STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

DAVID A. JOHNSON, SUSAN WEISENBURGER, JOHN TERMAN, JR., DARCY A. TERMAN, PAUL FARESE, JAMES FARESE, DENNIS DUCATE, JOAN MCLELLAN, DAVID A. DEMER, CHRISTINE A. DEMER, and GINGER METTS RICHARDSON,

Plaintiffs,

vs.

SVI HOSPITALITY, LLC and NATIONAL BANK OF SOUTH CAROLINA

Defendants.

and

SVI HOSPITALITY, LLC, HARICHARAN J. MISHRA AND ILLA A. MISCHRA,

Third Party Plaintiffs,

vs.

SUPERIOR CONSTRUCTION CORPORATION,

Third Party Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2008-CP-26-7956

FINAL ORDER

This matter comes before me pursuant to Cross-Motions for Summary Judgment by the Plaintiffs, filed on July 13, 2011, and National Bank of South Carolina (NBSC), filed on December 15, 2010. The Plaintiffs also seek Summary Judgment against the Defendant, SVI Hospitality, LLC (SVI).

The case between Plaintiff's and NBSC is before me, as Special Referee, pursuant to an Order of Reference signed by the Honorable Larry B. Hyman, dated June 21, 2010. The Plaintiffs, David A. Johnson, Susan Weisenburger, John Terman, Jr., Darcy A. Terman, Paul Farese, James Farese, Dennis Ducate, Joan McLellan, David A. Demer, Christine A. Demer and Ginger Metts Richardson (hereinafter collectively "Plaintiffs") seek judgment against the Defendants, SVI Hospitality, LLC (hereinafter "SVI") and National Bank of South Carolina (hereinafter "NBSC") jointly and severally, for recovery of earnest money paid as deposits on condominium units which were not delivered to them in accordance with the contract between the Plaintiffs and SVI. A separate Order Granting Summary Judgment against the Defendant, SVI Hospitality, LLC, has been signed and entered by me.

This decision is based upon the stipulations of the Parties, deposition portions submitted and other documents submitted to me prior to or at the hearing on the cross motions which was held on November 2, 2011.

Under the facts of this case, the issue presented is whether NBSC is liable to the Plaintiffs for refund of their earnest money deposits on the failed Atlantic Palms project. Important to this decision is the knowledge of NBSC as to the refundable nature of the earnest money deposits, the requirements NBSC placed on SVI via the loan documents, and the benefit NBSC received by use of the Plaintiffs' earnest money deposits in the development of the project.

Statement of the Case

The above captioned matter arises from the failed condominium project known as the Atlantic Palms Resort Horizontal Property Regime (hereinafter "Atlantic Palms"). The Plaintiffs entered into pre-construction purchase agreements (hereinafter collectively "Purchase Agreements") with the developer SVI for the purchase of units at the Atlantic Palms Resort. Each Plaintiff paid earnest money deposits to SVI with the execution of its Purchase Agreement. The Plaintiffs filed their action in an effort to recover their earnest money deposits as a result of

SVI's breach of the Purchase Agreements, including the failure to complete construction of or close the sale of the Units as required by the Purchase Agreements. The Defendant NBSC was the construction lender for SVI, and the Plaintiffs claim that NBSC, as the holder of the earnest monies, is liable to them because NBSC benefited from the use of the Plaintiffs' earnest monies.

In their Amended Complaint, filed on September 3, 2010, the Plaintiffs state causes of action against the Defendant SVI for breach of contract, equitable lien, quantum meruit/unjust enrichment, constructive trust, violation of the Federal Interstate Land Sales Full Disclosure Act and violation of the South Carolina Unfair Trade Practices Act. The pleading makes claims against NBSC for breach of contract, equitable lien, quantum meruit/unjust enrichment and constructive trust.

The Plaintiffs' claims against SVI are addressed in a separate order.

The Defendant NBSC served the Plaintiffs with its Answer and Counterclaim to the Plaintiffs' Amended Complaint on September 28, 2010, and asserted several motions to dismiss for failure to state a claim and affirmative defenses, including laches, estoppel, waiver, unclean hands, failure to mitigate, intervening events and contribution. NBSC also counterclaimed against the Plaintiffs for frivolous proceedings.

The parties have exchanged written discovery, and the 30(b)(6) depositions of the Defendant SVI and the Defendant NBSC have been taken. The Plaintiffs and Defendant NBSC have filed Cross-Motions for Summary Judgment supported by affidavits and by joint Stipulations. Additionally, the Plaintiffs submitted documents prior to and at the hearing on the Cross Motions for Summary Judgment, including portions of depositions taken and other documents produced in discovery.

Findings of Fact

Based upon the evidence submitted, I find as material facts the following:

1. Each of the Plaintiffs entered into separate Purchase Agreements (hereinafter "Purchase Agreements") with the defendant SVI Hospitality, LLC (hereinafter "SVI") for the purchase of Unit(s) (hereinafter "Units") at a project known as the Atlantic Palms Resort Horizontal Property Regime (the "Project"). Copies of the Purchase Agreements and copies of each of Plaintiffs' cleared earnest money deposit checks, were attached to the stipulations of the

parties collectively as Exhibit A-1 to Exhibit A-8. A summary of the Purchase Agreements is as follows:

Plaintiff	Unit #	Date of Purchase Agreement	Deposit Amount	Date of Deposit Check
Demer, Christine and David	807[1]	December 5, 2005, as amended by contract dated February 18, 2006	$31,980.00	December 5, 2005 ($2,000; January 10, 2006 ($29,980)
Ducate, Dennis and Joan McLellan	511	June 30, 2005	$16,990.00	June 11, 2005 ($5,000); July 7, 2005 ($11,990)
Farese, James	416	July 9, 2005	$14,990.00	June 17, 2005 ($5,000); July 11, 2005 ($9,990)
Farese, Paul	611	June 30, 2005	$16,990.00	June 16, 2005 ($5,000); July 7, 2005 ($11,990)
Johnson, David A.	313	August 29, 2005	$14,990.00	August 30, 2005
Richardson, Ginger Metts	607	August 16, 2005	$16,990.00	August 4, 2005
Terman, John and Darcy A.	309[2]	July 5, 2005, as amended by contract dated July 20, 2006, as amended by contract dated July 17, 2007	$28,990.00	July 5, 2005
Weisenburger, Susan	423	March 27, 2006	$21,000.00	March 27, 2006

2. Each Plaintiff paid its earnest money deposit, in the amounts set forth above, to

1 The Demers originally had contracts for Units 513 and 509, but they amended their contracts to purchase Unit 807 instead.
2 The Termans originally had contracts for Units 813 and 600, but they amended their contracts to purchase Unit 309 instead.

SVI. Plaintiff's earnest money deposits total $162,920.00.

3. SVI deposited each Plaintiff's earnest money deposit checks into a checking account maintained by SVI, in the name of SVI, at Beach First National Bank ("Beach First Account"). Each of Plaintiff's earnest money deposits was, at all times, comingled with the earnest money deposits of other prospective Unit purchasers (who are not parties to this action), and comingled with other funds in the Beach First Account.

4. Defendant National Bank of South Carolina (hereinafter "NBSC") did not sign any of the Purchase Agreements. NBSC is not named in the Purchase Agreements. The Purchase Agreements refer to lender or lenders, but do not specifically name NBSC.

5. While the parties stipulate that the Purchase Agreements in their entirety speak for themselves, the parties called the following paragraphs to the Court's attention:

A. With respect to the disposition of the Plaintiffs' deposits, each Purchase Agreement provides the following:

> Purchase Agreements, ¶ 2.
>
> At any time after the closing by Seller [SVI] of its construction loan for the construction of the Project, the Seller shall be free to use any or all of the Purchaser's Deposit, together with any interest earned thereon, if any, at any time prior to the Purchaser's closing on the Unit, for land acquisition, architectural and engineering fees, building permits, plan review fees, legal fees, construction costs and other costs associated with the Project. The Purchaser hereby waives any claim of a lien equitable or otherwise, on the Property by virtue of Purchaser's payment of the Deposit or its use in the Project to the degree that any such lien may exist, Purchaser agrees that any equitable lien which Purchaser may now or hereafter possess in the Property or the Project is hereby subordinated and made junior to any right or lien of the Seller's construction lender, including specifically, but not limited to, a mortgage lien given by Seller to any financial institution to secure a loan for land acquisition or for construction of the Project.

B. Paragraph 8 of each Purchase Agreement provides:

> Subject to Seller's right to terminate this Contract as set out above, and subject to delays caused by acts of God, war, acts of terrorism, labor or material shortages, strikes or other reasons beyond Seller's control, Seller shall complete construction of the improvements and tender a Deed to the Unit to the Purchaser within two (2) years of the date of the full execution of this Contract.

C. Paragraph 16 of each Purchase Agreement provides:

This Agreement shall inure to the benefit of, and be binding upon the parties and their respective heirs, successors, assigns, executors or administrators. **The rights of the Purchaser may not be assigned to any party, persons or entity, without the express written consent of the Seller, which consent may be withheld for any reason.** Seller may assign its rights and obligations pursuant to this Agreement. (Emphasis appears in Purchase Agreements.)

D. Paragraph19 or 20 of each Purchase Agreement provides:

SUBORDINATION TO MASTER DEED AND CONSTRUCTION MORTGAGE: The rights of Purchaser under this Purchase Agreement are subordinate to any construction or other mortgage granted by Seller, and in the event of foreclosure of that construction or other mortgage, or the receipt by the construction mortgage lender of a deed in lieu of foreclosure, Seller's construction lender may, at its option, terminate this agreement. Purchaser further agrees that this Purchase Agreement does not grant Purchaser any lien or other interest in the Property on which the project is being constructed and the Seller may record its Master Deed without any required action of the Purchaser.

E. Paragraph 17(b) of each Purchase Agreement provides:

If the Seller shall default under the terms and conditions hereof, and such default shall continue after 30 days written notice to Seller, the Purchaser may, as its sole remedy, elect to have all deposits hereunder returned, together with any interest earned thereon, if any, as liquidated damages, this Contract then becoming null and void and neither party having further obligations to the other hereunder. Purchaser may not bring an action for actual or consequential damages beyond the return of the Deposit.

6. In December 2005 or January 2006, SVI entered into a contract with Superior Construction to construct the improvements for the Project. The Project involved the conversion and renovation of an existing motel, owned by Mike Mishra ("Mishra") into condominiums, and the addition of two new floors. Mishra's wife and son were the named members of SVI, and Mishra was the "Manager" of the LLC.

7. When it entered into the construction contract with Superior, SVI did not have in place lender financing to fund the Project, however SVI had discussed financing with Beach First National Bank.

8. Despite the fact that it did not have a construction loan in place, Mishra and SVI permitted Superior Construction to commence demolition and work on the Project in or around February 2006. Superior's work was funded, in part, by Mishra, and in part by $1,144,996.92 in

advances made by NBSC to Mishra pursuant to a modification of an outstanding promissory note owed by Mishra to NBSC ("Mishra Note"). The purchasers' deposits were not used at this time. The Mishra Note was secured by an existing first mortgage on the Property.

9. SVI presented the Project to several lenders, including Beach First. Beach First preliminarily approved financing of the project, but withdrew its commitment when demolition exposed additional necessary work that had not been anticipated. Beach First then advised Mishra/SVI that it could not provide financing because the size of the loan needed exceeded its lending limits.

10. During the late fall of 2005, SVI approached NBSC seeking funding for the Project.

11. In late 2005, SVI and NBSC entered into negotiations for a permanent construction loan.

12. NBSC eventually agreed to extend certain loans to SVI for the purpose of financing SVI's construction/remodeling of the Project.

13. As each contract was consummated, the earnest money deposit was received and deposited into the SVI account at NBSC, and NBSC was provided with a copy of the completed contract. (Mishra Depo page 54, Lines 21-25, page 55, Lines 7-16).

14. In November 2005, SVI transferred the earnest money deposits of prospective Unit purchasers from its Beach First Account into a non-restricted checking account located at NBSC, account number 754-257-160-1 ("SVI Checking Account"). This money remained in the SVI Checking Account, intact and under SVI's control, until the August 22, 2006 closing, when it was swept into the Project at the closing of the construction loan.

15. When SVI deposited the funds from the Beach First Account into the SVI Checking Account, NBSC knew that the funds represented deposits made by prospective Unit purchasers and knew the terms of the Purchase Agreements.

16. NBSC's loans for the construction of the project are evidenced by Exhibits B-1 to B-12 to the Stipulations of the Parties:

i. First Mortgage and Security Agreement dated August 22, 2006;

ii. Loan Agreement dated August 22, 2006;

iii. Promissory Notes dated August 22, 2006;

iv. Assignment of Sales Contracts and Pledge of Deposit Accounts dated August 22, 2006 (hereinafter "Assignment");

v. Collateral Assignment of Management Agreement dated August 22, 2006;

vi. Assignment of Leases, Rents and Profits dated August 22, 2006;

vii. Assignment of Construction Documents dated August 22, 2006;

viii. Assignment of Contracts, Intangibles and Licenses dated August 22, 2006.

ix. Loan Modification Agreement dated September 27, 2007;

x. Mortgage and Security Agreement dated October 5, 2007;

xi. Promissory Note dated October 5, 2007; and,

xii. Assignment of Contracts of Sale and Earnest Monies dated October 5, 2007.

(collectively, "Loan Documents").

17. As part of the loan documents, NBSC required SVI to execute, inter alia, a Loan Agreement, a First Mortgage and Security Agreement, and an Assignment of Sales Agreement and Pledge of Deposits and Accounts. These loan documents address the Plaintiffs'= earnest money deposits in the following ways:

a) Sales Contracts for Units and applicable law permit the earnest money deposits to be used by Borrower (SVI) for construction of the improvements. (Loan Agreement, dated 8/22/06, Article II, Sec. 2.1 (l)).

b) Lender acknowledges that earnest money deposits are to be held in trust until the terms and conditions of the Sales Contract have been met. Lender also sets up the procedure for deposits to be disbursed at closing of the units. "This Agreement is made subject to the terms of the Sales Contracts, and to the rights of the purchasers under the sales contracts or by law and the Lender shall consent to the release of any deposits that are required to be refunded to a Purchaser under the terms of the Sales Contract or by law." (Assignment of Sales Contracts and Pledge of Deposits and Accounts, dated 8/22/06, ¶ 3).

c) "Sales Contracts say deposits can be used in construction... in the event a refund is

required to be made... either before or after default... Such refund shall be added to the principal balance of the Secured Obligation, in such order as the lender shall elect..." (Assignment of Sales Contracts and Pledge of Deposits and Accounts, dated 8/22/06, ¶ 4).

d) NBSC is granted a security interest in all present and future Purchase Agreements, all earnest monies deposited. The Agreement calls for NBSC to collect the proceeds under the Purchase Agreements, including the earnest money and apply those funds to the Note, interest and attorneys' fees and expenses in such order as the lender may elect, to the extent the Earnest Monies are not expended for development costs of the Project. (Assignment of Contracts of Sale and Earnest Monies, dated 10/5/07, ¶ ¶ 1, 2).

18. The Loan Agreement provides that all of the earnest money deposits be deposited upon receipt with the Lender [NBSC] in the Construction Account, and Borrower [SVI] authorizes Lender to make Construction Advances from the Construction Account pursuant to the provisions of the Loan Agreement. (Loan Agreement, Construction Rider 2 (l) (ii)).

19. The NBSC Commitment Letter dated July 27, 2006 provided that SVI's equity of $1,650,000.00 would come form the purchaser's earnest money deposits. The Commitment Letter also provides that the Contracts for Sale and Purchase and Earnest Money deposits be assigned to NBSC as Lender as part of the Closing Requirements. (Commitment Letter, Exhibit A to NBSC's Commitment, of record).

20. Prior to the construction loan closing on August 22, 2006, the real property comprising the Atlantic Palms project was owned by Mike Mishra. As part of the August 22, 2006 closing, the property was transferred to SVI Hospitality, LLC.

21. On or about August 22, 2006, the NBSC loans to SVI, totaling $16,300,000 were closed.

22. The HUD-1 settlement statement for the NBSC Loan closing, dated August 22, 2006, was attached as Exhibit C to the Stipulations of the Parties, shows the following:

- At closing, $6,598,350.03 in loan proceeds was drawn from the $16.3 Million loan from NBSC ("Initial Construction Loan Draw");

- The Initial Construction Loan Draw was combined with the $1,750,000 from the SVI Checking Account (which contained deposits obtained by SVI from prospective Unit purchasers), for a total of $8,348,650.03. This figure is shown on the HUD-1 as the gross amount due from SVI at the closing. From this amount:
    a) $6,179,345.36 was used to pay off the existing indebtedness on the Property owed to NBSC;
    b) $1,676,345.36 was paid to Superior for work completed up to the time of closing that had not already been paid for as described in paragraph 8, supra;
    c) $300,000 was paid to Mishra to reimburse him for advances made on the Project; and
    d) $192,559.67 went towards various closing costs.

23. As part of the loan approval process, NBSC reviewed the Purchase Agreements and was aware of the terms of the Purchase Agreements.

24. Paragraph 8 of the Purchase Agreements required SVI to tender a deed and title to the Unit no later than two years after the execution of the Purchase Agreements.

25. The August 22, 2006 Promissory Notes matured on August 22, 2007, and were not paid as agreed. On August 22, 2007, the Project was unfinished.

26. On September 20, 2007, SVI and NBSC entered into a Loan Modification Agreement which provided, among other things, that the Maturity Date for the August 22, 2006 Promissory Notes would be extended to February 2, 2008. *See supra* at ¶ 16(ix).

27. On or about October 5, 2007, NBSC loaned SVI an additional $2,500,000 to fund the completion of the Project. *See supra* at ¶ 16(xi).

28. The City of Myrtle Beach issued a Certificate of Occupancy for the Parking Garage and Levels 1-6 of the Project on November 16, 2007. It issued a Certificate of Occupancy for the remaining two levels of the Project on December 4, 2007.

29. After finally receiving Certificates of Occupancy, SVI was preparing to schedule closings. Although there is no evidence that SVI sent notices to the purchasers to close after

receiving the Certificates of Occupancy, it appears that several of the Purchasers attempted to close. One of the barriers to closing was the fact that in December 2007 and in early 2008, the General Contractor, Superior Construction Corporation, and several other subcontractors filed mechanics liens against the project.

30. Certain mechanic's liens were filed against SVI Hospitality, LLC that encumbered the Property at the time the Certificates of Occupancy were obtained by SVI, and further liens were filed after the Certificates of Occupancy were issued.

31. All of the Loans matured on February 2, 2008. Despite demand, they were not paid as agreed.

32. On February 28, 2008, NBSC commenced a foreclosure action for the Property.

33. Despite attempts to close on units in early 2008, SVI was unable to obtain the necessary approvals from NBSC close on the units. As a result, none of the pre-construction Purchase Agreements were closed. (Mishra deposition page 79, line 5 to page 81, line 19).

34. Another barrier to closings was the refusal of NBSC to consent to closing. This refusal to consent was due to the mechanics liens filed and due to economic considerations related to the project as a condominium. (Bill Short e-mail attached to Plaintiffs submissions as "Exhibit B" and Deposition of Wade King page 88, lines 6-10, page 94, line 10 – page 96, line 3; page 97, lines 7-23).

35. The Project was not completed as planned due, in large part, to a dispute between SVI Hospitality, LLC and its contractor, Superior Construction Corporation.

36. SVI did not deliver title to and did not deliver possession of the Units to any of the Plaintiffs or any other contracted purchaser.

37. At various times, Plaintiffs demanded SVI refund their deposits, but SVI did not refund the Plaintiffs' deposits.

38. Based upon an email submitted by Plaintiffs, in early 2008, one or more unit owners, including the one of the Plaintiffs (Weisenburger), were prepared to close on their units, but the Defendant, NBSC would not agree to allow the closing to take place due to the filing of mechanics liens.

39. From the 30(b)6 deposition of NBSC, it appears that NBSC made a conscious

decision not to allow closings at the project because it was economically detrimental to NBSC to allow a few closings to occur.

40. NBSC brought a foreclosure action against the Defendant SVI for the Atlantic Palms Resort based upon its default on the construction loans. Before the foreclosure was completed, NBSC sold the Atlantic Palms Resort, and it is currently being operated as a hotel by a non-affiliated third party. None of the purchasers, including the Plaintiffs, were named as parties or otherwise included in the foreclosure proceedings. SVI has no current interest in the property. (SVI deposition page 15, line 12 to page 16, line 4).

A. Legal Standard.

South Carolina Rule of Civil Procedure 56(c) provides that summary judgment may be granted, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that [movant] is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. The movant bears the burden of informing the court of the basis of the motion, and identifying those portions of the record that show there is no genuine issue as to any material fact. *Strother v. Lexington Co. Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Owens v. Magill*, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992).

Once the movant meets its initial burden:

> [A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial.

Rule 56(e), SCRCP. Thus, "to resist a motion for summary judgment the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995); *Baughman v. American Tel. and Tel.*

Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "It is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). Affidavits submitted to the court to support or resist summary judgment must "be made on personal knowledge . . .[and] set forth such facts as would be admissible in evidence and . . . how affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP.

When considering a motion for summary judgment, the Court must draw all reasonable inferences and view the evidence in a light most favorable to the nonmoving party. *Spencer v. Miller,* 259 S.C. 453, 192 S.E.2d 863, 864 (1972); *NationsBank,* 320 S.C. at 303, 465 S.E.2d at 100. However, the Court must rule based "on the record the parties have actually presented, not on one potentially possible." *Spencer,* 259 S.C. at 456, 192 S.E.2d at 865. And, while matters must be viewed in a light most favorable to the nonmovant, the Court is not "required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. at 527, 316 S.E.2d at 407; *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993). Nor can the court "ignore facts unfavorable to [the non-movant]. . . ." *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) (addressing motion for directed verdict). Instead, the Court "must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Id.* at 314, 468 S.E.2d at 307. "If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and the motion was properly granted." *Id.*; *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336

S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999); *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991).

B. Breach of Contract.

Plaintiffs have asserted a claim against NBSC for breach of contract under various theories of relief. The court will address each of these in turn.

1. Direct Breach of Contract.

To prevail on a claim for breach of contract, Plaintiffs must plead and prove the existence of a contract between each Plaintiff and NBSC, and must prove that NBSC breached the contract.

A contract is defined as an obligation arising from an actual agreement of the parties that is manifested by words, oral or written, or by conduct. *Rushing v. McKinney,* 370 S.C. 280, 290, 633 S.E.2d 917, 922 (Ct. App. 2006); *Regions Bank v. Schmauch*, 354 S.C. 648, 660-661, 582 S.E.2d 432, 439 (Ct. App. 2003). "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). Before a party can assert any claims against another arising out of a contract, a contract between the parties must first be found to exist. *Regions Bank*, 354 S.C. at 660, 582 S.E.2d at 439.

It is clear from the record that no contract exists between NBSC and Plaintiffs. It is undisputed that NBSC was not a party to the Plaintiffs' Purchase Agreements. It is undisputed that NBSC is not named in the Purchase Agreements. NBSC did not sign the Purchase Agreements. There is no evidence that there was any communication between Plaintiffs or NBSC, much less an "actual agreement of the parties" with respect to the subject matter of this

action. As a matter of law, Plaintiffs' claim for breach of contract fails.

2. Breach of Contract as Assignee.

Despite the absence of an actual contractual relationship between themselves and NBSC, Plaintiffs argue that because NBSC took an assignment of all of SVI's purchase agreements as additional collateral for the SVI Loan, NBSC became a party to the Purchase Agreements and assumed SVI's liability to Plaintiffs thereunder. In support of this argument, Plaintiffs rely on language carved out of the Assignment of Sales Contracts and Pledge of Deposit Accounts (the "Assignment"), and assert that when the Assignment was executed, NBSC stepped into SVI's shoes and assumed all of SVI's obligations to Plaintiffs, including SVI's obligation to refund deposit money. Plaintiffs' arguments, and their reliance on *Clardy v. Bodolosky,*[3] *Welling v. Crosland,*[3]and the other cases cited in their memorandum, for the proposition that the Assignment makes NBSC liable to them "as a direct party to the assigned Purchase Agreements" are misplaced.

A fundamental tenant of contract law is that a contract cannot bind a non-party. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty"). The mere fact that NBSC held a security interest in the Purchase Agreements neither makes NBSC responsible for SVI's performance under the Purchase Agreements, nor does it make NBSC liable to Plaintiffs for SVI's breach of the agreements.

The foregoing conclusion is buttressed by § 36-9-402 of the South Carolina Commercial

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3 *Welling* did not involve an assignment of certain collateral as security for a loan, but rather a true assignment of an option contract to purchase real estate, the express assumption by the assignee of the assignor's obligations, and the assignee's express agreement to be substituted in the place of the assignor. *Welling v. Crosland*, 129 S.C. 127, 123 S.E. 776, 736-37 (1924). This case is wholly distinguishable from the case before the Court.

Code, which provides:

> The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, **without more**, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions.

S.C. Code Ann. § 36-9-402 (emphasis added).4

The Assignment, like all contracts, must be read in its entirety, and the parties' intent determined from the four corners of the document. The Assignment must be construed "according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1965). "It is axiomatic that the intent and purport of a written contract or agreement has to be gathered from the contents of the entire agreement and not from any particular clause or provision thereof." *Id.* When contracts are capable of clear interpretation, the "Court's province is confined to the enforcement thereof." *Id.*

As additional collateral for the $18 million SVI Loan, NBSC did, in fact, take an assignment of the unit purchase agreements. As a matter of law, this fact does not make NBSC either a party to the unit purchase agreements, or liable to Plaintiffs for SVI's default. *See* S.C. Code Ann. § 36-9-402.

It is clear from reading the Assignment that SVI intended to grant NBSC a lien on the Purchase Agreements. *See* Assignment at ¶ 1 ("It is the intent hereof that this Agreement secure

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4 The Official Comment to § 36-9-402 states that, like former § 9-317 of the UCC, § 36-9-402 is intended to reject theories by which a secured party could arguably be liable for a debtor's contracts merely due to the existence of a security interest. S.C. Code Ann. § 36-9-402, Off. Cmt.; *see also Genesco Inc. v. Monumental Life Ins. Co.*, 577 F. Supp. 72, 86 (D.S.C. 1983), ("an assignment for security transfers the rights but not the obligations inherent in the assigned contract.)" *see also Spielman v. Acme Nat'l Sales Co., Inc.*, 169 A.D.2d 218, 223 (N.Y. 1991) ("[U]nless it is specifically agreed otherwise, a secured creditor should not be bound to contracts entered into between the debtor and third parties,

all indebtedness of [SVI] to [NBSC]. . . ."); at ¶ 2 ("[T]his Agreement is made as additional security for the performance of [SVI] of all its obligations under the Loan Agreement, the Note, and all of the other Loan Documents."). It is also clear that the parties did not intend that, with the mere execution of the Assignment, NBSC would step into the shoes of SVI, and perform SVI's obligations under the unit purchase agreements. *See* Assignment at ¶ 12; *see also* Mishra Tran. at 116, lines 6-11 and lines 20- 22.

The Assignment does contain a provision by which NBSC could, if it elected, and after an event of default, step into the shoes of SVI and assume SVI's obligations under the contracts.5 To accomplish this, the Assignment provides instructions for NBSC to follow should it choose to make this election. Assignment at ¶ 9. Until an event of default by SVI **and** an election by NBSC, SVI was "entitled to enjoy and enforce all of its rights under the [Purchase Agreements]," and NBSC "shall not be required to . . . take any action to preserve any rights against . . . any other person . . . with respects to the Deposits or Accounts." Assignment at ¶¶ 8, 12.

For the Court to hold NBSC liable for SVI's obligations to Plaintiffs under the Purchase Agreements, there must be evidence in the record to show that NBSC did "more" than take an assignment. There is none. To the contrary, the only evidence in the record is that NBSC did not do so. *See* Whitecross Aff. at ¶¶ 11, 14 18, 20; *see also* n.4, *supra*.

There is no evidence that NBSC, either expressly or by implication, took any action to assume any of SVI's obligations or liabilities under any of the Purchase Agreements. There is no

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notwithstanding the secured creditor's possession of the debtor's assets as collateral after default.").

5 The Assignment expressly provides "[u]nless and until Lender gives notice to a particular Purchaser of Lender's [NBSC's] intention to succeed to the rights of Borrower [SVI] and Lender takes such action as is

evidence that NBSC elected to step into the shoes of SVI. There is no evidence that NBSC took over the Project, or attempted to usurp SVI as developer. There is no evidence in the record that NBSC gave written notice to any Plaintiff of NBSC's intent to succeed to the rights of SVI. Plaintiffs themselves have admitted that they have never received any communication from NBSC regarding the Purchase Agreements. *See* n.4 *supra* (Plaintiffs' Affidavits) ("NBSC has never attempted to contact me in regard to my interests in the Unit or to attempt to allow me to close on the Purchase Agreement"). Additionally, there is no evidence in the record that Plaintiffs' believed that NBSC had replaced SVI as the counterparty to the Purchase Agreements. *See* Plaintiffs' Affidavits (discussing SVI's obligations under the Purchase Agreement and SVI's failure to deliver them title to the unit). Therefore, the Plaintiffs' claim for Breach of Contract as Assignees fails.

3. Breach of Contract - Third Party Beneficiaries.

Plaintiffs' final breach of contract argument arises out of their claim that they are third party beneficiaries to the Assignment. This argument too fails as a matter of law.

South Carolina contract law carries a presumption that one not a party to a contract may not enforce it. *See Touchberry v. City of Florence*, 295 S.C. 47, 48, 367 S.E.2d 149, 150 (1988). This presumption may be overcome by showing that the third party attempting to enforce the contract "was intended to be the direct beneficiary of the contract." *Id.* at 49, 367 S.E.2d at 150. A third party's ability to enforce a contract right hinges upon its classification as either an intended or incidental beneficiary. Only intended beneficiaries may enforce a contract right.

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necessary to succeed to such rights, Lender shall not be obligated to perform any of the obligations of Borrower under such Sales Contract." Assignment, ¶ 13.

Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 422, 440 S.E.2d 890, 891 (Ct. App. 1993) (holding that "if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person"). The contract must be shown to create a "direct, not incidental or consequential, benefit to the third party" in order for the third party to enforce the contract right. *Cothran v. Rock Hill*, 211 S.C. 17, 20, 43 S.E.2d 615, 617 (1947).

Plaintiffs argue that because the subject of the Assignment is the Purchase Agreements and the proceeds arising therefrom, that they are third party beneficiaries to the Assignment, and are entitled to compel performance thereunder. This is incorrect.

A reading of the Assignment indicates that, at best, Plaintiffs are only incidental beneficiaries to the Assignment. Even assuming that Plaintiffs were direct beneficiaries, they would still not be entitled to the relief they are seeking against NBSC – namely, payment of the deposit money. This is because the Assignment neither imposes upon NBSC an obligation to assume SVI's liability, nor require NBSC to perform SVI's obligations under the Purchase Agreements in the event SVI fails to do so. Third party beneficiaries can only enforce rights that are available under the contract for which they are third party beneficiaries. *See Hardaway Concrete Co. v. Hall Contr. Corp.*, 374 S.C. 216, 226-227, 647 S.E.2d 488, 493 (Ct. App. 2007) (reversing trial court's award for damages to third party beneficiary for providing ice where charges for ice were not allowed under the terms of the contract to which the third party beneficiary sought relief). The Assignment does not require NBSC to pay SVI's debt obligations if SVI is unable to. Because SVI could not force NBSC to pay its debts pursuant to the terms of the Assignment, Plaintiffs cannot either.

Based on the foregoing, Plaintiffs' breach of contract claim fails as a matter of law in all respects.

4. Equitable Lien

Plaintiffs' Fourth Cause of Action seeks the imposition of an equitable lien. A review of the Amended Complaint reveals that Plaintiffs' equitable lien cause of action is essentially a restatement of their breach of contract claim. *See* Amended Complt. at ¶ 75 (Plaintiffs "believe they are entitled to a judgment granting them an equitable lien superior to the rights of any other party to the funds that were deposited with SVI and are in possession of NBSC and an Order requiring NBSC to return said funds.").

To establish the right to the imposition of an equitable lien, Plaintiffs must plead and prove the existence following elements: (1) a debt owing; (2) specific property to which the lien attaches; and (3) expressed or implied intent that the specific property serve as security for payment of the debt. *First Fed. Sav. & Loan Ass'n of S.C. v. Finn,* 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989). In this case, not only have Plaintiffs failed to plead the three required elements in their Amended Complaint, Plaintiffs cannot show that all of the three required elements are present in this case to justify the imposition of an equitable lien.

First, a mere breach of contract does not give rise to an equitable lien. *Carolina Attractions,* 287 S.C. at 145, 337 S.E.2d at 247 (citing *U.S. v. Adamant Co.*, 197 F. (2d) 1, 10 (9th Cir.) ("there must be something more than the mere fact that a contract has been breached before a lien is impressed upon a specific fund."); *McKenna v. Turpin*, 128 Ind. App. 636, 151 N.E. (2d) 303, 305 (1958) (when there has been nothing more than a breach of agreement to pay a commission to a broker, broker is not entitled to equitable lien on property); *Hipps v.*

McKenzie, 201 Tenn. 26, 296 S.W. (2d) 838, 839 (1956) (action for damages is remedy for breach of contract, not action for equitable lien on land). And, as discussed above, Plaintiffs' breach of contract claim against NBSC fails as a matter of law.

Second, Plaintiffs have failed to identify the specific property to which an equitable lien would attach. "[F]unds that were deposited with SVI and are in the possession of NBSC," is not a specific description of property.6 Plaintiffs have pointed to no evidence to show that there are any funds that were deposited with SVI that are with or in NBSC. Neither have Plaintiffs pointed to any evidence to show that there are any funds of SVI with or in NBSC. 7 Absent specifically identified property, no equitable lien can attach.

With respect to the third element, nowhere is it alleged that it was SVI and Plaintiffs' intent, either expressly or by implication, that "any funds that were deposited with SVI and . . . in the possession of NBSC," would serve as security for monies due from SVI to Plaintiffs. Indeed, Mishra testified that SVI had made no plans for securing refunds claimed by the Plaintiffs, thus contradicting Plaintiffs' claims. *See* Mishra Tran. at 60, line 16 – 17; at 65, line 4 through 14. Had Plaintiffs wished to secure the return of their deposits in the event of a default by SVI, they had the ability to do so in their contract, but chose not to.

Plaintiffs' claim for an equitable lien fails as a matter of law. NBSC is entitled to summary judgment on this claim.

5. Constructive Trust

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6 *See* Amended Complt. at ¶ 75.

7 Even assuming that there was evidence that there were funds belonging to SVI deposited with NBSC, Plaintiffs would have the burden of proving that these funds were not otherwise encumbered or pledged, or

A constructive trust arises when the circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title. *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987). To obtain a constructive trust, Plaintiffs must prove that NBSC: (1) acquired property or title to property; and (2) used actual or constructive fraud, duress, abuse of confidence, or unconscionable conduct in order to acquire the property. *Dye v. Gainey*, 320 S.C. 65, 68, 463 S.E.2d 97, 99 (Ct. App. 1995). "Fraud is an essential element, although it need not be actual fraud." *Lollis*, 291 S.C. at 529, 354 S.E.2d at 561. In order to establish a constructive trust, Plaintiffs' evidence must be clear, definite, and unequivocal. *Id.*

Plaintiffs seek the imposition of a constructive trust based upon their allegations that "NBSC accepted receipt of the earnest money deposits from SVI." Amended Complt. at ¶ 92. However, beyond this allegation, Plaintiffs have failed to establish either requirement necessary for the imposition of a constructive trust.

As to the first element, Plaintiffs cannot meet their burden. As set forth in detail above, it is undisputed that NBSC was not the direct recipient of Plaintiffs' deposit money, and therefore never acquired the earnest money deposits. *See SSO Med. Servs., Inc. v. Cox,* 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990) (observing that a constructive trust can arise only when a party "has obtained money" that does not equitably belong to him); *Lollis v. Lollis,* 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987) ("A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding [it].").

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pleading and proving that they were entitled to assert a claim for equitable subordination, before an equitable lien could attach.

With respect to the second element, Plaintiffs have not even alleged that NBSC used actual or constructive fraud duress, abuse of confidence or unconscionable conduct in order to acquire the property. Additionally, there is no evidence that Plaintiffs have ever had any direct contact with NBSC, and no evidence of any conduct of NBSC directed at Plaintiffs. Indeed, Plaintiffs admit in their affidavits that they never received any communication from NBSC regarding these issues. Without clear, unequivocal evidence of some type of wrongful action by NBSC, Plaintiffs' constructive trust claim fails, and NBSC is entitled to summary judgment.

6. Unclean Hands

Plaintiffs' final theory for equitable relief is that, because they believe they are the only parties before the Court who do not have "unclean hands," then they should have a judgment against NBSC. This claim, too, must be rejected.

Plaintiffs do not allege in their affidavits, or point to any evidence in the record to show where NBSC acted with unclean hands. To the contrary, the evidence before the Court is that all of the parties wanted the Project to be successful. Mishra Tran. at 124, lines 8-16; at 125, lines 6-23; at 127, lines 10-20. Indeed, it is undisputed that, in additional to the $16.3 original loan, NBSC made an additional $ 2.5 million dollar loan to SVI, and extended the due dates for the matured loans, to achieve this end. Mishra Tran. at 120, line 11 to 121, line 3; *see* Stipulations of Fact at ¶ 23.

NBSC had no contact or relationship with Plaintiffs. The fact that SVI breached its contract with Plaintiffs does not give SVI unclean hands, much less NBSC.

7. Unjust Enrichment / Quantum Meruit

South Carolina has long recognized the equitable remedy of unjust enrichment, which is based on quasi contract, the elements of which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value.@ Columbia Wholesale Company, Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). The main issue that the courts examine for recovery under this cause of action is "whether the enrichment to the owner is unjust." Id. When determining the amount of damages, "the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff." Myrtle Beach Hospital, Inc. v. City of Myrtle Beach 341 S.C. 1, 10-11, 532 S.E.2d 868, 872 (2000), quoting United States Rubber Products, Inc. v. Town of Batesburg, 183 S.C. 49, 190 S.E. 120 (1937).

With the execution of the Purchase Agreements, the purchasers of units at the Atlantic Palms Resort paid their earnest money deposits to the developer, the Defendant SVI. Although the Purchase Agreements provided that the earnest money deposits could be used on the construction of the project, it also provided that if SVI defaulted on its obligations under the Purchase Agreements, the purchasers were entitled to a refund of their deposit monies. This fact was known to NBSC prior to the time they made their loan on the project. Also known to NBSC was the fact that as part of August 22, 2006 closing, the Plaintiffs' earnest money deposits were pooled and applied to many charges and expenses not provided for in the Purchase Agreements, including payment of indebtedness owed to NBSC by Mishra individually, not SVI, the developer and party to the Purchase Agreements.

As part of their required loan documents, NBSC required SVI to sign an Assignment of Sales Contracts and Pledge of Deposits and Accounts. (Ex B-5 to the Stipulation of Dismissal). This Assignment provides that "in the event any refund is required to be made of any of the Deposits, and Lender, before or after an Event of Default, is required to, or elects to, refund such Deposit, the amount of the refund shall be added to the principal balance of the Secured Obligations, in such order as Lender shall elect, be due and payable on demand and be secured by

the Mortgage or other Loan Documents." (Assignment of Sales Contracts and Pledge of Deposits and Accounts, dated 8/22/06, ¶ 4).

The Assignment also provides that SVI was required to deposit the earnest money deposits into an account at NBSC, and that NBSC "acknowledges that the deposits constitute earnest money deposits made pursuant to the terms of the Sales Contracts and are to be held in trust in the accounts until the terms and conditions of the Sales Contracts have been met." (Assignment of Sales Contracts and Pledge of Deposits and Accounts, dated 8/22/06, ¶ 3). NBSC further agreed that the agreement was subject to "the rights of the purchasers under the Sales Contracts or by law." (Assignment of Sales Contracts and Pledge of Deposits and Accounts, dated 8/22/06, ¶ 3).

The facts as established by the Loan Documents, testimony submitted, and stipulations, indicate that NBSC knew the Plaintiffs' refundable earnest money deposits were credited at closing, and were being used to benefit and improve the property subject to NBSC's mortgage.. In fact, NBSC's loan documents require the use of the earnest money deposits by SVI, despite NBSC's knowledge that they were refundable to the Plaintiffs upon default by SVI. Therefore, NBSC realized a benefit being conferred upon it by the Plaintiffs with full knowledge of the source and nature of the benefit.

It is clear that in early 2008, NBSC made a decision not to allow closings to occur for various reasons including reasons which were economically beneficial to NBSC and detrimental to the Plaintiffs. The Defendant NBSC realized the benefit of the Plaintiffs' earnest money deposits in at least two instances; first, when it applied the deposits to a prior mortgage NBSC had on the property, considering the funds owners equity and thus reducing the amount of the loan or increasing the value of the security for the loan. NBSC also realized the benefit of the Plaintiffs' deposits when it sold the loan to a third party during the foreclosure process, as the value paid for the loan, in part, reflected the value of the improvements securing the NBSC loan. NBSC's ultimate loss on the loan was reduced because it used the Plaintiffs' deposit monies in the construction of the project and the value was recognized at the sale of the loan. Undoubtedly, the amount of loss incurred by NBSC was lessened by the use of Plaintiffs deposits during the development of the project.

It is apparent that NBSC made a conscious decision not to allow closings to occur despite

several of the Plaintiffs' attempts to close. (Bill Short email, of record, and Deposition of Wade King page 88, lines 6-10, page 94, line 10 – page 96, line 3; page 97, lines 7-23). Since NBSC consciously determined to act in its own best economic interest, despite the rights of the Plaintiffs, the equities require that the NBSC repay the Plaintiffs for their unjust enrichment. The Plaintiffs on the other hand had no participation in the decision to allow or disallow closings and had no fault in the default of the Purchase Agreements by SVI. By their Affidavits, it appears that some of the Plaintiffs were ready and willing to close, but were never given the opportunity to do so.

The more difficult issue is the assessment of damages in this case. Here the Plaintiffs and NBSC are equally innocent victims of a dramatic upheaval in the real estate landscape which had (and continues to have) worldwide repercussions. Both parties invested in a real estate venture, which was deemed safe at the time of the investments, to improve their respective financial positions. NBSC financed the venture as a part of its investment portfolio, investing Eighteen million, eight hundred-thousand dollars ($18,800,000.00) hoping to earn substantial interest and servicing fees over the life of the loan. The Plaintiffs collectively invested One hundred sixty-two thousand, nine hundred twenty dollars ($162,920.00) in down payments toward the purchase of condominium units to use and enjoy as recreational and income properties. NBSC, because of circumstances beyond its control, has lost more than Ten million dollars ($10,000,000.00), or more than Fifty-five percent (55%) of its investment. The Plaintiffs to date have lost One hundred per cent (100%) of their investments, also because of circumstances beyond their control.

While NBSC has obviously not been made whole by the retention of the benefits derived from the investment of the earnest money deposits of the Plaintiffs in this project, it has clearly derived some benefit therefrom. By assignment or sale of its investment in this project, NBSC has received Eight million, three hundred twenty-one thousand, two hundred twenty-seven dollars ($8,321,227.00), or Forty-four and twenty-six one-hundredths (44.26 %) of its investment. Except for the infusion of the earnest money deposits into the project, NBSC's recovery would have been somewhat less.

While it would be inequitable for the innocent Plaintiffs to suffer the total loss (100%) of their investments, while equally innocent NBSC lost only 55. 74% its investment (although

obviously a much greater actual monetary loss), neither does equity demand that the Plaintiffs recover the entirety of their investment. I find it equitable for NBSC and the Plaintiffs to share their losses proportionate to each other. Precisely, since NBSC has recouped 44.26 % of its investment, the Plaintiffs should be allowed to recoup 44.46% of their investments.

Therefore, I find that the Plaintiffs are entitled to judgment against NBSC for return of Forty-four and twenty-six one hundredths (44.26 %) of their earnest money deposits on the theory of unjust enrichment / quantum meruit.[

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiffs, David A. Johnson, Susan Weisenburger, John Terman, Jr., Darcy A. Terman, Paul Farese, James Farese, Dennis Ducate, Joan McLellan, David A. Demer, Christine A. Demer and Ginger Metts Richardson, have judgment against the Defendant, National Bank of South Carolina, as follows:

1. (a) Plaintiff David A. Johnson is entitled to judgment against the Defendant NBSC in the amount of Six Thousand Six Hundred Thirty-five ($6,635.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

(b) Plaintiff Susan Weisenburger is entitled to judgment against the Defendant NBSC in the amount of Nine Thousand Two Hundred Ninety-Five and No/100 ($9,295.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

(c) Plaintiffs John Terman, Jr. and Darcy Terman are entitled to judgment against the Defendant NBSC in the amount of Twelve Thousand Eight Hundred Thirty and No/100 ($12,830.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

(d) Plaintiff James Farese is entitled to judgment against the Defendant NBSC in the amount of Six Thousand Six Hundred Thirty-five and No/100 ($6,635.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

(e) Plaintiff Paul Farese is entitled to judgment against the Defendant NBSC in the amount of Seven Thousand Five Hundred Twenty and No/100 ($7,520.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007

obviously a much greater actual monetary loss), neither does equity demand that the Plaintiffs recover the entirety of their investment. I find it equitable for NBSC and the Plaintiffs to share their losses proportionate to each other. Precisely, since NBSC has recouped 44.26 % of its investment, the Plaintiffs should be allowed to recoup 44.46% of their investments.

Therefore, I find that the Plaintiffs are entitled to judgment against NBSC for return of Forty-four and twenty-six one hundredths (44.26 %) of their earnest money deposits on the theory of unjust enrichment / quantum meruit.[

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiffs, David A. Johnson, Susan Weisenburger, John Terman, Jr., Darcy A. Terman, Paul Farese, James Farese, Dennis Ducate, Joan McLellan, David A. Demer, Christine A. Demer and Ginger Metts Richardson, have judgment against the Defendant, National Bank of South Carolina, as follows:

1. (a) Plaintiff David A. Johnson is entitled to judgment against the Defendant NBSC in the amount of Six Thousand Six Hundred Thirty-five ($6,635.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

   (b) Plaintiff Susan Weisenburger is entitled to judgment against the Defendant NBSC in the amount of Nine Thousand Two Hundred Ninety-Five and No/100 ($9,295.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

   (c) Plaintiffs John Terman, Jr. and Darcy Terman are entitled to judgment against the Defendant NBSC in the amount of Twelve Thousand Eight Hundred Thirty and No/100 ($12,830.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

   (d) Plaintiff James Farese is entitled to judgment against the Defendant NBSC in the amount of Six Thousand Six Hundred Thirty-five and No/100 ($6,635.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

   (e) Plaintiff Paul Farese is entitled to judgment against the Defendant NBSC in the amount of Seven Thousand Five Hundred Twenty and No/100 ($7,520.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007

until December 15, 2011;

(f) Plaintiffs Dennis Ducate and Joan McClellan are entitled to judgment against the Defendant NBSC in the amount of Seven Thousand Five Hundred Twenty and No/100 ($7,520.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011;

(g) Plaintiffs David A. Demer and Christine A. Demer are entitled to judgment against the Defendant NBSC in the amount of Fourteen Thousand One Hundred Fifty-five and No/100 ($14,155.00) Dollars, plus pre-judgment interest at a rate of 8.75% from December 4, 2007 until December 15, 2011; and

(h) Plaintiff Ginger Metts Richardson is entitled to judgment against the Defendants SVI and NBSC in the amount of Seven Thousand Five Hundred Twenty and No/100 ($7,520.00) Dollars, plus pre-judgment interest at a rate of 8.75% from November 16, 2007 until December 15, 2011.

2. Post-judgment interest at a rate of 7.25% from December 16, 2011 until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant National Bank of South Carolina's Motion for Summary Judgment is Granted as to the following causes of action:

1. Breach of Contract
2. Breach of Contract as Assignee
3. Breach of Contract as Third Party Beneficiary
4. Equitable Lien
5. Constructive Trust
6. Unclean Hands

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant National Bank of South Carolina's counterclaim for Frivolous Proceedings is dismissed with prejudice. The Plaintiffs filed their claims after reading the Complaint and consulting with an attorney. They also had a reasonable basis upon which they made their claims, the claims were not intended to harass the Defendant NBSC, and a reasonable attorney would believe the claim is not frivolous, interposed for delay or brought for any other purpose than to secure proper

discovery, joinder of party or adjudication of the claim.

AND IT IS SO ORDERED.

s/Thomas W. Cooper

The Honorable Thomas W. Cooper, Jr.
Special Referee

Manning, South Carolina

December 12, 2012