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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENWOOD	)	CIVIL ACTION NO. 2012-CP-24-576
	)	
IOS, LLC,	)	
	)	
Plaintiff,	)	**ORDER GRANTING PARTIAL SUMMARY JUDGMENT**
	)	
vs.	)	
	)	
Lander University,	)	
	)	
Defendants.	)	
	)	

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SC Court of Appeals

This matter comes before the Court upon the Motion of the Defendant, Lander University, formerly represented by Douglas Lamar Bell, of the Greenwood County firm, McDonald Patrick. During the pendency of this action, Lena Y. Meredith of Nicholson, Meredith and Anderson, LLC was substituted for Mr. Bell as counsel for the University. James Emerson Smith, Jr. of Columbia, South Carolina represents the Plaintiff, IOS, LLC. During Attorney Smith's bid for governor, he was assisted by co-counsel, Christopher James Moore, who has since been relieved in this matter.

As a matter of housekeeping, Lander College, an entity previously listed as a separate Co-Defendant, was the Defendant's name before it was formally changed to Lander University by action of the Board of Trustees on June 9, 1992. As Lander College was subsumed by Lander University prior any cause of action arose in this matter, it is not proper party to this action. The caption is therefore amended to IOS, LLC v. Lander University.

At a prior hearing before me, the parties consented to the dismissal of the Lander Foundation as a party to this action and to the dismissal of any causes of action predicated upon an alleged breach of an oral contract to purchase the Inn including breach of contract to purchase, and specific performance. This Order will address the remaining causes of action, including

promissory estoppel, negligent misrepresentation, negligence and breach of the lease agreement. It will also address Defendant's argument that Plaintiff lacks standing to pursue contract damages by virtue of an assignment of all leases and rents to the purchase money lender, Business Carolina, whose deficiency judgment was filed following a foreclosure of the property and remains unsatisfied, which Defendant argues bars the Plaintiff from recovery.

FACTUAL BACKGROUND

The Defendant has provided exhibits in its supplemental memorandum which set out the following facts regarding the ownership history of the property and the associated debt which led up to Plaintiff's offer to lease the property to Lander. It illuminates the lack of evidence which is fatal to nearly all of Plaintiff's claims.

The Inn on the Square was initially purchased on December 31, 2002, by Palmetto Inns from Business Carolina, following the foreclosure of a previous owner. According to loan documents obtained, S. Craig White, the sole member of Palmetto Inns, personally guaranteed the $1,000,000.00 purchase money Note and Mortgage. Exhibit D of said Loan Agreement contains a "Certificate and Affidavit of Ownership of Palmetto Inns", executed by S. Craig White, as well as an Unconditional Guaranty and UCC-1, filed 2/13/2003, and UCC-3 continuation filed 2/12/2008.

As a crucial part of this transaction, Business Carolina obtained from Palmetto Inns an Assignment of Leases and Rents which granted to the commercial lender an absolute assignment of leases and rents which was recorded on February 13, 2003, at Book 1453, Page 97, OCC for Greenwood. The UCC-1 filing further secured an interest in all furniture, fixtures and equipment as well as any tangible personal property, renewals or replacements thereof, including but not limited to, ranges, refrigerators, HVAC systems, telephones, televisions, and computers.

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Public record reflects that following Palmetto Inns' purchase of the hotel in 2002, Palmetto Inns went into default, and in October 2004, less than two years after the purchase, Business Carolina filed foreclosure pleadings.

Louis Smith, a member of IOS, LLC, testified that his employer, John Huffman, became interested in the distressed hotel after visiting Greenwood and staying there as a guest. Huffman partnered with Smith to negotiate a purchase of the Note (Ex. 7 to Defendant's Supplemental Memorandum, Depo. of Smith, p. 19, 20). Huffman testified that he had been involved with similar distressed properties, as a "turnaround artist" (Ex. 8, Defendant's Supplemental Memorandum Depo. of John Huffman, p. 282). Smith testified that an agreement was struck with Palmetto Inns guarantor, Craig White, that would allow White to "come back in at a certain percentage" if they were unable to refinance the existing indebtedness and remove his guarantee. *Id.*

Per Smith, he and Huffman were not able to borrow the funds necessary to purchase the Note (Ex. 7, Defendant's Supplemental Memorandum). Instead, they purchased the property subject to the existing Note and Mortgage, which required Craig White to remain pledged as personal guarantor. *Id.* Smith and Huffman's wife, Misty, formed IOS, LLC, which took title to the property in 2005 (Ex. 9 a-c., Defendant's Supplemental Memorandum, IOS, Corporate Documents.) According to the Operating Agreement, each member made an initial $1.00 capital contribution and Louis Smith was named manager. *Id.* A subsequent amendment appointed John Huffman as manager, replacing Louis Smith (Ex. 9b., Defendant's Supplemental Memorandum, IOS, LLC Amended Operating Agreement). A second addendum in 2006, (a signed copy of which has not been provided to the Defendant) designated White's separate LLC, Chesterfield Express, as the owner of 75% of IOS, by virtue of a "purchase of ownership interest." (Ex. 9c. Defendant's Supplemental Memorandum, IOS, LLC First Addendum to Amended Operating Agreement).

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At the time IOS, LLC purchased the property in 2005, Business Carolina agreed to a dismissal without prejudice of the 2004 Foreclosure (Ex. 10, Defendant's Supplemental Memorandum, Dismissal of Business Carolina Foreclosure of Palmetto Inns, without Prejudice). Business Carolina further entered into a Forbearance and Loan Modification with Palmetto Inns and White, which acknowledged IOS, LLC as the current titleholder of the property. The agreement allowed interest only payments for a certain period and extended the maturity date of the Note to March 29, 2011 (Ex. 11, Defendant's Supplemental Memorandum, Forbearance executed between Palmetto Inns and Business Carolina, Inc. on 3/29/2005 and Loan Modification Agreement, recorded at Book 1833, Page 136 in the Office of the Clerk of Court for Greenwood County). **An Addendum to the Forbearance Agreement, executed by Smith on behalf of IOS, LLC, affirmed the debt and stipulated that while IOS, LLC had not assumed the Note, it took title subject to Business Carolina, Inc.'s security interests**. *Id.* **In these documents, IOS, LLC acknowledged it had no right of recoupment or set off of any kind with respect to the indebtedness, loan or loan documents, and further waived appraisal, stay, valuation, extension or redemption.** *Id.*

Based upon the testimony of both Louis Smith and John Huffman, there was controversy with White immediately after Plaintiff purchased the property. Huffman claims when he initially met him, White threatened to kill him, and Huffman reciprocated (Ex.12, Defendant's Supplemental Memorandum, p. 316, Depo. of Huffman). Neither Smith nor Huffman elaborated as to the exact reason for the dispute, only that it was fair to say the two never got along. *Id.*

During their due diligence and the pendency of this action, Defendant Lander argues it discovered multiple additional liens and lawsuits filed against Emerald Inns, of which it wasn't previously aware, including a Complaint for Claim and Delivery filed by Allegiant/Telerent

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against White and his company, Emerald Inn, which he had used to finance upgraded furnishings for the hotel shortly before Palmetto Inns' transfer to IOS, LLC (Ex. 13, Defendant's Supplemental Memorandum, Greenwood County Public Index). The suit sought a money judgment against White and Emerald Inn, as well as the return of the hotel's furniture and fixtures for non-payment (Ex. 14, Defendant's Supplemental Memorandum, Telerent Complaint). Although Huffman indicated the property was purchased in the name of IOS, LLC so he could "walk in debt free" without assuming Palmetto Inns' liabilities (which he estimated totaled at least $200,000.00 over the mortgage debt), Huffman agreed to the payment of $5,000.00 for a release and possession of the furniture and personal property sought by Allegiant's Claim and Delivery (Ex. 15, Defendant's Supplemental Memorandum, Telerent handwritten agreement, check and itemization and Ex. 16, Huffman, Day 2, p. 17, l. 21-24). Lander argues that Huffman subsequently sold most of these furnishings to Defendant Lander when the lease commenced (Ex. 17., Defendant's Supplemental Memorandum, Handwritten Bill of Sale from IOS, LLC to Diane Newton on behalf of Lander University and Exhibit to Plaintiff's federal tax return indicating mass sale of assets on 12/31/2009).

A review of the Greenwood County Public Index reflects additional claims filed against Palmetto Inns and IOS, LLC, during the first year Huffman was in operation (Ex. 18, Defendant's Supplemental Memorandum, Greenwood County Public Index, IOS, LLC the Inn on the Square).

Around this time frame, a junior mortgage from IOS, LLC to Misty Huffman, individually, in the amount of $200,000.00 was filed with the Greenwood County Clerk of Court (Ex. 19, Defendant's Supplemental Memorandum, 7/18/05 IOS, LLC mortgage to Misty Huffman, Book 1883, Page 269, OCC Greenwood County). According to the Plaintiff, this Mortgage represents a loan to reimburse Mr. and Mrs. Huffman expenses they claim were put on personal credit cards or

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lines of credit but paid on behalf of IOS, LLC. Defendant claims no matching documentation to substantiate the debt has been produced by the Plaintiff. Defendant Lander has argued that this served to secure future profit via a second mortgage position to the exclusion of any other unsecured creditors which threatened to attach as a judgment in the interim.

Over the next two years, the following mortgages were additionally recorded against the property: Bridge Financial, LLC for $115,475.00 (recorded 9/12/06), Cornerstone Capital Funding for $230,000.00 (recorded 1/8/07), Upper Savannah Council of Governments for $250,000.00 (recorded 1/25/07), Uptown Development Corporation for $50,000.00 (recorded 1/25/07) and Upper Savannah Council of Governments for $50,000.00 (recorded 1/9/09) (Ex. 20 Mortgage and Lien record, and mortgages filed in the OCC Greenwood County). An additional Assignment of Leases and Rents was recorded on behalf of Upper Savannah Council of Governments. UCC's securing the furniture, fixtures and equipment were also filed on behalf of both Uptown Greenwood Development Corporation and Upper Savannah Council of Governments (Ex. 21, Defendant's Supplemental Memorandum, Uptown Greenwood Development Corporation and Upper Savannah Council of Governments UCC's).

Lonestar Ventures, LLC (an entity solely owned by Misty Huffman) also recorded a subsequent additional mortgage in the amount of $200,000.00 on 4/2/07 (Ex. 22, Defendant's Supplemental Memorandum, Mortgage from IOS, LLC to Lonestar Ventures, LLC, Bk. 2158, p. 228, Subordinated to Bridge Financial, Bk., 2158, p. 232). It is unclear whether this is a restatement of the original mortgage to Misty Huffman, refiled due to the subordination of her previous mortgage, or new debt. Defendant claims that as with the first mortgage to Misty Huffman, no documentation has been produced which substantiates additional debt.

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Defendant points out that after this case was filed, Louis Smith executed two confessions of judgment on behalf of IOS, LLC to Lonestar Ventures, one in the amount of $632,419.82, (Civil Action No.: 2014-CP-24-1429) and a second in the amount of $277,154.22 (Civil Action No.: 2014-CP-24-1430) (Ex. 23, Confessions of Judgment by IOS, LLC). These amounts far exceed the total of either mortgage to either Misty Huffman or Lonestar Ventures, LLC. There is also no corresponding complaint in the Court's record setting forth a debt, only the entry of the confession. Both of these confessions were filed in 2014, after the subsequent 2012 foreclosure proceeding wiped out any junior lienholders.

Despite the substantial influx of capital from 2006-2009 from documented third-party lenders, (i.e. not associated IOS, LLC in any way) the Plaintiff was never current with Business Carolina. Defendant points out that the Business Carolina file contains extensive documentation regarding late or missing payments (Ex. 24, Defendant's Supplemental Memorandum, Business Carolina Palmetto Inns, Loan Transcript). In October and November of 2007, Business Carolina threatened foreclosure and filed a Lis Pendens against both Palmetto Inns and IOS, LLC (Ex. 25, Defendant's Supplemental Memorandum, Greenwood County Public Index for IOS, LLC). A letter from Business Carolina indicates that foreclosure would only be deferred if IOS, LLC escrowed funds totaling $26,156.25, to be applied monthly to interest until March 1, 2008. In its November 2007 letter, Business Carolina indicated that if IOS successfully refinanced on or before March 1, 2008, the amount escrowed would be applied to reduce principal. After that date, the payment would revert to principal and interest in the amount of $7,071.39 per month. Throughout the history of the IOS purchase/forbearance, Business Carolina repeatedly agreed to extend Plaintiff's interest only payments, only to be forced to later demand that IOS and Mr. Huffman

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refinance the property or face foreclosure (Ex. 26, Defendant's Supplemental Memorandum, Letters of Todd Lucas to John Huffman, August 16, 2007 and November 8, 2007).

Based on the payment summary received from Business Carolina, Inc., it appears this default was never cured, and Palmetto Inns/IOS, LLC remained in arrears despite additional forbearance. (Ex. 24, Defendant's Supplemental Memorandum, Loan Transcript).

After four years of delinquency, Business Carolina finally signed an agreement on June 29, 2009, to sell the Note to Banc Capital and Financial Services (Exhibit 27, Defendant's Supplemental Memorandum, Banc Capital contract). Closing was initially to take place on or before June 29, 2009, but was extended at the buyer's request, who stated it needed more time to complete the transaction. *Id.* The Business Carolina file indicates that when Business Carolina negotiated the sale of the Note, Huffman reportedly went in search of an alternative use for the property to avoid the sale, being displaced as manager, and losing the property.

According to Business Carolina employee Todd Lucas's notes, Huffman contacted the bank after the agreement was reached with Banc Capital to discuss "performance of the hotel," indicating for the first time that he could no longer fund it (Exhibit 28, Defendant's Supplemental Memorandum, Business Carolina Credit Notes). On August 3rd, representatives of the bank met with Huffman and his attorney, Leonard Jordan, during which Huffman stated the hotel was suffering and he could no longer subsidize it every month. *Id.* Huffman reported that he was negotiating with Lander to lease the hotel, to which the bank objected, stating that they had already sold the Note and the buyer did not want "the Lander deal or to the hotel to be shut down." *Id.* On August 5, 2009, Business Carolina loan officer Todd Lucas documented a conversation with Huffman, who reportedly indicated that he would be forced to begin shutting the hotel down on August 8th, and would be completely closed by August 15, 2009, if Business Carolina did not agree

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to the lease. This tug of war continued until ultimately Huffman refused to keep the hotel open, over the prospective purchaser's objection, because "his line of credit had been canceled." *Id.* The Business Carolina file further indicates that the prospective buyer of the Note recommended replacing Huffman with the original borrower, Craig White, as interim manager.

Discovery indicates that Business Carolina finally tabled the sale of the Note and agreed to the Lease to Lander in August 2009. Additional security in the form of a Forbearance Agreement from IOS, LLC, itself, was required as part of the approval. This agreement reaffirmed IOS, LLC's ownership was subject to the Palmetto Inns debt, and reiterated its previous waiver of all defenses in the event of a future foreclosure (Ex. 29, Defendant's Supplemental Memorandum, Forbearance Agreement, IOS, LLC 2009). In addition, the bank required any rent paid by Lander go through an escrow agent and be applied to the indebtedness pursuant to a schedule mandated by the bank. It is clear from both the Business Carolina credit history notes as well as the Forbearance Agreement that a contract of sale had not been entered by IOS, LLC, as there is an acknowledged contractual waiver of any and all claims, defenses or set-offs as to Business Carolina in the event that future negotiations during the pendency of the lease did not result in a sale. IOS, LLC further agreed to assist in the orderly liquidation of the property in the event a contract of sale could not be reached (Ex. 29, Defendant's Supplemental Memorandum, p. 3, paragraph 1).

Further, the original assignment of leases and rents to Business Carolina, subject to which IOS, LLC took title provided (in pertinent part) that:

"for good and valuable consideration, Assignor **absolutely** (emphasis added) assigns and transfers to assignee" the following:

> (a). The income, rents, receivables, security or other similar deposits, revenues, issues, royalties, profits, earnings, products and proceeds from any and all of the Property (collectively, the "rents,

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issue and profits") together with the right, power and authority to collect same;

(b.) All leases, **written or oral**, **now in existence or hereafter arising** (emphasis added) all other agreements for the use and occupancy of all or any portion of the Property, and any and all extensions or renewals of any thereof (individually collectively, the "Lease" or "Leases" together with the right, power and authority of the Assignor to alter, modify, or change the terms thereof, or surrender, cancel or terminate same; and

(c.) Any and all guarantees of any obligations of any Lessee (the "lessee") under each of the leases.

Assignor **irrevocably** (emphasis added) appoints Assignee its true and lawful attorney-in-fact, at any time and from time to time, at the option of the Assignee to demand, receive and enforce payment of rents, to give receipts, releases and satisfactions, and to sue, in the name of the Assignor or the Assignee, for all the rents, issues and profits and to apply the same to the indebtedness secured; provided however, that Assignor shall have the right and license to collect the rents, issues and profits prior to or at any time there is no continuing default hereunder or under any of the other loan documents evidencing and securing the Note (as defined herein) ("Loan Documents"). The assignment of rents, issues and profits is an absolute assignment from Assignor to Assignee and not merely the passing of a security interest.

"Upon payment in full of the indebtedness, this Assignment shall become and be void and of no effect, but the affidavit, certificate, letter or statement of any officer, agent, or attorney of the Assignee showing any part of the Indebtedness to remain unpaid or unperformed shall be and constitute conclusive evidence of the validity, effectiveness and continuing force of this Assignment and any person may, and is hereby authorized to, rely thereon. The Assignor, as the lessor under any Lease, hereby authorizes and directs the lessee named in any such Lease or any other or future lessee or occupant of the premises described therein upon receipt from the Assignee is then the holder of the Note to pay over to the Assignee all rents, and profits or accruing under such Leases or from the premises described therein and to continue to do until otherwise notified by the Assignee."

The Forbearance Agreement contemporaneously executed by IOS with the Lander Lease/Option included an acknowledgement of default, and agreement to stay any foreclosure until

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the end of the lease term or the exercise of the Option. As set forth above, Paragraph 6 of the Forbearance Agreement further acknowledged that Business Carolina had an "absolute assignment" in and to the Lander Lease, as set forth in the Assignment of Leases and Rents executed by Palmetto Inns. Acceptance of the Forbearance Agreement by IOS, LLC specifically excluded acceptance of rent pursuant to the lease as a waiver of default.

In addition, a Subordination/Non-Disturbance agreement further provided in paragraph 9 that the Lender would be entitled, but not obligated, to exercise the claims, rights, power, privileges and remedies of the Landlord under the Lease, and shall be entitled to the benefits of, and to receive and enforce performance of, all of the covenants to be performed by the Tenant under the lease as though the Lender were named therein as the Landlord.

Ultimately, Lander declined to exercise the option to purchase the property and Business Carolina refiled its foreclosure against Palmetto Inns and IOS, and obtained a deficiency judgment in the amount of $425,218.84 (Ex. 30, Defendant's Supplemental Memorandum. Foreclosure Order and Judgment). After Lander vacated the property, Huffman began asserting that items were missing, although as was discussed above, he had given a bill of sale for items sold to Lander at the beginning of the lease term. There is also indication that other items stored on the property during the lease were sold to the buyer who purchased the property at the foreclosure sale, 104 East Court, LLP. (Ex. 31, Defendant's Supplemental Memorandum, Bill of Sale from Business Carolina, Inc. to 104 East Court, LLP).

In addition, despite his earlier assertion that he was unable to continue to operate the property as a hotel, following the expiration of the lease in June of 2011, Huffman submitted a demand for payment of $339,262.00, which he claimed was necessary to place the property back

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in "serviceable and operational condition" and replace items necessary to reopen as a hotel (See Plaintiff's Memo in Opposition to Summary Judgment. Demand).

A. SUMMARY JUDGMENT IS GRANTED TO DEFENDANT AS TO PLAINTIFF'S CAUSE OF ACTION FOR PROMISSORY ESTOPPEL

It is undisputed that at the time Plaintiff IOS, LLC purchased the failing hotel that it was teetering on the brink of insolvency. Leasing the property to Lander was a lifeline which delayed the ultimate foreclosure. Despite Plaintiff's assertion that it was a 'profitable venture' for a time, the loan payment history does not support these claims. Based on the documents submitted, IOS, LLC was simply unable to service the debt associated with the property and that this this prompted the negotiation of the Lander lease. There is no evidence of a firm sales contract. To the contrary, IOS, LLC marketed the property to potential buyers both before and after the execution of the lease. As Defendant points out, the amount of debt associated with IOS, LLC, which by April 10, 2010, also included federal tax liens for unpaid withholding on employee wages totaling $295,513.25, was a serious impediment to any contract of sale.

To establish a claim for promissory estoppel under South Carolina law, a plaintiff must demonstrate that: (1) a party made a promise unambiguous in its terms; (2) the party to whom the promise is made reasonably relied on the promise; (3) the reliance was expected and foreseeable by the party who made the promise; and (4) the party to whom the promise is made sustained injury in reliance on the promise. *Anthony v. Atlantic Group, Inc.*, 909 F. Supp. 2d 455 (D.S.C. 2012). Under promissory estoppel, the promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor, particularly because promissory estoppel applies without a contract; the presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist. *Barnes v. Johnson*, 402

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SC 458, 742 S.E.2d 6 (Ct. App. 2013). Because one may properly invoke promissory estoppel absent elements typically required for a contract, such a meeting of the minds or exchanged consideration, the doctrine requires, **by clear and convincing evidence**, a promise unambiguous in its terms (emphasis added). *Id.* An inability to clearly articulate the terms of an alleged oral contract, including how an existing capital contribution would be treated and specifically how the parties would settle up, renders an agreement ambiguous, and any loss is not recoverable under a theory of promissory estoppel. *Id.* Although the doctrine of promissory estoppel may be used to avoid the statute of frauds' writing requirement in South Carolina, it may not be used to create a legally enforceable promise when it would not otherwise be binding under ordinary contract principles. *Trident Construction Co., Inc. v. Austin Co.,* 272 F. Supp. 2d 566 (D.S.C. 2003). The doctrine of promissory estoppel, although equitable, has limitations. *See e.g., Rushing v. McKinney,* 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct.App. 2006) (holding absence of clearly articulated terms between parties precludes recovery in promissory estoppel). "Specifically, the doctrine's elements represent a balancing between affording a remedy where contract law cannot, and ensuring the doctrine's application is not, itself, an inequity against the party estopped." *Barnes v. Johnson,* 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct.App. 2013).

Plaintiff has not alleged any facts from which an unambiguous promise can be inferred by clear and convincing evidence. Defendants have previously submitted the Affidavit from Diane Newton in support of its motion for Summary Judgment. Ms. Newton was the Vice-President for Business and Administration at Lander University from 2003, through December 2009. In her affidavit, Ms. Newton stated that she did not enter into an agreement for the Defendants to purchase the Inn nor did she make any unambiguous representations to Plaintiff that the Defendants would purchase the Inn.

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Additional communications between the parties are also void of any unambiguous promise to purchase. Plaintiff has specifically failed to provide any evidence of an agreed upon purchase price or terms which would have been crucial to any contract of sale.

An examination of the lease entered by the parties' shows that it includes an article titled "Option to Purchase," which granted the Defendant the exclusive option to purchase the property, but which did not contain an explicit agreement to purchase. As Defendant points out, Article 21 of the Lease specifically sets forth a requirement of written notice to the Landlord and provided that "Tenant may cancel its exercise of the option to purchase at any time prior to the day of closing."

Further, Article 21 sets forth that "purchase of the Land and Building is subject to any required approvals by the South Carolina Joint Bond Review Committee, the South Carolina Budget and Control Board and General Services Division" which Defendant would argue invalidates any assertion that statements made by agents or employees of the Defendant could have been interpreted to guarantee that the Defendant would purchase the Inn in the future.

This requirement of third-party approval, set forth explicitly in the lease between the parties, makes it impossible for the Plaintiff to assert any reasonable reliance on alleged statements made by any agent or employee of the Defendant regarding the possibility of future purchase, as it is clear from the contract itself that they were incapable of consent to such a sale, even if terms had been agreed upon and all other requirements of due diligence had been met.

In addition, it is clear from the exchange of correspondence between the parties at the beginning of the Lease, that the Plaintiff was well aware that Lander did not have the authority to make an offer to purchase without Budget and Control Board investigation and approval. Lander Representatives clearly advised the Plaintiff that the Budget and Control Board procedure formerly

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used, that a series of petitions and approvals were necessary at the State level before any decision could be made to exercise the Option. This process included seeking authorization to fund due diligence studies, including appraisals, environmental studies and engineering/code compliance investigations and without favorable results, the University could not go forward (Ex. 2, Defendant's Supplemental Memorandum, Huffman emails).

Finally, correspondence from the Plaintiff's manager, John Huffman, indicates that he marketed the property to other potential buyers during the pendency of the lease. In November 2009, and again in March 2010, Huffman emailed Lander representatives to notify them he would be marketing the property to other prospective buyers from Columbia, Charleston and Atlanta and would need access to the property for site visits so these individuals could perform inspections.

B. SUMMARY JUDGMENT IS GRANTED TO DEFENDANT AS TO PLAINTIFF'S CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION

South Carolina law recognizes an action in tort for negligent misrepresentation. The doctrine of negligent misrepresentation is an equitable maxim that provides a duty for information negligently supplied for the guidance of others in business transactions. *S.C. Elec. & Gas Co. v. Westinghouse Elec. Corp.*, 826 F. Supp. 1549, 1557 (D.S.C. 1993). The essential elements of this tort are: (1) that the Defendant made a false representation to the Plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a proximate result of his reliance on the representation. *Gilliland v. Elmwood Properties*, 301 SC 295, 391 S.E.2d 577 (1990) and *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992). To be actionable, the representation must relate to

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a present or pre-existing fact and be false when made. *Fields v. Melrose, Ltd. Partnership*, 312 SC 102, 439 S.E.2d 283 (Ct. App. 1993). The representation cannot ordinarily be based upon unfulfilled promises or a statement as to future events. *Id.* Plaintiff alleges that Defendants made false representations to Plaintiff regarding the intent and/or willingness to purchase the Inn. "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." *Winburn v. Insurance Co. of N. Am.*, 287 S.C. 435, 443, 339 S.E.2d 142, 147 (Ct. App. 1985). While issues of reliance are ordinarily resolved by the finder of fact, there can be no reasonable reliance to show negligent misrepresentation based on a misstatement if the plaintiff knows the truth of the matter; thus, if the undisputed evidence clearly shows the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact to preclude summary judgment in an action for negligent misrepresentation. *Quail Hill, LLC v. County of Richland*, 692 S.E2d 499 (SC 2010).

The Plaintiff has not alleged facts to establish any of the six elements of this cause of action. Namely, Plaintiff has failed to show any false statement upon which it reasonably relied. It is clear from the lease that Plaintiff was well aware that Defendant had merely an option, and that purchase would require substantial due diligence and approval by third parties which were outside of the Defendant's control. Further, any inferred promise of a future purchase would not be a pre-existing fact, as required by *Fields*. Finally, Plaintiff cannot show reasonable reliance, as it was clear from the lease itself that Defendant could not unilaterally approve the purchase.

In addition, Plaintiff cannot show that Defendants had a pecuniary interest in making any representation. Plaintiff alleges Defendants had a pecuniary interest in inducing Plaintiff to sign a lease by representing that it would purchase the Inn. The Plaintiff suffered no pecuniary loss resulting from the lease, as income from the lease paid the mortgage and essentially prevented the

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sale of the Note and foreclosure of the property during the pendency of the lease, which was to the Plaintiff's benefit.

Plaintiff has argued it suffered economic loss as the result of its reliance on such representations. The economic loss rule is founded on the theory that parties to a contract may allocate their risks by agreement and do not need the special protections of tort law to recover for damages caused by a breach of the contract. *East River Steamship v. TransAmerica Delaval*, 476 U.S. 858, 106 S.Ct. 2295 (1986). In *Westinghouse*, the Court concluded that in a commercial transaction where the loss alleged is purely economic and the cause of action is for mere negligent misrepresentation, the economic loss rule bars recovery. 826 F.Supp. at 1557. The Plaintiff in the case at bar availed itself of protection of a contract which provides an adequate remedy at law. Plaintiff's cause of action for negligent misrepresentation is therefore barred by the economic loss rule, and Defendants are entitled to summary judgment.

D. SUMMARY JUDGMENT IS GRANTED AS TO PLAINTIFF'S CAUSE OF ACTION FOR NEGLIGENCE

Under South Carolina law, an action for tort does not lie if the cause of action is predicated on the alleged breach, or even negligent breach of a contract between the parties. *Welborn v. Dixon,* 70 SC 177-118, 49 S.E.2d 232, 235 (1904), *Toney v. LaSalle Bank Nat. Ass'n,* 896 F. Supp. 2d 455 (D.S.C. 2012).

In general, the Plaintiff's remedy is for breach of contract where there is no duty except as the contract creates. However, a tort cause of action may exist when the duty arises out of liability, independently of the personal obligation undertaken by the contract. *Gilliland v. Elmwood Properties*, 301 SC 295, 391 S.E.2d 577 (1990).

The allegations of item "46" of Plaintiff's complaint are that Defendant breached the duty of care in surrendering the Inn to Plaintiff at the conclusion of the Lease. As there exists a contract

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entered by the parties on August 12, 2009, which provides for a remedy under those circumstances, Defendant correctly argues that any "duties" owed to the Plaintiff would arise solely of that contract and are improperly brought in tort. In order for any cause of action in tort to lie, the Plaintiff would be required to show a duty of care outside of the lease contract. Inasmuch as Plaintiff's cause of action sounds in contract, summary judgment for the fifth cause of action, titled "Negligence" is appropriate.

The Court finds that Plaintiff's cause of action for alleged property damage under the lease agreement (Plaintiff's Six Cause of Action) is the only cause of action which survives Defendant's Motion for Summary Judgment. Additionally, as the property was subject to the irrevocable assignments to the Lender and was foreclosed after the Defendant's lease terminated, there is an issue of fact which remains as to whether Plaintiff may recover for any alleged damage to the Inn after Lander vacated the property and prior to the lender's foreclosure of any interest which Plaintiff may have had in the property.

AND IT IS SO ORDERED!

_____

Frank R. Addy, Jr.
Eighth Judicial Circuit
Court of Common Pleas for South Carolina

October ____, 2021

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Greenwood Common Pleas

Case Caption: IOS, LLC VS Lander University , defendant, et al

Case Number: 2012CP2400576

Type: Order/Summary Judgment

So Ordered

s/Frank R. Addy, Jr., 2159