STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Our Happy Place, LLC, Plaintiffs, v. LPS Construction Company, Inc., Wallace Wiggins, Jaguar Development & Masonry, American Master Roofing, Inc., a/k/a AMR, Albert Clay d/b/a CMC Construction Co., CMC Steelworks, Inc., Randi J. Jones, Imperial Pest Controllers, Inc., Arthur A. Grigorian, and Mid-South Investors II, Inc., d/b/a Orkin, Defendants.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION No.: 2018-CP-07-00419 **ORDER GRANTING MID-SOUTH INVESTORS II, INC. D/B/A ORKIN'S MOTION FOR SUMMARY JUDGMENT**

THIS MATTER was heard by the undersigned on the Motion for Summary Judgment filed by Mid-South Investors II, Inc. ("MSI") against Plaintiff, Our Happy Place, LLC ("OHP"). The hearing was held on January 7, 2022. Franklin H. Turner III, Esq. attended for MSI. Thomas J. Finn, Esq. attended for Plaintiff.

The Court, having considered MSI's motion, the briefs submitted, and oral arguments of counsel, finds and concludes that MSI's Motion for Summary Judgment should be granted in full for the reasons set forth more fully below.

FACTUAL FINDINGS

This lawsuit arose out of alleged construction defects at 20 Hovarth's Peninsula ("Residence") in Hilton Head Island, South Carolina. Construction of the Residence was begun in October of 2001 and completed in July of 2002. The original owner was listed as GHC, LLC. The Residence was sold to Dr. Arthur Grigorian ("Grigorian") on March 23, 2011, by Loco Beach

Properties for $1.6 million. In July of 2016, Grigorian learned that a deck was leaking into the framing and causing rot. On August 11, 2016, Grigorian entered a contract with MSI for pest control services. There is no evidence that the Residence was treated against termites from the time of its construction until Grigorian contracted with MSI fourteen years later.

Plaintiff's pest control expert, Dr. Maxcy Nolan, testified that termites infested the Residence roughly four years before MSI treated the subject property. Nolan testified to his opinion that MSI treated the property correctly. Nolan testified that he had no issue with the chemicals used by MSI, the amount used, or the way in which they were used to treat the property. Further, Nolan testified that he believed it was likely that the treatment by MSI was successful in cutting off the termite infestation from the ground (the water source in a non-leaking residence), but that the active leaks in the Residence provided the termites a water source to sustain the colony without ground contact.

In March of 2017, Grigorian put the Residence up for sale for $1.7 million. Plaintiff offered $1.6 million. Grigorian ultimately sold the Residence to Plaintiff in November of 2017 for $1.1 million, a reduction of a third of the list price. The estimated value on the MLS listing at the time was $1.77 million.

Plaintiff reduced its offer on the Residence from $1.6 million to $1.7 million after securing a 213-page home inspection report from Lynes Construction, Inc. d/b/a Lynes Home Inspection in September of 2017 ("Lynes Report"). The Lynes Report noted multiple areas of concern with the Residence, including defective (and leaking) stucco installation, leaking windows, leaking doors, leaking decks, extensive moisture damage, and feared extensive termite damage. A couple of illustrative excerpts from the Lynes Report include:

> [T]he **rear wall** of this house has ***major water problems from the ground floor to the attic***. **Drywall** appears to be **buckling at** its **horizontal joints** which **indicates a settling.** This could be from ***rot damage or. . .termite damage. All of the windows and doors are leaking***

> ***water and the porches are leaking water.*** **This is the major problem of this house.** (Subsequently, the repair general contractor, Randy Atkinson, confirmed the suspicions of the home inspector finding that all elevations and all floors of the Residence leaked.) Id at 44;
>
> **In...the rear of the attic there appears to be termite trails...** [Plaintiff should] have the termite inspector verify if this is indeed termites and determine if there is damage and also where they entered the building. **Since this is just above the rear wall that has all the water damage on the lower floors my fear is that termites are eating their way to the top**. Id at 18 (emphasis added).

After receiving the Lynes Report, Plaintiff wrote Grigorian that it was lowering its offering price because:

> ...there is a good deal of water (and damage) at the back and side walls of the home. **We [Plaintiff] will not know to what extent the damage is until they remove the stucco and open up the wall sections [after purchase]**. Realtor Email dated 9/15/17.

Plaintiff was further concerned about "the structural integrity underneath and the cost of these repairs," noting that it would have to remove stucco on two sides of the Residence and quite possibly on all four sides, as well as "replace the failed windows/doors and fix any structural issues." *Id.*

Grigorian agreed to the reduced offer, but only if the home was sold "as is." Plaintiff then purchased the Residence in November of 2017, and discovered in February of 2018, when it began the planned repairs and opened up the walls, that the Lynes Report was correct in its concern for extensive water and/or termite damage. Plaintiff then field this action against the original construction contractors, Grigorian, Imperial Pest Control (a pest control company that provided an initial clean CL-100 letter), and MSI.

MSI transferred its pest control contract from Grigorian to Plaintiff in December of 2017, almost three months after Plaintiff had received the Lynes Report. *Mid-South Treatment Contract with Our Happy Place, LLC.* Paragraph 1 E states:

> **The Customer agrees to be solely responsible for maintaining the Treated Premises free from any condition conducive to termite infestation ("Conducive Conditions,"**

> **see paragraph 8 for explanation)**....The Customer agrees to be solely responsible for identifying and correcting Conducive Conditions. This responsibility rests exclusively with the Customer, not with [MSI]. (bold in original, underline added).

Paragraph 1(I) of the Agreement states: "the parties do not intend and the Agreement shall not be construed to require [MSI] to perform exploratory, invasive, or destructive testing of [the Residence.] *Id.*

Per Paragraph 8 of the Agreement:

> Conducive Conditions include, but aren't limited to, roof leaks, improper ventilation, faulty plumbing, **water leaks or intrusions in or around the structure, inherent structural problems** – including, but not limited to, wood to ground contact, masonry failures, **stucco construction**, polystyrene or Styrofoam molded foundation systems, siding within 6" of the ground, mulch, ground cover. *Id* (emphasis added).

Plaintiff did not share the findings of the Lynes Report with MSI. Consequently, Plaintiff was aware of the construction defects allowing water intrusion behind the stucco at the Residence, of the leaking and rotting doors and windows, and of the likelihood of extensive water and/or termite damage hidden behind the walls, while MSI (a pest control operator and not a construction contractor) was not. Plaintiff now complains that it was damaged by MSI's failure to discover the conducive conditions and termite damage about which Plaintiff had been extensively warned prior to purchasing the Residence. Plaintiff also argues that MSI owed Plaintiff a duty to point out conducive conditions at the Residence (about which Plaintiff had been warned) despite clear contractual language that identifying and correcting conducive conditions was the sole responsibility of Plaintiff. Further, Plaintiff contracted with MSI after Plaintiff purchased the Residence.

In sum, the Residence was infested with termites years before MSI treated the Residence. Plaintiff was on notice prior to purchase that the Residence had active leaks relating to original construction throughout the structure and that those leaks had resulted in an unknown amount of

water damage and/or termite damage. After receiving the Lynes Report, Plaintiff did not conduct prior to purchase, or have Grigorian conduct, any destructive testing to ascertain what, if any, hidden water/termite damage existed. Plaintiff did not inform MSI regarding the active leaks or construction defects. The MSI contract with Plaintiff disclaimed damage related to conducive conditions such as active leaks. The MSI contract with Plaintiff charged Plaintiff, not MSI, with discovering and repairing any conducive conditions. Plaintiff's expert opined that MSI treated the property appropriately and used the correct chemicals in the correct way and in the correct amounts, and that MSI's treatment had likely been effective at cutting off the termites from the ground. Plaintiff sued MSI for termite damages that Plaintiff was warned existed prior to Plaintiff purchasing the Residence even though MSI did not contract with Plaintiff until after purchase.

CONCLUSIONS OF LAW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.,* 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Once the moving party has met the initial burden by "showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Rife v. Hitachi Constr. Mach. Co.,* 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005) (citing *Regions Bank v. Schmauch,* 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003)). "[T]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* (citations omitted).

A. Plaintiff Lacks Standing to Sue.

Plaintiff contends its injury is the economic loss it sustained because of the refurbishments to the subject property. For Plaintiff to have standing to claim this injury, it has the burden of showing it is a real party in interest. "Generally, a party must be a real party in interest to the litigation to have standing." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) (quoting *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010)) (internal quotation marks omitted). "Every action shall be prosecuted in the name of the real party in interest." SCRCP 17(a). This rule ensures "that an action shall be prosecuted 'in the name of the party who, by the substantive law, has the right sought to be enforced.'" *Bank of Am., N.A.*, 405 S.C. at 220, 746 S.E.2d at 481 (quoting 4 S.C. Jur. *Action* § 23 (1991) (footnotes omitted)). "It is ownership of the right sought to be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property." *Id.* (quoting 4 S.C. Jur. *Action* § 23 (1991) (footnotes omitted) (internal quotation marks omitted).

Plaintiff in this case purchased the Residence at a significant discount and was aware that a significant amount of time and money would be required to make the repairs for both known and unknown damages. As documented above, Plaintiff was well aware that the Residence had an unknown amount of hidden damages that included extensive water and/or termite damage, which is why Plaintiff reduced its offer to Grigorian by $500,000. In other words, Grigorian, not Plaintiff, was the party damaged by the active leaks and construction defects discovered prior to the sale of the Residence to Plaintiff. Had the hidden damages been minor, Plaintiff would have made a windfall, purchasing the Residence at roughly 2/3 value. Unfortunately for Plaintiff, its gamble did not payoff so spectacularly. While Plaintiff made $730,000 more on its sale of the Residence than it spent purchasing the property, it claims to have spent $700,000 in repairs and

remodeling. Consequently, Plaintiff's complaint is that it did not reduce its offer to Grigorian by more, and thus did not make as much as it wanted on the resale. Stated differently, Plaintiff argues that if Grigorian had taken more of a loss, Plaintiff would not have been damaged as severely. The loss, in other words, was Grigorian's and Plaintiff is not the real party in interest in this matter. *See Vaughn v. Dame Constr. Co.*, 272 Cal. Rptr. 261, 263 (Cal. Ct. App. 1990) (finding that the essential element of the cause of action is injury to one's interests in the property -- ownership of the property is not" and that "[i]f...the new owners bought the property with full knowledge of the defective construction and presumably paid no more than the fair market value of the property in its defective condition, there is little likelihood that the new owners would or could assert the same claim as [Vaughn]" because Vaughn was the real party in interest – the party that sustained the injury of losing value on the property. *Id.* at 263-64.

B. Plaintiff contracted to purchase the home as-is.

Plaintiff agreed to enter a contract for sale of the Residence that contained an "as is" clause. South Carolina courts are clear that while an "as is" clause in a contract is not a complete bar to claims arising out of the contract, when coupled with a "right to inspect" provision and an "as is" provision, may completely bar claims other than fraud. *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980) ("The 'as is' clause of the contract does not constitute an absolute defense to an action for fraud and deceit."); *McLaughlin v. Williams*, 379 S.C. 451, 459-60, 665 S.E.2d 667, 672 (Ct. App. 2008) ("As is" clause coupled with "right to inspect" provision barred claim for negligent misrepresentation where inspection showed evidence of moisture intrusion).

In this matter, the Residence was sold "as is" after Plaintiff asked for a significant price reduction in response to the Lynes Report's discovery of construction defects, active leaks and extensive water damage and/or termite damage and the possibility of hidden damage. Plaintiff's

forensic construction expert described the situation where Plaintiff received a very low price on a beachfront home but knew there was an unknown amount of hidden damages as rolling the dice: "you roll the dice and sometimes you win, sometimes you don't." *Dep. of Peter Gosden*, March 24, 2021 at 93:1-10. Plaintiff had full knowledge of the potential for extensive damage to the Residence before purchasing and chose to roll the dice/take a gamble and, by having others pay the cost of its lost bet, Plaintiff is now asking the Court to socialize its "losses." Summary Judgment is appropriate as a matter of law because Plaintiff received a significant discount in price for the presence of an unknown amount of damages, if any.

C. Breach of Duty.

Plaintiff has asserted that Mid-South was negligent in its performance of the pest control services on the subject property. "To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (1) a duty of care owed by the defendant; (2) a breach of that duty by a negligent act or omission; (3) a negligent act or omission resulted in damages to the plaintiff; and (4) that damages proximately resulted from the breach of duty." *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 251, 734 S.E.2d 161, 163-64 (2012) (citations omitted). To determine whether an action is negligent, "the test depends on what a person of ordinary reason and prudence would do under those circumstances and at that time and place." *Id.* at 251, 734 S.E.2d at 164. "If any of these elements is absent a negligence claim is not stated." *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314, 743 S.E.2d 109, 113 (Ct. App. 2013) (quoting *Summers v. Harrison Constr.*, 298 S.C. 451, 455, 381 S.E.2d 493, 495 (Ct. App. 1989)).

There is no evidence the Residence had ever been serviced for termites from its completion in 2002 until Mid-South treated property in 2016. According to Maxcy Nolan, Plaintiff's pest control expert, the Residence was infested with termites years prior to MSI's treatment. Nolan

acknowledged that MSI's treatment was properly administered – as to the types and amounts of chemicals used and how they were applied. Indeed, Nolan believed the treatment succeeded and cut off the infestation from the ground. *Infra.*

Plaintiff nevertheless claims it was damaged by this successful treatment and seems to claim that it was damaged because MSI did not inform it, prior to Plaintiff contracting with MSI, that conducive conditions existed, and where they were located. Plaintiff ignores that it had the clear burden, as set forth by a contract it executed, to identify and repair all conditions conducive to termite infestation. Plaintiff also ignores that it had been warned extensively prior to entering a contract with MSI that the Residence had multiple active leaks and extensive water and/or termite damage. Based on the foregoing, MSI, as a matter of law, did not breach any duty it owed to Plaintiff and Plaintiff suffered no damage because of any such breach of duty

This is further supported by the fact that MSI was not asked for its termite treatment records prior to Plaintiff's purchase of the Residence. There is no evidence that MSI failed to adequately treat the subject property for termites or that MSI failed to perform any duty that caused Plaintiff damage.

D. The terms of the contract between Mid-South and Plaintiff.

The terms of the Agreement limit the liability of MSI for damages caused by termites when conditions conducive to termite infestation are present. *Infra.* "Actions on a contract must be based on the terms of the contract." *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 24, 850 S.E.2d 1, 29-30 (2020) (citing *Maybank v. BB&T Corp.*, 416 S.C. 541, 573, 787 S.E.2d 498, 515 (2016)). "'The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly...'" *Id.* at 24-25, 850 S.E.2d at 30 (quoting *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)).

Specifics of the Agreement are set forth above. Pursuant to those contractual provisions Plaintiff, not MSI, was charged with both identifying and correcting conducive conditions, and

MSI disclaimed any damages related to conducive conditions. Plaintiff was aware prior to purchase that conducive conditions existed throughout the structure, but failed to communicate that knowledge to MSI. The knowledge of Plaintiff (and ultimately Grigorian as well) of the presence of conducive conditions throughout the Residence that resulted in widespread water and/or termite damage removes liability for related damages from MSI and places them on the shoulders of Plaintiff in this matter as a matter of law.

CONCLUSION

Based on the foregoing, Mid-South Investors II, Inc.'s Motion for Summary Judgment is GRANTED.

The Honorable Bentley D. Price

Charleston, South Carolina
February , 2022

Beaufort Common Pleas

Case Caption: Our Happy Place LLC VS LPS Construction Co Inc , defendant, et al

Case Number: 2018CP0700419

Type: Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766