444, 445, 449, 451, 473]. In addition, the reports detail at least one incident during which El Alamo sold alcohol without a license to do so. [See Plaintiff's Exhibit 27, page 432]. While Santos argues that the ordinance is being challenged in a separate Common Pleas action, Santos acknowledges that it is unnecessary for this Court to analyze that litigation to decide the issues before the Court. It is clear from the evidence presented that Santos' establishment remained open on at least one occasion during the hours prohibited by the ordinance and that during these hours patrons consumed alcoholic beverages in Santos' establishment. Thus, the Court finds that Santos violated the Code of Ordinances for the City of Hanahan constituting default under Section 10 of the Second Lease.[4]

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[4] Due to the alleged criminal activity in and around El Alamo, the Hanahan City Council unanimously voted on May 26, 2016, to revoke the business license of El Alamo. Said revocation was upheld on appeal to the Court of Common Pleas. The Circuit Court's decision to affirm the revocation is currently on appeal to the South Carolina Court of Appeals. Santos argues that Harris "concedes that both the Hanahan City ordinance and South Carolina state law provide an automatic stay for such an appeal." Although Rule 241 of the South Carolina Appellate Court Rules provides that as a general rule, the service of the notice of appeal in a civil matter acts to automatically stay matters decided in the order and to automatically stay the relief ordered in the appealed order, Rule 241 provides that there are exceptions to the general rule found in statutes, court rules, and case law. Hanahan Municipal Ordinance 10-9(b) states that a timely appeal of a business license revocation **does not effectuate a stay of city council's decision to revoke**. Despite such, El Alamo has continued to operate on the premises which Harris argues violates Hanahan City Ordinance 10-2 prohibiting operating of a business without a valid business license. The HPD incident reports evince repeated instances in which El Alamo has been cited for violations of Ordinance 10-2. [Plaintiff's Exhibit 27, pages 444, 448, 449, 451]. Nothing in the record suggests that Santos sought a temporary injunction in an effort to continue business operations during the pendency of the appeal. See Amrik Singh & SBPS, Inc. v. City of Greenville, 384 S.C. 365, 681 S.E.2d 921 (Ct. App. 2009) (Following revocation of business license, owner unsuccessfully sought a temporary injunction to continue business operations during the pendency of the appeal given the Greenville City Ordinance provided that an appeal does not stay the revocation). Nonetheless, the Court finds that no exceptions to the general rule providing for an automatic stay of the business license revocation apply in this particular case. The Court notes that if the Hanahan Municipal Ordinance's

Having determined that Santos breached the Second Lease, the Court must determine whether any notice and cure period applies to Santos' breach of the Lease and, if so, whether proper notice was given and whether Santos cured its defaults.

Mr. DeLuca testified at trial that he personally met with Mr. Reyna at El Alamo in the Fall of 2016 and warned him that violations of local ordinances and criminal activity must stop or Harris would have no choice but to take legal action. On October 13, 2016, Harris provided Santos with a Notice of Default regarding the failure to comply with Section 10 of the Second Lease involving exceeding the maximum occupancy. Nonetheless, these violations have continued well past the cure period. As such, the Court finds that Harris complied with the Notice provisions of the Second Lease.

The Court finds that Santos breached the Second Lease and Harris complied with the Notice of Default provisions therein. The Court must next determine whether said breach was material under the analysis set forth in Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994).

In determining whether Tenant's breach of the Lease was material, the Court must consider (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable

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provision regarding the inapplicability of the general rule is upheld, a business would effectively be shut down regardless of whether they prevail on appeal, an application of the law that would effectively eliminate due process. As such, the Court declines to find that Santos breached the lease by continuing to operate El Alamo during the pendency of the appeal of the business license revocation.

assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Kiriakides, supra.

The Court finds that Harris' expectations that Santos will comply with all local and state ordinances are certainly reasonable. The Court concludes that the breaches as proven amounts to those that deprives Harris of the benefit it expected from the Lease itself. The violation of local ordinances, particularly those that relate to fire safety and safety of the general public significantly increases the exposure to Harris as to liability for injuries to persons on the premises and otherwise. Certainly the exposure to liability was an issue contemplated by the Second Lease as the Second Lease requires Santos to keep a minimum of $1,000,000.00/$2,000,000.00 in general liability insurance on the premises with Harris as an additional insured. Harris could not possibly be adequately compensated for Santos' failure to abide by the local ordinances.

The Court finds that that Santos' damages, if the lease is forfeited, include the length of time remaining under the lease alone. However, no testimony was offered at trial as to the potential revenues lost should Santos forfeit the lease. Arelis de Santos Gomez testified as to the amount of work, effort, and her savings that she put into the business and indicated that if put out she would have no money to pay rent as a single mother with a daughter starting college next year. However, Arelis de Santos Gomez is not the tenant of the premises associated with the Second Lease as evinced by her testimony. Aracelis Santos did not testify and presented no evidence as to the extent to which she would suffer forfeiture. The fourth factor examines the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances. Having considered all the circumstances surrounding the Second Lease and Santos' breach, the Court concludes

that Santos was given ample time within which to cure the default and, over time has failed to attempt to cure its default. This Court has no reasonable assurances that Santos will cease to allow El Alamo to remain open and serve alcoholic beverages after hours in the future.

In light of the foregoing, the Court finds Santos' repeated breaches of the lease relating to Sections 4 and 10 of the Second Lease were material and the eviction is upheld.

(2) Public Nuisance

Harris additionally argues that Santos violated the terms and conditions of the Second Lease by creating a public nuisance on the premises and that the Court should uphold the eviction as a result.

South Carolina defines a nuisance as follows:

> A person who erects, establishes, continues, maintains, uses, owns, occupies, leases, or releases any building or other place used for the purposes of lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace in this State is guilty of a nuisance; and the building, place, or the ground itself in or upon which the lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace is conducted, permitted, carried on, continued, or exists and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining the nuisance also are declared a nuisance and shall be enjoined and abated as provided in this chapter.

S.C. Code Section 15-43-10(A). "Continuous breach of the peace" means a pattern of repeated acts or conduct which either (1) directly disturbs the public peace or (2) disturbs the public peace by inciting or tending to incite violence. S.C. Code Section 15-43-10(B).

S.C. Code Section 15-43-20 provides that the Attorney General, the solicitor in the judicial district in which the alleged nuisance is kept, or any citizen of this State may

bring suit for injunction of the nuisance as to the person conducting or maintaining the nuisance and the owner or agent of the building or ground upon which the nuisance exists. S.C. Code Section 15-43-20.

Santos argues that the procedure set forth in Title 15 is the only means by which a nuisance may be established under South Carolina law and that this Court may not determine whether the actions or inactions of El Alamo constituted a nuisance. The Court disagrees. The Court must determine whether Santos kept the premises "in compliance with laws, ordinances and requirements of **any** legally constituted public authority." [Plaintiff's Exhibit 2, Section 10]. The Court finds that this provision of the lease contemplates not only that a magistrate would have to determine whether Santos violated the ordinances of the City of Hanahan (which the Court finds she has), it also contemplates that a magistrate would have to determine whether Santos violated the laws of the State of South Carolina which certainly include the laws pertaining to public nuisance. While the procedure set forth in Title 15 certainly provides a means by which a Court of equity may grant an injunction as to a nuisance, nothing therein prohibits the magistrate court from determining the existence of said nuisance as a ground for ejectment. To hold otherwise would render the foregoing provision of the Second Lease, a provision common to nearly all commercial and residential leases in South Carolina, meaningless. Santos and Harris entered into a lease that requires Santos to comply with all laws of any legally constituted public authority. Whether Santos has breached said lease is necessarily determined by this Court and this Court alone. This Court cannot and will not enjoin Santos from operating her business as contemplated by the procedures regarding public nuisances as set forth in Title 15. However, if this Court determines that Santos has breached the Second Lease, the Court may uphold

Harris' application for ejectment, simply preventing Santos from operating her business **on Harris' property**.

It is a sound principle of South Carolina law that "if one maintains a place where the laws are publicly, repeatedly, persistently, and intentionally violated, then such place would become a common or public nuisance." State v. Turner, 198 S.C. 499, 18 S.E.2d 376 (1942); see also State ex rel. Hembree v. Sherald, 2010 WL 10085571 (U.P. Ct. App. 2010). A business may become a nuisance by the manner in which it is conducted, and by the conduct of the persons assembling in and around it. Turner, supra.

The evidence in the record suggests that the number of calls for service to the Hanahan Police Department for El Alamo far exceeds the number of calls for service for the three (3) other establishments in Hanahan that allow for on-premises consumption of alcohol (LG's, Buccas, and Hanahan's). Chief Turner testified that the Hanahan Police Department has been required to devote so much time to El Alamo that it hampers the HPD's ability to address criminal activity elsewhere in the city. Chief Turner further testified that the HPD is forced to address an incident at El Alamo each and every weekend and, because of the danger posed by prior incidents of violence and weapons at El Alamo, the HPD must send multiple officers to El Alamo to address the issues. Two local business owners testified regarding disruption to the surrounding areas caused by disturbances at El Alamo, particularly as to the signage for one business being destroyed by a patron of El Alamo and the disturbances to the other's customers, tenants in a mobile home park adjacent to El Alamo.

As indicated previously herein, a substantial amount of criminal activity of third parties has occurred in and around the premises of El Alamo over the last three (3)

years to which the City of Hanahan Police Department has responded, most of these incidents involving purported customers of El Alamo rather than the owners, operators, and employees thereof. However, there were many instances during which the owners, operators, and employees of El Alamo violated the municipal ordinances of the City of Hanahan and the International Fire Code.

The Court finds that the credible evidence in the record demonstrates that Santos has maintained El Alamo as a place where the laws are publicly, repeatedly, persistently, and intentionally violated, thus disturbing the public peace. While Santos asserts that the only evidence of nuisance produced by Harris consists of incident reports relating to third parties associated with El Alamo as opposed to Santos herself, it is apparent from the record that Santos has conducted her business in a manner which encourages violations of the various municipal ordinances and which attracts patrons whose conduct violates the various local and state laws. The Court finds that El Alamo became a nuisance by the manner in which it was conducted and by the conduct of the persons assembling in and around it and therefore breached the Second Lease. The Court further finds that in examining the factors as set forth in Kiriakides, said breach was material. As set forth previously herein, Harris' expectations that Santos will comply with all local and state laws are certainly reasonable. The Court concludes that the breaches as proven amount to those that deprive Harris of the benefit it expected from the Lease itself. Violations of state law, just as those involving municipal ordinances, significantly increase the exposure to Harris as to liability for injuries to persons on the premises and otherwise. Likewise, Harris could not possibly be adequately compensated for Santos' failure to abide by the laws pertaining to public nuisance. Having considered all the circumstances surrounding the Second Lease and

Santos' breach, the Court concludes that Tenant was given ample time within which to cure the default and, over time has failed to attempt to cure its default. This Court has no reasonable assurances that Santos will cease to allow El Alamo to remain open without constituting a public nuisance. As such, the eviction is upheld.

(3) Failure to Provide Evidence of Insurance Coverage

In Case Number 2016CV0810605290, Harris argues Santos breached the Second Lease by failing to provide evidence of insurance.

The Second Lease requires Santos to "keep in full force and effect" public liability insurance on the premises in which both Santos and Harris are named as the insured with a single limit of $1,000,000.00 and an aggregate of $2,000,000.00. [Plaintiff's Exhibit 2, Section 8]. The Second Lease expressly requires Santos to provide a certificate of insurance "not later than the commencement date of this lease and prior to the expiration of such insurance policy during the term of this lease." [Plaintiff's Exhibit 2, Section 8].

Santos obtained insurance for the calendar year 2016 and provided a certificate of insurance to Harris. [Plaintiff's Exhibit 8]. Harris provided Santos with a letter titled "Notice of Default and Right to Cure" on October 13, 2016, regarding liability insurance for the Second Lease. In this letter, Harris' CFO Eric C. Coulter stated to Santos, "At this time we are requesting you increase the liability insurance to Single limit of $3,000,000.00 and an Aggregate of $6,000,000.00. Please provide an updated insurance certificate within 10 business days. Failure to provide increased insurance coverage will cause a default in the lease after October 31, 2016." [Plaintiff's Exhibit 3]. However, nothing in the Second Lease requires Santos to increase the limits of liability upon demand but rather only pay upon demand as additional rent any increase in

premiums of insurance carried by Harris on the Premises resulting from Santos' occupancy or improvements. [Plaintiff's Exhibit 2, Section 8]. No evidence was presented at trial that Harris obtained additional insurance and/or demanded an increase in rent as a result.

On December 21, 2016, counsel for Harris sent an email to counsel for Santos indicating that it was his understanding the insurance certificates for both Latino Mix and El Alamo were set to expire on December 30, 2016. [Plaintiff's Exhibit 9]. Counsel for Harris further indicated that Harris needed to obtain new certificates as soon as possible but no later than December 30, 2016.

Costa DeLuca, employed by Harris, testified that no insurance certificates were ever provided demonstrating that Santos maintained the public liability insurance coverage up to the limits required by the Second Lease subsequent to December 30, 2016. Santos did not testify at trial and produced no evidence that insurance certificates were ever provided subsequent to the purported expiration of the initial insurance certificate on December 30, 2016.

Nonetheless, while Harris has proven by the preponderance of the evidence that Santos did not provide a certificate of insurance prior to the expiration of the 2016 calendar year insurance policy, the record is devoid of any evidence that constitutes a notice of default (and right to cure) as to her failure to do so. As indicated previously herein, the purpose of a notice of default is to give the party allegedly in default an opportunity to cure the default and meet his obligation. Hammond v. Tilghman Lakes, Inc., 295 S.C. 152, 367 S.E.2d 446 (Ct. App. 1988). Forfeiture provisions of a lease are strictly construed and when a forfeiture depends upon giving a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to

time and content. Litchfield Co. of South Carolina, Inc., v. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986).

Although counsel for Harris requested new certificates of insurance from Santos on December 21, 2016, the Court finds that this email did not constitute written notice of default. Moreover, nothing in the record evinces that Harris ever provided Santos with the opportunity to cure any such potential breach as provided for in Section 30 of the Second Lease. The fact that Santos breached the Second Lease by failing to maintain public liability insurance is immaterial as the Court finds that Harris failed to comply with the Notice of Default provisions of the Second Lease in giving Santos the opportunity to cure the breach.

Therefore, Harris' request to uphold the eviction of Santos based on the alleged violations of the Second Lease as to liability insurance is denied.

(4) Violation of Prohibition on Third-Party Occupancy

Harris additionally alleges that Santos violated the Second Lease by allowing Reyna to operate a business on the premises. As with issues pertaining to Financial Default, Harris did not plead in its Application for Ejectment this issue. Nonetheless, the Court finds that the parties tried this issue by implied consent.

The Second Lease provides that Santos "shall not, without written consent of [Harris], in each case . . . sublet the Premises or any part thereof or permit the Premises to be occupied by other persons." [Plaintiff's Exhibit 2, Section 12].

Harris alleges that whereas Santos is the tenant under the Second Lease, she never operated a business on the premises. Harris alleges that because the business license for El Alamo was obtained and held by Reyna instead of Santos, Santos was in effect permitting the premises to be occupied by other persons. However, Reyna and

Santos' sister, Arelis de Santos Gomez, have been living in a long-term monogamous relationship and describe one another as his or her "significant other."

It is worthy to note that it is Reyna, not Santos, that summarized the concept of El Alamo to Harris as early as February 26, 2013. [Plaintiff's Exhibit 20]. Harris additionally served Reyna with its Notice of Default in October of 2016. [Plaintiff's Exhibit 4]. The Court finds that Harris impliedly consented to Reyna operating El Alamo, regardless of whether he was doing so on his own or at the direction or under the supervision of Santos. As such, the Court finds that Santos did not breach the Second Lease as to Section 12, "Assignment or Sublease."

Moreover, even if the Court would have held that Reyna's operation of El Alamo constituted a breach, the record is devoid of any evidence that Harris provided Santos with notice of default as to this section of the Second Lease and an opportunity to cure. Thus, Harris failed to comply with the Notice of Default provisions of the Second Lease in giving Santos the opportunity to cure the breach and as such, the Application for Ejectment as to this particular ground is denied.

III. Conclusion

The Court finds that while Santos breached the First and Second Leases by failing to pay rent when due or demanded, the breach was not so substantial or fundamental to justify forfeiture.

The Court further finds that Harris failed to meet its burden as to Santos' failure to provide proof of sufficient liability insurance under the First Lease. Moreover, even if Santos was in default in that regard, Santos was not given proper notice under the First Lease to cure the default. However, the Court finds that the First Lease expired, Santos became a month to month tenant as to Latino Mix, and notice was properly given

regarding Harris' intention not to renew said First Lease. As such, Application for Ejectment sought in Case Number 2017CV0810600019 is granted.

The Court finds that Harris met its burden as to Santos' failure to provide proof of sufficient liability insurance under the Second Lease. However, Santos was not given proper notice under the Second Lease to cure the default. The Court finds that Harris failed to meet its burden of proof as to Santos' violation of the Second Lease's prohibition against third-party occupancy and that even if Santos was in default thereof, Santos was not given property notice under the Lease to cure the default. Nonetheless, the Court finds that Santos failed to comply with local ordinances and created a public nuisance on the premises and that said breaches were material. As such, the Application for Ejectment sought in Case Number 2016CV0810605290 is granted.

The Clerk is directed to provide a copy of this Order to counsel for both Landlord and Tenant. All post-trial motions, including those pertaining to the request for attorney fees pursuant to either Lease, shall be filed with the Court within ten (10) days of the receipt of the within Order.

IT IS SO ORDERED.

The Honorable Rad S. Deaton
Berkeley County Magistrate

December 7, 2017
Charleston, South Carolina

Counsel for Harris: Merrit G. Abney, Esquire
Counsel for Santos: Thomas R. Goldstein, Esquire

EXHIBIT E

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY HARRIS INVESTMENTS HOLDINGS, LLC, Plaintiff, v. ARACELIS SANTOS, Defendant.	IN THE MAGISTRATE COURT CASE NUMBER: 2017-CV-08-10600019 2016-CV-08-10605290 **ORDER**

THIS MATTER comes before the Court on February 1, 2018, upon the Plaintiff's Motion for Award of Attorney's Fees filed on December 21, 2017, in the above-captioned actions. The Defendant filed a Reply to Plaintiff's Request for Attorney's Fees on January 25, 2018.

Present at the hearing were counsel for the Plaintiff, Merritt G. Abney, and counsel for the Defendant, Thomas R. Goldstein. The Court engaged in meaningful discussions regarding the applicable law and issues raised in the Plaintiff's Motion and the Defendant's Reply.

The general rule in South Carolina is that attorney's fees are not recoverable unless authorized by contract or statute. Baron Data Systems, Inc. v. Loter, 377 S.E.2d 296, 297 S.C. 382 (1989). In awarding reasonable attorney's fees, there are six factors to be considered by the Court: 1) The Nature, Extent, and Difficulty of the Legal Services Rendered; 2) The Time and Labor Necessarily Devoted to the Case; 3) The Professional Standing of Counsel; 4) The Contingency of Compensation; 5) The fee Customarily Charged in the Locality for Similar Legal Services; and 6) The Beneficial Results Obtained. Id. See also Rule 1.5 of the S.C. Rules of Professional Conduct.

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In the instant case, the May 22, 2014, lease ("the First Lease") provides in pertinent part:

> In the event that any legal matter, dispute, action or proceeding exist [sic] or is commenced by or between Lessor and Lessee under this Lease, the prevailing party shall be reimbursed reasonable attorney fees and court cost [sic] in such matter.

First Lease, Paragraph 46.

The December 1, 2015, lease ("the Second Lease") provides as follows:

> In the event Landlord successfully defends any action by the Tenant, or if it is necessary for Landlord to employ an attorney for the collection of rent or any other sum due hereunder, or to enforce any covenant of this lease, or the termination of this lease, or for the possession of the Premises or any part thereof the Tenant shall pay all costs, including reasonable attorney's fees.

Second Lease, Paragraph 32.

The foregoing paragraphs of the respective leases clearly demonstrate that the contracts between the parties provided for reasonable attorney's fees and costs to "the prevailing party" as related to the First Lease and to the Landlord as related to the Second Lease.

The Defendant first contends that the Plaintiff is not a "prevailing party," arguing that neither the Plaintiff nor the Defendant are the prevailing party in these cases because the Defendant prevailed on many of the issues and the Plaintiff prevailed on many of the issues. A "prevailing party" is the one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention and is the one in whose favor the decision or verdict is rendered and judgment entered. Seckinger v. The Vesselm Excalibur, 483 S.E.2d 775, 326 S.C. 382 (Ct. App. 1997). A party need not be successful as to all issues in order to be found to be a prevailing party. Id. While the Plaintiff did not prevail

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on each and every issue or claim presented in its pleadings, the Plaintiff prevailed on the ultimate issue in each action, the ejectment of the Defendant. As such, the Court finds that the Plaintiff is the prevailing party in this matter.

The Defendant next asserts that this Court is without jurisdiction to award an amount of attorney's fees in excess of the Court's general jurisdictional amount, $7,500.00, citing S.C. Code Section 22-3-10. The Defendant argues that the attorney's fee award is a "money judgment" and therefore the Court lacks jurisdiction over the above-referenced dollar amount. The magistrate's court has concurrent jurisdiction with the circuit court in contract actions for the recovery of money only, if the sum claimed does not exceed $7,500. S.C. Code 22-3-10(1); see Mosseri, Mosseri, Castro v. Austin's at the Beach, Inc., 642 S.E.2d 760, 372 S.C. 593 (Ct. App. 2007). This jurisdictional limit does not apply to "matters between landlord and tenant and the possession of land as provided in Chapters 33 through 41 of Title 27...." S.C. Code Section 22-3-10(10), Id. The Magistrate Court will retain jurisdiction in cases involving landlord and tenant and the possession of land even when any counterclaim exceeds $7,500. S.C. Code Section 22-3-10(12), Id. In cases that do not fall under S.C. Code Section 22-3-10(12) when a counterclaim is filed which if successful would exceed the civil jurisdictional amount as provided in Section 22-3-10, then the initial claim and counterclaim must be transferred to the docket of the common pleas court for that judicial circuit. S.C. Code Section 22-3-30, Id. Chapters 33 through 41 of title 27 of the South Carolina Code deal with creation, construction and termination of leasehold estates, ejectment of tenants, rent, undertenants of life tenants, and the Residential Landlord Tenant Act (which is not applicable to non-residential leaseholds). Mosseri, Mosseri, Castro, supra. The common theme of chapters 33 through 41 is possession of

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the property. Id. The instant cases were clearly matters between landlord (the Plaintiff) and tenant (the Defendant). The cases clearly involve the possession of land as both were initiated by the filing of an application for ejectment requesting that the Court evict the Defendant from the leased premises. Whereas the statute sets forth explicitly that the Court retains jurisdiction over counterclaims which exceed the jurisdictional limit in these matters, the statute is silent as to attorney's fees. However, the plain meaning of the statute indicates that this Court has jurisdiction over "all matters" between landlord and tenant and the possession of land. The Court finds that "all matters" includes a request for attorney's fees pursuant to a valid lease.[1]

The Nature, Extent, and Difficulty of the Legal Services Rendered

Although these matters were litigated in the magistrate court and without formal discovery, the parties' attorneys attended several hearings, including those pertaining to the Defendant's Motions for Removal, the Plaintiff's Motions for Summary Judgment, the Defendant's motion to dismiss her counterclaims, the hearing on the merits which lasted a full day with eight (8) witnesses, and the Defendant's Motion for New Trial which was heard in conjunction with the within Motion. These matters were highly contested and, as was the case in Loter, supra, were transformed from simple commercial eviction matters, if such things exist, into complex litigation. As such, the Court finds that the nature, extent, and difficulty of the legal services rendered in these matters was of such a nature that warrants an award of attorney's fees.

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[1] See also 1987 Op. Atty Gen, No. 87-10, p 45, wherein the South Carolina Attorney General opined that in matters brought pursuant to the South Carolina Residential Landlord and Tenant Act, the Magistrate Court has concurrent jurisdiction to include those cases brought pursuant to the Act where damages **or** attorney's fees may exceed the typical (then) $1,000.00 jurisdictional limit established by S.C. Code Section 22-3-10. The Court finds the reasoning therein to be sound and equally applicable to commercial eviction matters.

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The Time and Labor Necessarily Devoted to the Case

The Court has meticulously reviewed the time sheets provided by the as well as the Affidavit of Plaintiff's counsel in support of this Motion. The Court recognizes that these matters were time-consuming matters given the issues and contentious motions filed, briefed, and argued. The Court finds that the majority of the time and labor spent on the part of counsel for the Plaintiff and his staff was reasonable and not duplicative and thus an award of attorney's fees is warranted.

The Professional Standing of Counsel

The Court finds that based on the aforementioned Affidavit of Plaintiff's counsel, the Motion, timesheets, and conduct throughout these proceedings that counsel for both parties are experienced commercial litigators enjoying strong reputations in the legal community.

The Contingency of Compensation

This factor is inapplicable to the present cases as the fee arrangement between the Plaintiff and its counsel was not based upon a contingency fee.

The Customary Fee for Like Work

The first step in setting a reasonable fee is determining the appropriate hourly rate. See Liberty Mut. Ins. Co. v. Employee Resource Management, Inc., 176 F.Supp. 510 (D.C.S.C. 2001). The reasonableness of the attorney's hourly rate is determined by the prevailing market rates in the relevant community. Id. The court must assess the experience and skill of the prevailing parties' attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. Id.

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The Court finds that the rates charged in these matters were reasonable in the Charleston metropolitan market for Family Court, Circuit Court or Federal Court litigation based upon counsel's extensive experience and the Court's familiarity with attorney's fees customarily charged in the legal community.

However, the Court finds that while counsel for the Plaintiff reduced his hourly rate from his customary $400.00/$450.00 per hour to $380.00 per hour, the hourly rate charged exceeds the hourly rates in the Charleston area for commercial evictions in **magistrate court**. Moreover, the Court finds that the hourly rate for the paralegal ($205.00) and project assistant ($115.00) exceed those of the prevailing market rates in the community.

As such, for purposes of the attorney's fees award in the present matters, the Court reduces counsel for the Plaintiff's hourly rate to $280.00 per hour, a rate the Court finds commensurate with the prevailing market rates for practitioners in the **magistrate courts** of the Charleston market. Additionally, the Court finds it appropriate to reduce the paralegal hourly rate to $125.00 per hour and the project assistant to $80.00 per hour.

The Beneficial Results Obtained

The Court finds that the total benefit obtained by the Plaintiff in the matters currently before the Court was the ejectment of the Defendant. While the result was not financially significant in terms of a dollar figure, the Plaintiff prevailed on the ultimate result that it sought, thus accomplishing the aims of the suit.

The Court finds that the majority of the claims upon which the Plaintiff prevailed were related substantially to the claims in which it did not. See Hensley v. Eckerhart, 461 U.S. 424 (1983) (Where the plaintiff has failed to prevail on a claim that is distinct in

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FEB 09 2018
Goose Creek
Magistrate Office

all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised). The Court concludes that the successful and unsuccessful claims in these cases arose from a "common core of facts", and it is impossible to accurately separate out counsel for the Plaintiff's work on each different issue. This is also not a case where the unsuccessful theory so drove the evidentiary hearing and as such must in fairness be apportioned. Moreover, the Court sees no obvious way to reduce the award by a percentage of successful claims versus unsuccessful claims.

The Defendant contends that the charges submitted by the Plaintiff should "shock the conscience" of the Court. While certainly this Court rarely, if ever, sees attorney's fee affidavits which demonstrate over one hundred hours spent litigating a case in magistrate court or one in which the attorney's fee request exceeds fifty thousand dollars ($50,000.00), the Court must consider the relationship of the parties and the nature of their contract in its analysis. The Plaintiff and Defendant are parties to two (2) separate commercial leases presumably entered after arms-length negotiations. While the Plaintiff corporation was likely more sophisticated than the Defendant in terms of business experience, the Defendant was aware of the contractual provision in the leases with respect to attorney's fees and the potential application thereof. In the context of the complex world of commercial real estate, regardless of the level of the court in which the case was tried, this Court cannot find that an attorney's fee request of this magnitude shocks the conscience of the Court.

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FEB 09 2018
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Nevertheless, while the majority of the time and labor spent on the part of counsel for the Plaintiff in this matter was reasonable and not duplicative, the Court finds that any award of attorney's fees and costs in these matters should be reduced by some time the Court finds duplicative and the amount of costs other than "court" costs.

As such, and based upon the foregoing factors and relevant law, the Court finds that the Plaintiff is entitled to an award as follows: $34,608.00 in attorney's fees based upon 123.6 hours of time, $862.50 in fees for 6.9 hours of paralegal time, $312.00 in fees for 3.9 hours of project assistant time, and $104.73 in costs, for a total of **$35,887.23.**

IT IS SO ORDERED.

The Honorable Rad S. Deaton
Berkeley County Magistrate

February 9, 2018
Charleston, South Carolina

Counsel for Plaintiff: Merrit G. Abney, Esquire
Counsel for Defendant: Thomas R. Goldstein, Esquire

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Magistrate Office

EXHIBIT F

STATE OF SOUTH CAROLINA	)	**2016CV0810605290**
	)	CIVIL CASE NUMBER
COUNTY OF BERKELEY	)	
	)	**IN THE MAGISTRATE'S COURT**
	)	
	)	**WARRANT OF EJECTMENT**
	)	

Harris Investment Holdings, Llc

PLAINTIFF(S)

Vs

Aracelis Santos
5901 Loftis Road Suite#2, 4
Hanahan, SC 29410

DEFENDANT(S)

TO ANY LAWFUL CONSTABLE OR THE SHERIFF OF THE COUNTY:

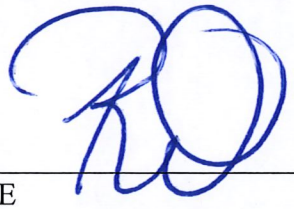
Upon Judgment of this Court rendered on December 7, 2017, you are hereby Ordered to serve the Defendant(s) / Occupant(s) of the premises located at 5901 Loftis Road Suite#2, 4 Hanahan, SC 29410 this Warrant of Ejectment to peacefully and voluntarily vacate the said premises on or before February 7, 2018 at 8:00AM.

TO THE DEFENDANT(S) / OCCUPANT(S) OF:

5901 Loftis Road Suite#2, 4 Hanahan, SC 29410, you are hereby Ordered to peacefully vacate the above said premises on or before February 7, 2018 at 8:00AM. Failure to comply with this Order will result in a **FORCIBLE EJECTMENT.**

Upon a Forcible Ejectment any and all property, which is not the property of the Plaintiff/Landlord, will be removed from the premises and will be deposited at or near but not obstructing the nearest public roadway. The deposited property may be removed by Municipal or County officials after a period of forty-eight hours, excluding Saturdays, Sundays and Holidays. The deposited property may be removed before or after forty-eight hours by Municipal or County officials if in the normal course of debris or trash collection. If the premises is located in a municipality or county that does not collect trash or debris from the public highways, then after a period of forty-eight hours, the plaintiff/landlord may remove the personal property from the premises and dispose of it in the manner that trash or debris is normally disposed of in such municipalities or counties.

IT IS SO ORDERED.



JUDGE
Goose Creek Magistrate

EXHIBIT G

ELECTRONICALLY FILED - 2019 Jun 06 11:49 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0801008

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
Aracelis Santos,	)	Case No. 2018-CP-08-01008
	)	
Appellant/Plaintiff,	)	
	)	
vs.	)	**ORDER OF DISMISSAL WITHOUT PREJUDICE**
	)	
Harris Investment Holdings, LLC,	)	
	)	
Respondent/Defendant.	)	
	)	

This matter comes before me on motion of the Respondent/Defendant, Harris Investment Holdings, LLC, (hereinafter "HIH") for an order dismissing this case without prejudice. For the reasons set forth below, the motion is granted.

HIH filed eviction actions in the magistrate's court seeking to eject Aracelis Santos from two separate units in the same shopping center located at 5901 Loftis Road, Hanahan, South Carolina, known as "El Alamo" and "Latino Mix," respectively. A consolidated bench trial was held before the magistrate on October 11, 2017.

Following trial, the magistrate's court issued an order dated December 7, 2017, in which it granted HIH's applications for ejectment with respect to both Latino Mix and El Alamo. Santos filed a motion for a new trial, which the court denied via written order dated February 2, 2018. On February 2, 2018, the court issued a writ of ejectment with respect to El Alamo.[1] On February 8, 2018, Santos filed a Notice of Appeal of the magistrate court's orders to this Court in Case No. 2018-CP-08-0026 (the "First Appeal").

[1] Santos vacated the Latino Mix premises voluntarily prior to the magistrate court's ruling on the motion for a new trial.

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In the meantime, following a hearing on February 26, 2018, the magistrate set an appeal bond in the amount of $59,295.23. Santos filed a motion for reconsideration of the bond amount, which the magistrate denied via written order dated March 7, 2018.

Thereafter, Santos moved this Court in the First Appeal to vacate the bond requirement, upon which the Court determined the inclusion of any amount awarded to HIH for attorneys' fees in the bond was improper. Via order issued on April 9, 2018, this Court remanded "the issue of the bond" to the magistrate's court for re-calculation. Meanwhile, the First Appeal remained pending in this Court.

After the magistrate re-calculated the bond, on June 1, 2018, Santos filed a second civil action in this Court (Case No. 2018-CP-08-1008, the "Second Appeal"), in which she again sought to appeal the magistrate's order of ejectment and related orders and, in addition, to assert various tort claims against HIH. HIH moved to dismiss the Second Appeal on several grounds, including that the combination of a civil appeal with new tort claims was procedurally improper.

Following a hearing on HIH's motion to dismiss, the Court issued an order dated October 2, 2018 (the "Order"), to which Santos consented, requiring her to dismiss the Second Appeal. Despite repeated demands from counsel for HIH, Santos has not complied with the Order as evidenced by the fact that this action remains pending. At the hearing on the instant motion, Santos argued that the Order was intended only to require her to amend her pleading in this action to delete the claim for civil appeal, and she insisted she has complied with the Order. But the plain language of the Order, to which Santos consented, expressly requires *dismissal of the action* without prejudice. Santos plainly has not complied with this requirement.[2]

[2] Moreover, the Court notes that, contrary to her counsel's statements at the hearing, Santos did not seek to amend her complaint in this action until March 19, 2019, and she did so then for the purpose of attempting to add additional parties to this action.

Because Santos has failed to comply with the Order to which she consented, HIH is entitled to an order dismissing this action without prejudice. It is hereby ORDERED that this action is dismissed without prejudice.

AND IT IS SO ORDERED.

Kristi F. Curtis
Circuit Court Judge

June ___, 2019

ELECTRONICALLY FILED - 2019 Jun 06 11:49 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0801008

ELECTRONICALLY FILED - 2019 Jun 06 11:49 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0801008

Berkeley Common Pleas

Case Caption: Aracelis Santos VS Harris Investment Holdings, Llc

Case Number: 2018CP0801008

Type: Order/Dismissal

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

EXHIBIT H

STATE OF SOUTH CAROLINA	)	**2016CV0810605290**
	)	**2017CV0810600019**
		CIVIL CASE NUMBERS
COUNTY OF BERKELEY	)	**MAGISTRATE'S COURT**
	)	
	)	**AMENDED BOND TO STAY EXECUTION**
	)	**ON APPEAL**

Harris Investment Holdings, Llc

LANDLORD

Vs

Aracelis Santos
5901 Loftis Road Suite#2, 4
Hanahan, SC 29410

TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the Landlord on **December 7, 2017**, by the Magistrate. Tenant(s) has appealed the Judgment to the Circuit Court.

Pursuant to the findings of the Magistrate, the Tenant(s) is obligated to pay rent in the amount of **$2,852.00** per **month**, due on the **1st day** of each **month**.

Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

AMENDED BOND: Having considered the Motion to Alter and Amend filed by the Defendant, the Plaintiff's response thereto, as well as the new communication from counsel, the Court finds it that it is appropriate to amend the bond to $5,500.00. The $5,500.00 BOND shall be paid within five (5) days. Rent shall continue to be due and owing in the amount of $2,852.00, and shall be paid on the 1st day of each month and late after the 5th day.

Dated on May 17, 2018:

by previous signature dated May 7, 2018
Tenant(s)

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on May 17, 2018

JUDGE

Goose Creek Magistrate
303-B North Goose Creek Blvd.
Goose Creek, SC 29445
Phone: (843) 553-7080

EXHIBIT I

ELECTRONICALLY FILED - 2018 Dec 04 10:36 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0800266

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BERKELEY)	NINTH JUDICIAL CIRCUIT
Aracelis Santos,)	Case No. 2018-CP-08-1008
)	Case No. 2018-CP-08-0026
Appellant/Plaintiff,)	
)	**PLAINTIFF'S MOTION FOR A RULE TO SHOW CAUSE AND FOR DISMISSAL OF APPEAL FOR FAILURE TO PROSECUTE**
vs.)	
)	
Harris Investment Holdings, LLC,)	
)	
Respondent/Defendant.)	
)	

Plaintiff, Harris Investment Holdings, LLC, (hereinafter "Plaintiff" or "Harris") hereby moves this Court for a Rule to Show Cause compelling Defendant Aracelis Santos to appear before the Court and show cause why the Court should not find Defendant Santos in contempt for failing to prosecute the appeal or to comply with this Court's order filed on October 2, 2018 in this case.

BACKGROUND

HIH filed eviction actions in the Magistrate's Court seeking to eject Santos from two separate units in the same shopping center located at 5901 Loftis Road, Hanahan, South Carolina, known as "El Alamo" and "Latino Mix," respectively. A consolidated bench trial was held before the Magistrate on October 11, 2017.

Following trial, the Magistrate issued an order dated December 7, 2017, in which it granted HIH's applications for ejectment with respect to both Latino Mix and El Alamo. Santos filed a motion for a new trial, which the Court denied via written order dated February 2, 2018. On February 2, 2018, the Court issued a writ of ejectment with respect to El Alamo.[1] On February 8,

[1] Santos vacated the Latino Mix premises voluntarily prior to the Court's ruling on the motion for a new trial.

ELECTRONICALLY FILED - 2018 Dec 04 10:36 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0800266

2018, Santos filed a Notice of Appeal of the Magistrate Court's orders to this Court in Case No. 2018-CP-08-0026 (the "First Appeal").

In the meantime, following a hearing on February 26, 2018, the Magistrate set an appeal bond in the amount of $59,295.23. Santos filed a motion for reconsideration of the bond amount, which the Magistrate denied via written order dated March 7, 2018.

Thereafter, Santos moved the Circuit Court in the First Appeal to vacate the bond requirement, upon which the Circuit Court determined the inclusion of any amount awarded to HIH for attorneys' fees in the bond was improper. Via order issued on April 9, 2018, this Court remanded "the issue of the bond" to the Magistrate for re-calculation in light of this Court's ruling. The First Appeal did not terminate and the action remains pending in this Court.

After the Magistrate re-calculated the bond, Santos filed a second civil action in this Court (Case No. 2018-CP-08-1008, the "Second Appeal"), in which she also sought to appeal the Magistrate's order of ejectment and subsequent order and, in addition, to assert various tort claims against HIH.

Hearing on the merits of the appeal have been scheduled multiple time with this Court, including on April 9, 2018 before Judge Nicholson and on August, 6, 2018. On both occasions, the Court was unable to review and decide the merits of the appeal because Santos failed to provide a transcript, which is Santos' obligation as the appellant. At both hearings, the Court expressly directed Santos' counsel to obtain a transcript of the hearing in order to avoid further delay, and Santos' counsel agreed to do so. Indeed, following the hearing on August 9, the Court issued an order dated October 2, 2018 (the "Order") requiring Santos to obtain the transcript. In addition, the Order expressly required Santos to dismiss the Second Appeal as redundant of the First Appeal. Despite repeated demands from counsel for Harris, Santos' counsel has refused to comply with

ELECTRONICALLY FILED - 2018 Dec 04 10:36 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0800266

the order. Moreover, Santos' non-compliance is willful. She has refuses to comply in order to delay resolution of this appeal for as long as possible so that she may remain in the Premises despite the order of eviction while the appeal remains pending. Because Santos has flagrantly disregarded the rules of appellant procedure and the directives of this Court, she should be sanctioned and the appeal should be dismissed with prejudice.

ARGUMENT

This Court ordered Defendant Santos as follows:

> "1. Santos will dismiss the Second Appeal without prejudice, and HIH will withdraw its Motion to Dismiss the Second Appeal without prejudice.
> 3. Santos will order a transcription of the audio recordings from Magistrate court Proceedings in this matter to provide this Court will[sic] a complete record for appellate review.
> 4. The hearing on the First Appeal and HIH's motion to dismiss the First Appeal is continued, and shall not be rescheduled for hearing until the transcript referenced in item #3 above has been prepared and filed with the Court."

Order, filed October 2, 2018, attached as **Exhibit 1** (the "Order").

To date, Plaintiff's counsel has refused to dismiss the Second Appeal or to order the transcript as required by this Court, directly disobeying the Court's order and causing the case to unnecessarily hang in limbo. Counsel for Harris has followed up with Defendant Santos' counsel repeatedly regarding the transcript to no avail.

Not only should Defendant Santos' be held in contempt for her failure to order this transcript, this failure also amounts to a failure to prosecute, justifying dismissal of Santos' appeal in its entirety. The plaintiff (in this case the appellant) has the burden of prosecuting her action a court may properly dismiss an action for a party's unreasonable neglect in proceeding with her cause. McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). South Carolina courts have affirmed dismissal of actions based on a failure to prosecute where the dismissals

ELECTRONICALLY FILED - 2018 Dec 04 10:36 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0800266

"were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial" and upon a subsequent finding of unreasonable neglect. Id. (citing Small v. Mungo, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for hours); Bond v. Corbin, 68 S.C. 294, 294–95, 47 S.E. 374, 374 (1904)). "In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant." Id. at 63, 626 S.E.2d at 904.

In this case, the appeal was initially scheduled for a hearing before Judge Nicholson on April 9, 2018. Santos failed to provide a transcript from the Magistrate Court proceeding, such that the Court could not review the decision below. At the hearing, Judge Nicholson instructed counsel for Santos to obtain a transcript in order to pursue the appeal. A second hearing was held on the appeal before Judge Buckner on August 6, 2018. Despite Judge Nicholson's directive at the April hearing, Santos again failed to obtain a transcript, resulting in further delay as Judge Buckner was unable to review the merits of the Magistrate's ruling without it.

Judge Buckner also instructed Santos' counsel to obtain the transcript if he intended to pursue the appeal, and counsel agreed to do so and to the entry of the Order requiring him to do so. Nevertheless, he has willfully refused to comply with the order despite repeated demands from Harris' counsel that he do so. By refusing to complete this simple task, even after having been ordered by this Court to do so, Santos has shown complete indifference to Harris' rights and this Court's authority, such that her appeal should be dismissed to maintain the orderly disposition of cases.

Based on the foregoing, Plaintiff respectfully requests this Court compel Defendant Santos to appear before the Court and show cause why she should not be held in contempt for failing to comply with this Court's Order dated October 2, 2018, and that both the First and Second Appeals be dismissed with prejudice for her failure to prosecute, along with any other such relief as the Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ MERRITT G. ABNEY

Merritt G. Abney
South Carolina Bar No. 71893
E-Mail: merritt.abney@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
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(843) 853-5200

Attorneys for Plaintiff Harris Investment Holdings, LLC

Charleston, South Carolina

December 4, 2018

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EXHIBIT A

ELECTRONICALLY FILED - 2018 Dec 04 10:36 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0800266

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY)	
Aracelis Santos,)	Case No. 2018-CP-08-1008
)	Case No. 2018-CP-08-00266
Appellant/Plaintiff,)	
)	
vs.)	**ORDER**
)	
Harris Investment Holdings, LLC,)	
)	
Respondent/Defendant.)	

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.
2018 OCT -2 PM 12:44
FILED

This matter comes before the Court on the civil appeals from the Magistrate Court filed by Appellant/Plaintiff Aracelis Santos in the above-titled actions and motions to dismiss the appeals filed by Respondent/Defendant Harris Investment Holdings, LLC ("HIH"). Following a conference between counsel and the Court, the parties agreed on the record to proceed with respect to these motions as outlined below, and the Court adopts this agreement as the order of the Court.[1]

BACKGROUND

HIH filed eviction actions seeking to eject Santos from two separate units in the same shopping center located at 5901 Loftis Road, Hanahan, South Carolina, known as "El Alamo" and "Latino Mix," respectively. A consolidated bench trial was held before the Magistrate on October 11, 2017.

Following trial, the Magistrate issued an order dated December 7, 2017, in which it granted HIH's applications for ejectment with respect to both Latino Mix and El Alamo. Santos filed a motion for a new trial, which the Court denied via written order dated February 2, 2018.

[1] This Court signed a duplicate Order on August 17, 2018. The Original Order was send to the Berkeley County Clerk of Courts office via Regular U.S. Mail. The Berkeley Clerk of Courts Office has contacted this Court that they never received the August 17, 2018 Order.

SCANNED

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On February 2, 2018, the Court issued a writ of ejectment with respect to El Alamo.[2] On February 8, 2018, Santos filed a Notice of Appeal of the Magistrate Court's orders to this Court in Case No. 2018-CP-08-0026 (the "First Appeal").

In the meantime, following a hearing on February 26, 2018, the Magistrate set an appeal bond in the amount of $59,295.23. Santos filed a motion for reconsideration of the bond amount, which the Magistrate denied via written order dated March 7, 2018.

Thereafter, Santos moved the Circuit Court in the First Appeal to vacate the bond requirement, upon which the Circuit Court determined the inclusion of any amount awarded to HIH for attorneys' fees in the bond was improper. Via order issued on April 9, 2018, this Court remanded the issue of the bond to the Magistrate for re-calculation in light of this Court's ruling. The First Appeal did not terminate and the action remains pending in this Court.

#2
PMB

After the Magistrate re-calculated the bond, Santos filed a second civil action in this Court (Case No. 2018-CP-08-1008, the "Second Appeal"), in which she also sought to appeal the Magistrate's order of ejectment and subsequent order and, in addition, to assert various tort claims against HIH.

ORDER OF THE COURT WITH CONSENT OF THE PARTIES

1. Santos will dismiss the Second Appeal without prejudice, and HIH will withdraw its Motion to Dismiss the Second Appeal without prejudice.

2. Santos is granted leave to amend the First Appeal in order to state that she also seeks review of any further orders of the Magistrate Court entered after the filing date of the First Appeal.

3. Santos will order a transcription of the audio recordings from Magistrate Court proceedings in this matter to provide this Court will a complete record for appellate review.

[2] Santos vacated the Latino Mix premises voluntarily prior to the Court's ruling on the motion for a new trial.

4. The hearing on the First Appeal and HIH's motion to dismiss the First Appeal is continued, and shall not be rescheduled for hearing until the transcript referenced in item #3 above has been prepared and filed with the Court.

AND IT IS SO ORDERED.

Sept. 30, 2018
Walterboro, S.C.

Perry M. Buckner III
Circuit Court Judge

ELECTRONICALLY FILED - 2018 Dec 04 10:36 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0800266

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State of South Carolina
The Circuit Court of the Fourteenth Judicial Circuit

PERRY M. BUCKNER
JUDGE

101 HAMPTON STREET
POST OFFICE DRAWER 470
WALTERBORO, SOUTH CAROLINA 29488-0470
TELEPHONE: (843) 549-7878
FAX: (843) 549-9876
E-MAIL: pbuckner@sccourts.org

October 1, 2018

SENT VIA REGULAR MAIL
Jackie Williams
Clerk of Court
300 California Dr. #B
Monks Corner, South Carolina 29461

Dear Ms. Williams:

Enclosed you will please find an original Order signed by Judge Buckner. Please file this Order in your office, and serve copies on all counsel of record.

Thank you for your attention to this matter and please do not hesitate to contact our office if you have any questions or concerns.

Sincerely,

David A. Nasrollahi
Law Clerk to the Honorable Perry M. Buckner, III

Enclosures: Orders for 2018CP0801008/2018CP0800026
cc:

EXHIBIT J

NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

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T 843.534.4110
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October 16, 2018

Via Certified Mail – Return Receipt Requested

Certified Article Number
7160 3901 9849 0188 0910
SENDERS RECORD

Aracelis Santos
28 Lighthouse Drive
Goose Creek, SC 29445

RE: Harris Investment Holdings, LLC v. Aracelis Santos (El Alamo)
Case No.: 2016cv0810605290
Our File No.: 020766/01507

Dear Ms. Santos:

As you know, I represent the Landlord in connection with the above-titled matter. Please be advised the lease for El Alamo expires according to its terms at midnight on November 30, 2018. You are hereby directed to vacate the premises with all of your belongings before midnight on November 30, 2018, or else we will take further legal action against you and your belongings may be removed from the premises.

Very truly yours,

Merritt G. Abney

MGA:ls
cc: Thomas R. Goldstein, Esq.

EXHIBIT K

NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

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February 26, 2019

Thomas R. Goldstein, Esq.
Belk, Cobb, Infinger & Goldstein, PA
2344 Cosgrove Avenue
Charleston, SC 29405

RE: Harris Investment Holdings, LLC v. Aracelis Santos (El Alamo)
Case No.: 2016cv0810605290
Our File No.: 020766/01507

Tommy:

As you are aware, the Lease for El Alamo expired according to its terms on November 30, 2018, and I have previously directed your client to vacate the premises by that date. Your client has refused to vacate in violation of the terms of the Lease and is trespassing on my client's property by remaining beyond the Lease term.

The purpose of this letter to notify you that engineers recently identified asbestos in the premises, and the Department of Health & Environmental Control (DHEC) is requiring that the building be cleared in connection with the mandatory remediation process. Remediation of the premises will begin on or about March 1, 2019. Your client is hereby directed to vacate and remove all of her personal property from the premises by that date. Once the remediation process begins, no access will be permitted to the premises for any reason.

Very truly yours,

Merritt G. Abney

MGA:ls

NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

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August 28, 2020

RECEIVED
Aug 28 2020
SC Court of Appeals

Via Electronic Filing and U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Aracelis Santos v. Harris Investment Holdings, LLC
Appellate Case No.: 2019-00169
Our File No. 020766/01507

Dear Ms. Kitchings:

Enclosed please find for electronic filing Respondent's Return to Appellant's Motion to Remand in the above matter. We would appreciate your filing and returning a clocked-in copy to us.

By copy of this letter, we are hereby serving this Return on counsel for the Appellant via electronic mail only.

Thank you for your assistance with this matter. Should you have any questions or need any additional information, please do not hesitate to contact me.

Very truly yours,

Merritt G. Abney

MGA:ls
Enclosures
cc: Thomas R. Goldstein, Esq. (tgoldstein@cobblaw.net)