STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2017-CP-10-05493
	)	
Shem Creek Development Group, LLC,	)	**ORDER DENYING DEFENDANT'S**
	)	**MOTION TO COMPEL PLAINTIFF TO**
Plaintiff,	)	**PRODUCE DOCUMENTS RESPONSIVE**
	)	**TO DEFENDANT'S SECOND REQUEST**
v.	)	**FOR PRODUCTION AND, IN THE**
	)	**ALTERNATIVE, COMPEL THE**
The Town of Mount Pleasant, South Carolina,	)	**PRODUCTION OF THE SAME**
	)	**DOCUMENTS IN RESPONSE TO**
	)	**DEFENDANT'S SUBPOENA TO RELATED**
Defendant.	)	**ENTITY, 101 COLEMAN PARTNERS, LLC**
_____	)	

On October 22, 2019, Defendant The Town of Mount Pleasant, South Carolina ("the Town") filed a Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and, in the Alternative, Compel the Production of the Same Documents in Response to Defendant's Subpoena to Related Entity, 101 Coleman Partners, LLC. Plaintiff Shem Creek Development Group ("SCDG") and 101 Coleman Partners, LLC ("101 Coleman Partners") submitted memoranda in opposition to this motion on November 27, 2019.

On November 15, 2019, while the Town's motion to compel was pending, the Town issued a separate subpoena to 101 Coleman Partners, seeking the same materials that it had previously sought pursuant to the subpoena which was the subject of the Town's motion to compel. The later subpoena also sought the deposition of 101 Coleman Partners' corporate representative under Rule 30(b)(6), SCRCP, on the same subjects of the documents requested. As a result, 101 Coleman Partners filed a motion to quash the subpoena and notice of deposition on November 27, 2019, on the same grounds on which it opposed the Town's motion to compel.

By consent of the parties, no hearing was held, and the arguments were considered based on the parties' briefs and supporting materials. After considering the law, the briefs filed by the

parties, the arguments of counsel, and all matters submitted, the Town's motion to compel is DENIED and 101 Coleman Partners' motion to quash is GRANTED.

I. FINDINGS OF FACT

In 2013, SCDG and the Town negotiated and drafted a parking license agreement to memorialize the terms for SCDG to build an office building and parking garage containing 276 total parking spaces and provide public parking therein near Shem Creek in Mount Pleasant, South Carolina. The parking license agreement requires the Town to pay to SCDG annual minimum rent of $185,000 for the "Rent Period." The parties also included a provision that allows for a pro rata reduction of rent if at "any point in the Rent Period of this License" the operation of the parking garage results in a net operating profit.

The parking license agreement defines the Rent Period as the first fifteen years of the "License Term." The "License Term" begins on the "Rental Commencement Date" and runs for a period of 30 years, "unless extended or sooner terminated in accordance with the terms and provisions of this License." The Rental Commencement Date is defined as the date of the Town's issuance of the certificate of occupancy for the garage.

As originally proposed, the parking license agreement included a default clause that would have allowed SCDG to terminate the license and accelerate all remaining rent payments if the Town defaulted by failing to pay rent. This draft default clause also provided that if SCDG relets the premises then sums paid by a new licensee should be first applied to the expenses that the Town was required to reimburse with any excess applied to the rent payments owed by the Town. The draft default clause, however, contained no limitation on damages available to SCDG if the Town defaulted under the license.

The Town later drafted and proposed a revised default clause that liquidates damages and eliminates SCDG's ability to seek consequential and punitive damages. The Town's revision specifically provides that the "sole and exclusive remedy" for default is the rent payments due under the license and that "both parties waive any claims that either may have to consequential or punitive damages." The Town's revision also eliminated the language establishing the Town's right to have other revenue received from the operations of the garage applied to its remaining rent payments. The Town's revision, however, maintains SCDG's right to terminate the license agreement if the Town defaults. Thus, the Town's revised default clause creates a liquidated damages provision, which ultimately became part of the final parking license agreement approved by the Town and SCDG.

The Section 8.17 of the parking license agreement also contains a survival clause, which provides that "any obligation of [the Town] to pay any sum owing or to perform any act after expiration or other termination of this License shall survive the expiration or other termination of this License." The survival clause does not provide for the survival of any rights of the Town, including the right to reduce rent.

After SCDG and the Town entered into the parking license agreement, the present dispute arose about whether SCDG's proposed design for the parking garage complied with the terms of the parking license agreement and whether the Town breached its requirements to pay rent. Regardless of the dispute, SCDG continued its pursuit of the project with a proposed design that included 234 parking spaces, which the Town approved in September 2014.

To complete the project, SCDG partnered with an equity investor to create a joint venture to own, build, and operate the office building and parking garage. This joint venture was formed

as 101 Coleman Partners, LLC in 2015. Under the terms of the joint venture, SCDG has only a 15% membership interest in 101 Coleman Partners.

After the formation of 101 Coleman Partners but before the Rental Commencement Date, SCDG terminated the parking license agreement in accordance with its rights under the default clause as a result of the Town's failure to honor the agreement. Later, 101 Coleman Partners completed the project and received a certificate of occupancy for the garage in July 2017, which would have been the Rental Commencement Date but for the prior termination. Since then, 101 Coleman Partners has operated the parking garage and office building.

As a result of the Town's alleged repudiation of the agreement and failure to pay rent, SCDG filed this action against the Town in October 2017, asserting a claim for breach of contract based on the Town's failure to provide an estoppel certificate, accept the garage, and pay rent as required under the parking license agreement.

During the litigation, SCDG disclosed its damages calculation, which is based on past rent payments plus interest and future rent payments discounted to present value. SCDG's damages calculation includes no reduction for rent based on prospective net operating profits under the rent reduction clause. According to SCDG, the default clause provides solely for fixed minimum rent payments as liquidated damages and the rent reduction clause is inoperable as a result of the termination of the license.

Following SCDG's disclosure of its damages calculation, the Town issued its second requests for production of documents to SCDG and a subpoena for documents to 101 Coleman Partners. The requests for production and subpoena seek the same documents: financial and operational records of 101 Coleman Partners, including documents relating to the profitability of the parking garage owned and operated by 101 Coleman Partners. SCDG and 101 Coleman

Partners objected to the requests for production and the subpoena because, among other reasons, the documents sought are not relevant to this action. In response, the Town filed the present motion to compel, arguing that the documents sought are relevant under the rent reduction clause of the parking license agreement.

II. STANDARD

According to the South Carolina Supreme Court, a "trial court must make an effort to impose reasonable discovery limits," and "requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010) (vacating lower court's ruling granting a motion to compel on the grounds that the discovery requests at issue sought information and documents that were not relevant to the resolution of the issues before the court). The proper procedure for resolving a relevancy dispute is for the trial court to first identify "the central issue in the case before it" and then determine if the "discovery requests are . . . relevant to a resolution of the [central] issue . . . ." *Id.* at 388-89, 692 S.E.2d at 925 (internal quotation marks omitted).

III. CONCLUSIONS OF LAW

The Town's motion to compel the production of documents relating to the financial performance and operations of 101 Coleman Partners is denied because that information is not relevant to this litigation and the Town's discovery requests are overly broad. SCDG and the Town agreed to a liquidated damages provision in the parking license agreement, and it fixes damages in the event of a breach. Therefore, the documents requested will not aid in the dispute's resolution and are not relevant to the issue of damages.

A "claim for damages is 'liquidated' in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 91, 757 S.E.2d 557, 559 (Ct. App. 2014). "When parties agree in advance to a sum certain that represents a reasonable estimate of potential damages, they exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the 'peace of mind and certainty of result' afforded by a liquidated damages clause." *NPS, LLC v. Minihane*, 451 Mass. 417, 423, 886 N.E.2d 670, 675 (2008); *see also, Xerox Corp. v. RP Digital Servs.*, 232 F. Supp. 3d 321, 325 (W.D.N.Y. 2017) ("[W]here, as here, a contract contains a valid liquidated damages provision, 'mitigation of damages is not relevant.'"); *Barrie Sch. v. Patch*, 402 Md. 497, 513-14, 933 A.2d 382 (2007) (holding that a court need not consider mitigation when the parties have agreed to liquidated damages); *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380, 613 N.E.2d 183 (1993) (stating that mitigation is not proper where there is a valid liquidated damages clause).

Here, the default clause in the parking license agreement contains a liquidated damages provision because it fixes damages based on the rental payments due under the parking license agreement. In exchange for eliminating the availability of consequential and punitive damages, the parties agreed to fix the damages, which meets the definition of liquidated damages. This conclusion holds even if the rent reduction clause applies because liquidated damages include those capable of ascertainment by mathematical computation. *Wells Fargo Bank*, 408 S.C. at 91, 757 S.E.2d at 559. And the rent reduction clause establishes a simple, straight-forward method of reducing rent that is based on a formula of revenue minus expenses multiplied by the percentage of public parking spaces in the garage.

Also, the documents sought are not relevant because they pertain to the operations of 101 Coleman Partners, which is a separate and distinct entity from SCDG. SCDG has only a 15% interest in 101 Coleman Partners, and 101 Coleman Partners has no interest in the parking license agreement or this litigation. As a result, 101 Coleman Partners' activities and financial information have no relationship to the parking license agreement or this litigation.

To the extent that the Town argues that the documents are relevant under the rent reduction clause of the parking license agreement, that argument fails because the rent reduction clause is not applicable. The clear and unambiguous terms of the parking license agreement demonstrate that the rent reduction clause only applies during the Rent Period. The rent reduction clause states:

> If at any time during the **Rent Period** of this License should the operation of the Garage result in annual net operating profit, the Licensee shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year of **the Term** by its pro rata share, based upon the percentage of the Parking Spaces comprising the Public Spaces.

(PLA § 1.07(b)) (emphasis added). Thus, for the rent reduction clause to apply, profitability must occur during the "Rent Period," which is defined as "the first fifteen years of the License Term." (*Id.* at § 1.07(a).) And the License Term does not begin until the Rental Commencement Date and it expires upon the termination of the License in accordance with its provisions.

SCDG terminated the parking license agreement in June 2016 before the License Term and Rent Period even began. And to the extent that the License Term and Rent Period ever began, they ended with the termination of the parking license agreement. Either way, the rent reduction clause does not apply because there have been no operations of the garage in the Rent Period.

The interpretation that the Town's rent reduction rights did not survive the termination of the parking license agreement is further supported by the survival clause found in Section 8.17 of the agreement. Under that section, the only obligations and rights that survived the termination of

the parking license agreement were the Town's obligations to pay rent and perform other acts. (PLA § 8.17.) Significantly, the survival clause is silent as to the survival of any rights the Town possessed under the parking license agreement, including rent reduction rights.

The South Carolina Court of Appeals decision in *Donahue v. Multimedia, Inc.*, 362 S.C. 331, 608 S.E.2d 162 (Ct. App. 2005), supports the conclusion that the termination of the parking license agreement and survival clause jointly operate to terminate the Town's rent reduction rights under the agreement while preserving its obligation to pay minimum rent payments. In *Donahue*, the plaintiff and defendant entered into a contract that gave the plaintiff the right of first refusal to purchase the defendant's rights in a television program hosted by the plaintiff. *Id.* at 335-36, 608 S.E.2d at 164-65. After the contract expired, the defendant assigned its interest to a third party without providing the plaintiff the right of first refusal. *Id.* at 336-47, 608 S.E.2d at 165. The plaintiff then sued the defendant for breach of contract, and the trial court later granted summary judgment to the defendant because the plaintiff's right to first refusal only existed "during the term" of the contract and did not survive the contract's expiration. *Id.*

The Court of Appeals affirmed the trial court, ruling that the contract unambiguously provided that the plaintiff's right of first refusal lasted during the term of the contract and that he had no such right after the contact expired. *Id.* at 339-40, 608 S.E.2d at 166-67. It also rejected that other the plaintiff's argument that provisions which granted the plaintiff rights that survived the term of the contract applied to the right of first refusal:

> [The plaintiff's] right of refusal, as outlined in Section 6, is expressly limited to "the term" of the contract, which expired in August 1996. The fact that the parties expressly agreed certain provisions of the contract would last "in perpetuity" creates no ambiguity in terms expressly limited to the contract's general term. We therefore agree with the trial court that, as a matter of law, the transfer of MEI assets to Universal was in no way precluded by

> Donahue's right of first refusal as agreed upon in Section 6 of the contract.

Id. at 340, 608 S.E.2d at 167.

Under *Donahue*, the Town's right to rent reduction did not survive the termination of the contract. Just as the plaintiff in *Donahue* had a right of first refusal that was expressly limited to the term of the contract, the Town's right to rent reduction is expressly limited to the "Rent Period." And as the contract in *Donahue* granted rights that survived the expiration of the contract that did not include the right of first refusal, the parking license agreement includes a survival clause that requires the Town to pay rent after the termination but does not include language maintaining rent reduction rights beyond the termination of the license. So, just as the plaintiff's right of first refusal was extinguished when the contract expired in *Donahue*, the Town's right to rent reduction was similarly extinguished when the parking license agreement and Rent Period ended in this case. Therefore, the express terms of the parking license agreement render the rent reduction clause inapplicable and of no effect in this litigation.

The parties were free to negotiate a survival of the Town's rent reduction rights following termination of the license agreement. Instead, they expressly eliminated the survival of such rights and limited the Town's right to rent reduction to the Rent Period. The original draft parking license agreement included language that allowed the Town to partially offset its liability for future rent with payments received from subsequent licensees. But the Town rejected that language and instead proposed a liquidated damages provision that fixed damages as the minimum rental payments and eliminated SCDG's ability to recover consequential and punitive damages. The revised default clause drafted by the Town and approved by SCDG shows the parties' intent to eliminate the right to reduce future rent owed after termination of the parking license agreement,

and the contrary position that the Town now takes is contradicted by its proposed revisions to the parking license agreement.

IV. ORDER

For the reasons stated above, it is therefore **ORDERED** that the Town's Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and, in the Alternative, Compel the Production of the Same Documents in Response to Defendant's Subpoena to Related Entity, 101 Coleman Partners, LLC is **DENIED** and 101 Coleman Partners' Motion to Quash is **GRANTED**.

AND IT IS SO ORDERED.

_____
The Honorable Maite Murphy

Charleston, South Carolina

January __, 2020

Charleston Common Pleas

Case Caption:	Shem Creek Development Group LLC VS Mount Pleasant South Carolina Town of
Case Number:	2017CP1005493
Type:	Order/Compel

So Ordered

s/ Maite Murphy 2166