THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001400

IOS, LLC.,.....Appellant-Respondent,

v.

Lander University, ...Respondent-Appellant.

INITIAL BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF THE CASE

On May 29, 2012, IOS, LLC ("IOS") filed their Complaint against Lander University and The Lander Foundation ("Lander") alleging causes of action for 1) breach of oral contract for the sale of real property, 2) breach of contract and specific performance, 3) promissory estoppel, 4) negligent misrepresentation, 5) negligence and 6) Breach of Lease Agreement. On August 7, 2012, Lander filed their Answer admitting that it had entered into a lease agreement with IOS to use and occupy their hotel as a college dormitory. The remainder of the answer denies most of the substantive allegations in the Complaint and raises affirmative defenses of 1) Statute of Frauds, 2) Standing, 3) Failure to state a cause of action, 4) integration/merger, 5) failure of essential elements of a contract, 6) statute of limitations and 7) frivolous civil proceedings.

On December 28, 2017, IOS stipulated to the dismissal of the Lander Foundation. At the hearing before Judge Frank R. Addy on Lander's Motion for Summary Judgment, IOS conceded to the dismissal of breach of contract of an oral agreement for the purchase of property and specific performance of an oral contract to purchase. On March 7, 2019, Judge Addy issued a form 4 order granting partial Summary Judgment in favor of the Lander dismissing IOS' causes of action for breach of contract, breach of oral promise to purchase real estate, promissory estoppel, negligent misrepresentation, and negligence but denying summary judgement as to IOS' cause of action for breach of lease agreement. On November 2, 2021, Judge Addy signed the formal order granting partial summary judgement. On November 12, 2021, IOS filed a Motion to Reconsider pursuant to S.C.R. Civ. P. 59(e), asserting that the order failed to provide the necessary findings of fact and conclusions of law sufficient to support the decision and allow for proper appellate review. The Motion further asserted inconsistencies and that there exists as to causes of action for breach of contract, breach of oral promise to purchase real estate, promissory estoppel, negligent

misrepresentation, and negligence, genuine issues of material fact and law that would make the granting of summary judgment inappropriate. Judge Addy issued a form 4 order denying IOS' Motion to Reconsider on December 2, 2021. IOS filed notice of this appeal on December 3, 2021, and Lander cross-appealed December 7, 2021.

STANDARD OF REVIEW

An appellate court evaluates summary judgment under the same standard as the trial court. *Grinnell Corp. v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Summary Judgment is proper only when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. S.C.R. Civ. P 56(c). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non- moving party. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id*.

FACTS

IOS is a South Carolina limited liability company that owned the Inn on the Square ("Hotel" or "property"), a hotel / restaurant / bar operation, in downtown Greenwood, South Carolina from 2005 to 2011. During that time-period, Vietnam Combat Veteran John Huffman was the person responsible for the operation of the Hotel. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, Huffman deposition, pp.9-15. Mr. Huffman had years of experience rehabilitating similar projects and had worked on twenty-two prior buildings before becoming involved with IOS. *Id* IOS agreed to purchase the Hotel in order to

rehabilitate it into a profitable, going concern. *Id* On behalf of IOS, Mr. Huffman negotiated a debt reduction on the mortgage on the Hotel, obtained financing through various lenders in order to renovate and improve the structure and the furniture, fixtures, and equipment ("FFE") in 2007 (spent approximately $670,000.00 in upfitting), secured a franchise agreement with Clarion hotels, and achieved three-star status as a hotel operation. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.14-15.

For a time, IOS was a profitable venture. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.20-24. As a result of the economic downturn in 2008 the hotel portion of the operation began to struggle. *Id* Leading up to the summer of 2009, IOS intended to close the rooms on the top two floors and only operate the restaurant and bar, its most profitable operations, both for the public and for private events. *Id* Then, around July 2009, IOS made the decision to market the property for sale. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.23-24. The property was never listed for sale; however, through local channels Lander University came to learn that IOS might be interested in selling the building and set up a meeting with Mr. Huffman in July 2009. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.25-26. During that meeting, Diane Newton, a representative and housing acquisition executive of Lander University toured the property and expressed an interest in leasing the rooms for student housing. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.26-27. Mr. Huffman informed them IOS was not interested in leasing the property. *Id* A few days later, Mr. Huffman alleges Ms. Newton met with him and indicated Lander would be willing to purchase the Inn for $2.3 million but that it would require federal funding.

Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.28-29. She informed him that funding would take time and, because Lander needed beds within a month, inquired as to whether IOS would just rent the second and third floors (not the bar/ restaurant/ event hosting first floor) until they could work out a contract for the purchase of the property. *Id* IOS agreed to look at such an arrangement. IOS then negotiated with Lander, through Ms. Newton, to rent the top two floors and their forty-eight rooms for a ten-month lease at a monthly rent of $48,000.00. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp. 28-30. This oral agreement was made with the understanding that the lease would give Lander time to obtain financing to purchase the property for $2.3 million in April 2010 and that Lander would draw up an offer to purchase reflecting that term. *Id* Based on that understanding, Mr. Huffman obtained a verbal agreement from IOS as well as the mortgagor to enter such a deal. *Id* IOS has consistently maintained that without Lander's promise to purchase the property it never would have agreed to lease its recently renovated, three-star hotel for student housing. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.30-31; Ex.2, Louis Smith deposition, pp.103-104.

Following this meeting, with the understanding that a lease and offer to purchase were forthcoming, Mr. Huffman was contacted by Ms. Newton who was upset and concerned that her housing need deadline and that no lease had been executed because the South Carolina Budget and Control Board ("BCB") had to approve it. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.35-36. Mr. Huffman was then faxed a copy of the lease the BCB drafted which materially altered the terms he had negotiated with Ms. Newton, including the

rent ($48,000.00 to $31,000.00), ad valorem tax treatment, the scope of the lease (entire property as opposed to 2d and 3d floors necessitating the close / cancellation of events, bar, and restaurant), and maintenance responsibility. *Id,* pp.36-48. The BCB lease also required IOS to obtain forbearance agreements from the various lenders recognizing and consenting to the lease. Mr. Huffman refused to agree to this proposed lease. *Id* In response, Ms. Newton offered an oral "side" lease agreement to IOS which they took to Lander's attorney office to have drafted. *Id* The terms of the oral "side" lease were that (1) even though the BCB lease made IOS responsible for maintenance, Lander agreed they would be responsible and reimburse IOS for maintenance expenses; (2) the additional rents ($17,000.00 per month) would be deferred and paid later, on the "back end", and incorporated into the sales price for the property; and (3) the property taxes would be owed and paid, but in the same manner as the deferred rent. *Id,* pp.36-48, 261-264; Ex. 3, July 11, 2011, letter. Based on the oral "side" lease agreement, IOS agreed to obtain the forbearance agreements and execute the BCB lease that had been presented. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.44-45; Ex. 4 - Lease.

Once IOS executed the written BCB lease agreement for a ten-month term, Lander took possession of the building and students began moving in. Over the next few months, IOS and its attorney regularly reached out to Ms. Newton and Lander's attorney inquiring as to the status of the promised offer to purchase. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 5 - 9/2/09 email; Ex. 6 - 11/17/09 emails. Upon inquiry into the status of the promised purchase offer, IOS was regularly put off and assured that Lander was still working toward that goal (offering to buy) but that it would require BCB approval following

environmental assessment, appraisal, and other inspections which, they were told, would likely happen in March 2010. *Id.,* Ex. 1, pp.73-74, 80.

During this same time-period, Lander treated the property as if they owned it. Of note, Lander unilaterally, and without the written approval required by the lease (Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 4, paragraph 10) filled in the swimming pool with concrete, tore down the fence surrounding the pool, nailed the windows shut (voiding the warranty), and sold and moved furniture. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.61- 64, 171-172. When IOS confronted Lander about this conduct their response was essentially that they owned it all because they were going to purchase the building. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex.1, pp.63, 75-76; Ex. 3.

As time passed, IOS learned that Ms. Newton was leaving Lander for a post at another university around December 2009. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 7 - 12/16/09 emails. During that time period, IOS was informed that Phase I of the BCB's purchase approval process had occurred (essentially, they got funding to conduct the due diligence). *Id.* IOS was informed that their contact with Lander going forward would be Tom Covar who informed IOS that they were still working towards an offer to purchase the property. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 8 - 1/12/10 emails. As it became clear the due diligence would not be completed prior to the prior represented target of April 2010, Lander confirmed that they would be exercising their option to renew the lease. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 9 - 2/22/10 email. Even during the renewal process it was still Lander's stated

intent to purchase the subject property. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 10 - 3/3/10 email. After the renewal of the lease, a similar pattern continued. IOS would inquire as to the status of the offer of purchase and would be informed that they were still working on it. The parties even worked on setting up an alternative arrangement including a long-term lease while Lander worked through the purchase due diligence period. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 11 - 4/23/10 email.

Then, in February 2011, Lander abruptly informed IOS they would not be renewing the lease when it expired in June 2011. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 12 - 2/24/11 letter. IOS requested a joint walk-through of the premises in advance of IOS re-taking possession. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 13 - 3/7/11 letter. After an initial walkthrough in May 2011, IOS planned a joint walkthrough with a number of inspectors for the parties to attend. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 14 - 6/15/11 email. Lander did not show and when IOS arrived the power had been shutoff, the doors were unlocked, and the entire property was in disrepair with substantial damage. *Id.,* Ex. 3. Some of the damage was as follows: pool filled in with concrete and pool fence torn down without being repaired, bar equipment / fixtures missing including ice machine, other furniture missing including TVs, computers, servers, telecommunications switchboard, windows crudely nailed shut, industrial laundry equipment had been taken out, textiles and other soft goods had been removed, water damage to ceiling tiles, bar / kitchen sink and plumbing ripped out or exposed, and mold damage throughout the restaurant. Appellant-Respondent's Brief in Opposition to Summary

Judgment Ex. 1, pp.155- 58, 171-72, 181-86; Ex. 3; Ex. 15 - damage photos. Lander essentially abandoned the property and failed to make amends or repairs in anyway following IOS demand that they do so. This was in violation of the lease which required Lander to return the property in the condition it was delivered. Appellant-Respondent's Brief in Opposition to Summary Judgment - BCB Lease.

Without the capital to fix the extensive damage Lander caused and replace the missing items Lander took or lost, IOS was unable to re-open the property as a hotel and, thus, was unable to service its debt and the property was foreclosed upon in July 2011. The property was sold at auction to the first priority lien holder shortly thereafter. In addition, judgments were entered against IOS by a number of different creditors including Clarion / Choice hotels due to IOS' breach of the franchise agreement following their failure to re-open as a hotel following the end of Lander's lease. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 2, pp.76-77.

ARGUMENT

Notwithstanding the presence of more than a scintilla of evidence to create a genuine issue of fact that would defeat summary judgment on causes of action for breach of oral contract to purchase and specific performance of oral contract to purchase, Appellant-Respondent acknowledged a question as to a definite price and agreed to dismiss those causes of action, only as to the purchase of the Hotel. This did not include the remaining causes of action to include promissory estoppel for Lander's promise to purchase the Hotel as discussed in detail below.

The trial court erred in granting summary judgment as to all remaining causes of action because there exist genuine issues of law and fact that would prohibit the granting of summary

judgment. First, the cause of action for breach of oral contract "side" lease deal falls within the estoppel exception to the statute of frauds and the trial court's order lacks sufficient findings of fact and conclusions of law to determine whether summary judgment was granted or denied as to the oral lease "side" deal. Second, the cause of action for promissory estoppel is an exception to the statute of frauds and issues of material fact render summary judgement improper. Third, genuine issues of material fact exist with respect to IOS' negligence claim. And Fourth, genuine issues of material fact exist to support IOS' negligent misrepresentation claim. The trail court acknowledged the same in the summary judgment hearing transcript, but it is not reflected in the final order.

I. The circuit court erred in granting summary judgment on Appellant-Respondent's causes of action for Breach of Oral Lease "side" agreement, Promissory Estoppel, Negligent Misrepresentation and Negligence, where genuine issues of law and fact exist such that summary judgment is not appropriate.

1. Genuine issues of material fact exist on the breach of lease agreement claim

There are essentially two lease agreements at issue: (1) the written lease agreement; and (2) the oral "side" lease agreement entered into by agreement between Lander and IOS. The elements of a breach of contract claim are existence of a contract, its breach, and damages caused by that breach. *See Fuller v. E Fke & Cas. Ins. Co.,* 240 S.C. 75, 89, (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id* "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed. The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Minter v. GOCT, Inc.,* 322 S.C. 525, 528 (Ct. App. 1996). "The main guide in contract interpretation is to ascertain and give

legal effect to the intentions of the parties as expressed in the language of the lease." *Gilbert v. Miller,* 356 S.C. 25, 30 (Ct. App. 2003). In addition, there is implied in this contract a covenant of good faith and fair dealing that is treated as a term of the contract and any violation of that implied covenant is also actionable as a breach of contract for which damages may be had. *See Rotec Servs. v. Encompass Servs.,* 359 S.C. 467 (Ct. App. 2004); *Williams v. Riedman,* 339 S.C. 251,274 (Ct. App. 2000).

There is no dispute that a written lease agreement exists and that the parties performed under that written lease. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 4. Appellant-Respondent has provided evidence that that lease was breached in a number of respects with the primary breaches being: (1) unapproved alterations to the property; (2) removal of FFE items without replacement; (3) failure to return the property in the condition it was received, and (4) that Respondent-Appellant acted in bad faith during the term of the lease. Appellant-Respondent has also presented testimony as to the damages resulting from those breaches. Thus, factual issues exist making summary judgment inappropriate. This is reflected correctly in the circuit court's order denying summary judgment as to breach of the lease. Appellant-Respondent presented substantial evidence of an additional oral "side" lease agreement relating to the initial lease for a ten-month term. "A tenancy for not to exceed one year may be created by oral agreement." S.C. Code § 27-35-10. There is further record evidence that Respondent-Appellant partially performed under that agreement by reimbursing Appellant-Respondent for maintenance costs. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.37-38. Appellant-Respondent has presented evidence that other terms of that enforceable, oral lease were

breached, i.e., failure to pay additional rents and taxes, which resulted in damages. Respondent-Appellant can certainly present evidence to dispute that assertion (or the validity of the oral lease agreement); however, it is a material dispute of fact that should be submitted to the factfinder. While the circuit court upheld the cause of action for breach of lease, the findings of fact and conclusions of law are inadequate to determine whether or not that includes the order "side" deal lease which has additional and separate damages.

2. The Trial Court erred in granting Summary Judgement on Appellant-Respondent's claim for Promissory Estoppel.

Respondent-Appellant assert that the statute of frauds, S.C. Code§ 32-3-10 bars the enforcement of the alleged oral contract between the parties. Appellant-Respondent concedes no written contract for the sale of the subject property to Respondent-Appellant exists. Thus, Appellant-Respondent's only chance of success on the merits of its claim that the oral agreement should be enforced is a common law exception to the statute of frauds.

Partial performance of an alleged, oral agreement is a recognized exception to the statute of frauds; however, it is generally an equitable remedy by which specific performance of the contract is enforced. Appellant-Respondent concedes specific performance is not a possible remedy at law and has elected not to pursue that remedy. Nonetheless, "the doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds." *Collins Music Co. v. Cook,* 281 S.C. 580,583 (Ct. App. 1984) (citing *Florence Printing Co. v. Parnell,* 178 S.C. 119, 127 (1935)). Appellant-Respondent has asserted a claim for estoppel here. If proven, Appellant-Respondent seeks to recover the actual damages to IOS that arose as a result of its detrimental reliance. In order to succeed on that claim a plaintiff is required to show: (1)

competent proof of the existence of the oral contract (promises); and (2) "that he has suffered a definite, substantial, detrimental change of position in reliance on the contract …." *Collins Music,* 281 S.C. at 583. And, here, evidence of partial performance by Appellant-Respondent is probative of substantial and detrimental reliance.

Based on the evidentiary record cited above there can be little doubt that, while the parties never consummated a written sales agreement for the subject property, it was certainly the parties' intention to enter a sales agreement for the Hotel. Lander started the BCB approval process and continued to pursue purchase of the property for the majority of the two-year lease. Numerous communications between the parties' evidence this. In addition, Diane Newton, a representative of Lander, entered into an oral "side" agreement with IOS to pay ongoing maintenance costs of the property despite it being listed as a landlord duty under the lease agreement, and to pay the difference in initial, agreed rents, as well as the property tax due during lease period, on the back-end sales price when the sale closed. As discussed above, this oral side agreement (further evidence of the parties' intent to enter a sales agreement for the property) is itself an enforceable oral, lease agreement that Lander should be estopped from disclaiming. While IOS was not in ideal financial condition at the time Lander approached it in July 2009 about the building, the facts show IOS had a recently renovated, well-appointed, popular, and promising hotel/bar operation. IOS detrimentally relied upon the representations of Ms. Newton and, by extension, Lander in the following respects: (1) entering into a written less-than-agreed-upon rent with the expectation it would be added later to the sales price ($170,000.00) pursuant to the "side" deal; (2) agreeing to lease a recently renovated, boutique hotel property to a University for student dormitory; (3) agreeing to pay property taxes on the

property for two years, against the initial agreement for Lander to escrow property taxes, based on the promise to IOS that it would be paid on the back-end at closing ($68,000.00); (4) refraining from taking action upon the discovery of numerous, unapproved, and substantial modifications to the property on the repeated assurances that the property was being purchased; (5) twice negotiating and executing numerous forbearance agreements with its lenders to accommodate Lander's lease request pending an offer to purchase or approval thereof; (6) handing over possession of IOS' higher-end furnishings, textiles, soft goods, telecommunications, electronics, and, essentially, all contents in the facility; and (7) agreeing to discontinue restaurant, bar, and event-hosting operations after initially negotiating the right to use the first floor during the term of the lease.

In *Springob v. Univ. of South Carolina,* 407 S.C. 490 (2014), a group of luxury basketball ticket purchasers were induced to purchase tickets based on a promotion that if they paid a premium for the seats for five years ($5,000.00 per seat for year one; $1,500 per seat for years 2-5) they would then only have to maintain their Gamecock Club membership and pay face value for the season tickets after the initial five year period. *Springob,* 407 S.C. at 494. In year six the University sought to charge them $1,500 per seat. *Id.* No written contract existed, and the University raised the statute of frauds as a defense because the contracts could not be performed within one year. *Id.* at 495-96. The trial court granted summary judgment in the University's favor, finding that the estoppel exception to the statute did not apply. The Supreme Court reversed and remanded the matter to the trial court based on its finding that a genuine issue of fact existed with respect to the ticket buyers' estoppel argument. Key to the Court's finding was that the ticket buyers proffered affidavits that they had been induced by the

University's representatives to buy the tickets based on the promise that after year five the same tickets could be purchased at face value as long as they kept up their Club membership. *Id* at 498. The Court found that was sufficient to create an issue of fact as to definite, substantial, and detrimental change in reliance on oral promises made by the University. *Id* Similarly here, both Mr. Smith and Mr. Huffman testified that there was no way plaintiff would have rented the property to Lander without an expectation that Lander would offer to buy the property as promised. Mr. Huffman testified that he entered into a side agreement with Ms. Newton, in the presence of Lander's attorney, that Lander would pay maintenance costs incurred by IOS (despite the written lease agreement) and that Lander would reimburse IOS on the back-end, at closing, the difference between what the parties had agreed to on the rent term and property taxes and what the BCB ultimately agreed to in the lease agreement. Without that assurance, and Ms. Newton/Lander's repeated declarations that they "owned" or "would own" the contents of the property during the lease term Mr. Huffman testified he would not have leased the property and he would have taken action on the substantial modifications Lander was observed to be making to the permission in breach of the lease agreement (i.e. without written consent). Last, as a result of the oral agreement, Mr. Huffman testified that he agreed to lease the first floor and to close the restaurant/bar, the profit center of IOS' business, based on the promise that Lander would be putting an offer on the property. These facts establish definite, substantial, and detrimental change by IOS in reliance on oral promises made by Lander and their representatives. Mr. Huffman's testimony alone is sufficient to create a genuine dispute on this issue. Whether it is the oral agreement to purchase the property or the oral side agreement to reimburse IOS for the taxes and additional rents, there is sufficient evidentiary

record to present that issue to the factfinder.

3. The circuit court erred in granting summary judgment where genuine issues of fact exist with respect to Appellant-Respondent's negligence claim.

Appellant-Respondent's negligence claim is premised upon the allegation that Respondent-Appellant owed a duty to Appellant-Respondent with respect to the lease of the property that was breached, resulting in damage to IOS. Here the duties owed would be: (1) to act in good faith and with fair dealing so as not to impair Appellant's rights under the lease; (2) to perform tenant's other contractual duties under the lease; and (3) a special duty of care created by statute. This lease, like all commercial leases in South Carolina, is governed by title 27 of the South Carolina Code of Laws which imposes a special duty on both landlords, and with respect to this claim, tenants:

> **SECTION 27-35-75.** Lessee's obligations as to use and maintenance; lessor's right to inspect.
>
> (A) Unless otherwise agreed to in a commercial lease agreement or a security agreement, this section applies to all leases on commercial units located in South Carolina.
>
> (B) A lessee must: ...
>
> (2) not deliberately or negligently destroy, deface, damage, impair, abuse, or remove any part of the premises or knowingly permit any person to do so who is on the premises with the lessee's permission or who is allowed access to the premises by the lessee;

Here, as in *Pryor v. Northwest Apartments, Ltd.,* 321 S.C. 524 (Ct. App.1996), a special duty of care is imposed by statute. *See also Nedrow v. Pruitt,* 366 S.C. 668 (Ct. App. 1999); *Rayfield v.S.C. Dep't of Corr.,* 297 S.C. 95, 103 (Ct. App. 1988); *Faile v. S.C. Dep't of Juvenile Justice,* 350 S.C. 315, 334 (2002).

Appellant-Respondent has provided evidence that during the term of the lease, Lander breached these duties in a number of ways including (1) unapproved alterations to

the property; (2) removal of FFE items without replacement; (3) failure to return the property in the condition it was received, and (4) that Lander acted in bad faith during the term of the lease. IOS also presents evidence of damages resulting from those breaches. Lander disputes damages and the breach and, thus, summary judgment is not appropriate.

It is true that the law would require Appellant-Respondent to elect between tort and contract remedies and is not permitted to recover under both. However, to the extent Respondent-Appellant argues that their conduct was permitted under the lease, Appellant-Respondent would have the election to proceed under its negligence theory for breach of the above-mentioned duties.

4. The circuit court erred in granting summary judgment where genuine issues of material fact exist to support Appellant-Respondent's claim for damages for Respondent-Appellant's negligent misrepresentations.

"To state a claim for negligent misrepresentation a plaintiff must show (1) 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 communicate truthful information to the plaintiff; (4) the defendant breached that duty; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a result of such reliance." *Schnellmann v. Roettger,* 368 S.C. 17, 20-21 (Ct. App. 2006). "A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." *Winburn v. Insurance Co.,* 287 S.C. 435, 441 (Ct. App. 1985). Damages can be recovered on a negligent misrepresentation where a party suffers injury or loss from relying on the misrepresentation. *Redwend Ltd. Partnership v. Edwards,* 354 S.C. 459, 474 (Ct. App. 2003). "These general rules have been applied, in every case this Court has located, to support the

recognition of a negligent misrepresentation claim where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction." *Id* (internal citations omitted).

It is well established that "[n]either the parol evidence rule nor a merger clause in a contract prevents one from proceeding on tort theories of negligent misrepresentation and fraud." *Slack v. James,* 364 S.C. 609, 616 (2005). Whether reliance is justifiable under a given set of facts usually requires factual inquiry. *See Redwend Ltd P'ship v. Edwards,* 354 S.C. 459, 474 (Ct. App. 2003) (internal quotation marks omitted). "The general rule is that questions concerning reliance and its reasonableness are factual questions for the jury." *Unlimited Servs., Inc. v. Macklen Enters., Inc.,* 303 S.C. 384, 387 (1991); *see also Frewil LLC v. Price,* 411 S.C. 525, 531-32 (Ct. App. 2015) (involving misrepresentations related to inducement of lease agreement); *Starkey v. Bell* 281 S.C. 308, 313 (Ct. App. 1984) ("Issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are **preeminently factual issues for the triers of the facts."** (emphasis added)).

a. False representation:

Huffman testified regarding two oral agreements or misrepresentations in the inducement of the lease agreement. First, he testified that Lander, through the representations of Diane Newton, agreed to purchase the subject property for $2.3 million. Second, he testified that the parties agreed to a lease of the property for a ten-month term for $480,000.00 ($48,000.00 per month) with the understanding that Lander would be responsible for maintenance / costs on the property and for escrowing the annual property tax on the property. However, the Budget Control Board did not agree to those terms and insisted

on a $31,000.00 per month lease. In response, IOS refused to enter into a lease agreement. As a result, Lander represented to IOS that they would pay the additional $17,000.00 per month in rents they had agreed to on the back-end at closing, once a sale was complete, by adding it to the purchase price. They made the same agreement for the property taxes which were $34,000.00 per year. Lander promised that, although IOS would be responsible for maintenance costs under the terms of the lease, Lander would reimburse IOS for those costs. In fact, Lander performed on the promise to reimburse maintenance costs during the first year of the lease. However, IOS was never paid the outstanding rents or the property taxes it was promised by Diane Newton in this "side" agreement to induce IOS to sign the lease. Last, Lander represented to IOS that they could do whatever they wanted with the real property and the furniture, fixtures, and other contents of the property because they were buying it.

Lander contends, correctly, that in order for the representation to be actionable it must be false and must relate to a present or pre-existing fact and be false when made. *See Fields v. Melrose Ltd. P'ship,* 312 S.C. 102, 105 (Ct. App. 1993). Lander, through Ms. Newton, contend that no representations were made that Lander would purchase the property, that there was an agreed purchase price, or that Lander ever performed on promises made under an oral agreement. This conflicts with the testimony of IOS' representative and creates a factual dispute regarding whether Lander made false statements to induce the execution of the lease with its substantial reduction in rents and taxes. As such, summary judgment is not appropriate here.

b. Defendant's pecuniary interest:

Lander desperately needed additional beds to accommodate a spike in demand for

student housing entering the 2009 Fall semester and, as a result, they approached IOS about purchasing and leasing the subject property in July 2009. Following the BCB exerting influence over the lease terms that Newton and IOS had previously agreed, Lander, more than ever, were trying to get the lease executed so they could ready the facility before students were to move in within weeks. There is no real dispute that Lander had a pecuniary interest in making the side agreement representation - they needed a lease executed into so they could honor their obligations to students who were paying for student housing. So, they promised to pay additional rents, pay taxes, and be responsible for rents - all things that were promised were outside of the lease that was being signed - to induce its execution.

c. Duty to communicate truthful information:

IOS contends Lander had such a duty based on their relationship as negotiating parties, parties to a contract with an implied covenant of good faith and fair dealing, and IOS detrimentally relied upon Lander's misrepresentations in executing a lease with different terms than what they agreed to. Moreover, a tenancy for less than one year (which this was - 10 months) may be created by oral agreement. *See* S.C. Code§ 27- 35-10. Because the oral "side" lease agreement is enforceable then Lander had a duty to IOS to provide truthful information in negotiating the terms of that agreement. In any event, "[t]he determination of the existence of a duty is solely the responsibility of the court." *Miller v. City of Camden,* 329 S.C. 310,320 (1997) (citing *Ellis v. Niles,* 324 S.C. 223 (1996)). And our courts recognize that a "duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." *Winburn v. Ins. Co. of North America,* 287 S.C. 435, 441 (Ct. App. 1985) (citing RESTATEMENT (SECOND) OF TORTS§ 552 (1977)).

d. Breach of that duty:

IOS contends, based on testimony in this case, that Lander breached this duty by failing to pay the additional rents on the back-end as promised, failing to purchase the building as promised, failing to pay property taxes on the property as promised, and failing to purchase, replace, or repair the furniture, fixtures, and other contents they claimed as "theirs" that were destroyed and / or removed from the property without the written consent of the landlord. Presumably Lander disputes this which necessitates denial of summary judgment on this claim.

d. Justifiable reliance:

IOS presented evidence that it relied on the representation of Lander's representatives both with respect to the promise to purchase and the oral "side" lease agreement regarding additional rents, taxes, and maintenance costs. As set forth above, whether that reliance was justifiable is a fact question for the court. *See Frewil LLC v. Price,* 411 S.C. 525, 531-32 (Ct. App. 2015). In addition, IOS reliance on the oral lease agreement here was further induced (and in turn justified) because Lander partially performed that agreement by reimbursing IOS for incurred maintenance costs.

e. Pecuniary loss to plaintiff based on that reliance:

IOS never was paid the additional rents. IOS was required to pay the property taxes on the property without reimbursement. IOS suffered the loss, constructive loss, and destruction of its furnishings, electronics, real property (pool, fixtures, etc.), laundry equipment, and numerous other items that it left in the care of Lander based on the representations that it was "theirs" because they were buying everything anyway.

CONCLUSION

For the foregoing reasons this Court should reverse the trial court's granting of summary judgment consistent with the arguments herein and remand.

Respectfully submitted,

s/James E. Smith Jr.
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May 5, 2022
Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001400

IOS, LLC.,.....Appellant-Respondent,

v.

Lander University, ...Respondent-Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Petitioner, Lena Y. Meredith, Esq., with a copy of the Initial Brief of Appellant-Respondent and Designation of Matter to be included in the Record on Appeal and Certification by email and first-class US mail to the below addresses:

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May 5, 2022

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May 5, 2022

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: IOS, LLC v. Lander University
Appellate Case No. 2021-001400

Dear Madam Clerk:

I am attaching by email the Initial Brief of Appellant-Respondent, Designation of Matter Designation of Matter and Certification with Proof of Service in the above-referenced matter.

By copy of this letter to Respondent-Appellant's counsel, I am hereby service her with a copy of the same.

Thank you for your assistance.

With kind regards, I remain

Very truly yours,

James E. Smith, Jr.

JES
Enclosure as referenced
cc: Lena Y. Meredith, Esq., - *Via Email* Lena@nicholsonmeredith.com