IN THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

KIRKLAND PROPERTIES, LLC **PLAINTIFF**

VS. **CIVIL ACTION NO. 2020-750 W**

PILLAR INCOME ASSET MANAGEMENT, INC.; FBH OF VISTA RIDGE, LLC; MBL TITLE, LLC; AND UNKNOWN JOHN AND JANE DOES A THROUGH M, AND UNKNOWN CORPORATE ENTITIES N THROUGH Z **DEFENDANTS**

OPINION AND FINAL JUDGMENT

THIS CAUSE came on for trial before the Court on May 13, 14, and 15, 2024 on *Kirkland Properties, LLC's Complaint for Specific Performance Or in the Alternative Damages* filed by Kirkland Properties, LLC (hereinafter, "Kirkland") on August 27, 2020 (MEC Doc. No. 3) and the *Joint Answer and Affirmative Defenses of Pillar Income Asset Management, Inc. and FBH of Vista Ridge, LLC* filed by Pillar Income Asset Management, Inc. and FBH of Vista Ridge, LLC (hereinafter, "Pillar" and "FBH," respectively), on June 28, 2021 (MEC Doc. No. 35). Throughout the trial, Kirkland was represented by the Honorable W. Thomas "Tad" McCraney, III, and Pillar and FBH were collectively represented by the Honorable Walter Willson and the Honorable Kelly Dunleath Simpkins. In addition to hearing the arguments of counsel, the Court received into evidence 36 exhibits and heard testimony from seven witnesses: Bruce Kirkland (hereinafter, "Bruce"); Bennie Kirkland, Michael Bankston (hereinafter, "Bankston"); Chip Hutchison

(hereinafter, "Hutchison"); Donald Phillips (hereinafter, "Phillips"); Steve Cone (hereinafter, "Cone"); and Brett Sanders. The parties requested to present proposed Findings Fact and Conclusions of Law, which were submitted to the Court on July 17, 2024 (MEC Doc. Nos. 129 & 130). Having jurisdiction over this cause and these parties, and having considered the pleadings, arguments of counsel, evidence, testimony, applicable law, and post-trial submissions of the parties, the Court does this day render its *Opinion and Final Judgment*.

I. FACTS AND PROCEDURAL HISTORY

Kirkland is a family-owned real estate business located in Madison County that owns and manages multi-family residential properties throughout Mississippi. *Tr. Trans.* at 10-12. Kirkland's owner/manager, Bruce, testified at trial as its corporate representative. *Id.* at 11.

FBH is a "single purpose entity" that nominally owns the Vista Ridge apartment complex located in Tupelo, Mississippi, which is the subject of this litigation (hereinafter, the "Property"). *Id.* at 272. The Property is comprised of 11 two-story apartment buildings which contain a mixture of one, two and three bed-room units (160 total units). Ex. 6; Ex. 20. Pillar is a Texas-based commercial real estate company which manages a portfolio of apartment complexes that includes the Property and approximately 100 others. *See* Ex. 26; *Tr. Trans.* at 254. The ownership structure of the Property is complex and involves several layers of partnerships and corporations. *See* Ex. 27 at p. 2. It is part of a real estate syndication held by a publicly traded company, Transcontinental Realty Investors, Inc. ("TCI"). The majority shareholder of TCI is the May Trust, which was created by Texas

real-estate tycoon, Gene Phillips, for his family. *Tr. Trans.* at 218-221, 254-55. Phillips, who testified as one of the corporate representatives for FBH and Pillar, is Gene Phillips's brother and a Trustee of the May Trust. *Tr. Trans.* at 217-18. Phillips is Pillar's Vice-President of Construction but is employed by Regis Property Management, LLC, which is a subsidiary of Pillar. *Tr. Trans.* at 221-22.

In 2018, Bruce was working on a real estate transaction with a third-party broker named Nick Nail (hereinafter, "Nail"). Coincidently, Nail works for a Tennessee company called The Kirkland Company, which despite the similar name, has no affiliation with Kirkland. During discussions about this transaction, the Property came up as a possible acquisition for Kirkland. Nail indicated to Bruce that he knew the owner and might be able to put together a transaction for the Property. *Tr. Trans.* at 13-14. On December 19, 2018, Pillar signed an engagement letter with Nail's company and as the "Seller" agreed to pay a commission of 1% if Kirkland purchased the Property. Ex. 1. This agreement was signed on Pillar's behalf by Stubbs Davis who is an "internal" broker with Pillar. *Id.*; *Tr. Trans.* at 224-25, 258, 270.

Nail's efforts resulted in the Parties executing a Purchase and Sale Agreement ("PSA") with an effective date of February 15, 2019. Ex. 2. The PSA identifies Kirkland as the "Purchaser" and FBH as the "Seller." Daniel Moos signed the PSA as the President of FBH. Ex. 2 at pp. 1; 23. At this time, Moos was also the CEO of Pillar and TCI. *Tr. Trans.* at 222-23, 264. Pillar had a contract to manage the Property and was not a party to the PSA. Ex. 2; *Tr. Trans.* at 293,303.

Per the terms of the PSA, Kirkland agreed to purchase the Property (along with its current leases) for $17.5 million dollars. The purchase price was to be paid by Kirkland assuming the balance of the FBH's existing HUD loan and tendering the difference at Closing (less earnest money deposits and other adjustments). Ex. 2 at pp. 2, 17. The PSA does not establish a firm closing date. Rather, the PSA provides that the Closing would be set if and when the lender consented in writing to Kirkland's assumption of the FBH's loan. *Id.* at p. 16. And, this was contingent on HUD's approval of the same.

The PSA recited that Kirkland was "a sophisticated and experienced purchaser of real estate" and was purchasing the Property on an "AS-IS, WHERE-IS" condition. *Id.* at ¶ 7. The PSA required Kirkland to make an initial deposit of $75,000 into escrow within three days of signing the PSA, and another $75,000 deposit upon the expiration of the inspection period. *Id.* at ¶3. Further, the PSA gave Kirkland forty-five (45) days to inspect the property. *Id.* at ¶6. Should Kirkland be dissatisfied with the condition of the Property after inspection, or "for no reason," Kirkland could, at its own discretion, terminate the PSA by giving written notice to FBH prior to the end of the inspection period. *Id.* The Inspection Period ended on April 1, 2019. *Id.*

Article 21 of the PSA contains a merger clause which states the PSA "supersedes and terminates" the parties' preliminary negotiations and any other preexisting agreements or understandings. Article 21 also states the parties may change, alter or modify the terms of the PSA provided this is done "in a written instrument signed by the party against whom enforcement of such change would be sought." *Id.* at p. 22.

After the PSA was signed, Kirkland conducted its initial on-site inspection of the Property in March 2019. *Tr. Trans.* at 16-17. During the inspection, Kirkland's team alleged it found two issues with the Property: a drainage issue and rotten wooden trim on various windows and doors. *Tr. Trans.* at 17-18. Kirkland's team took photographs to document their observations. *Id.* at pp. 18-19; Ex. 21. Hutchison, a construction superintendent for Kirkland, testified that the majority of the rotten wood was on one side of the buildings, but some parts of most of the buildings looked good. *Tr. Trans.* at 215. Several sets of photographs from various inspections were introduced into evidence at trial.

On March 22, 2019, Bruce sent a letter addressed to Nail which described the issues they had with the drainage and rotten wood. *Tr. Trans.* at 17-18; Ex. 3. Kirkland's letter included some of the inspection photographs and stated that FBH will need to "replace all rotten wood around windows and doors" prior to closing. Ex. 3. Bruce's letter also stated that prior to closing FBH will need to hire an engineer to develop a plan to correct the drainage problem and mentioned the installation of a French drain as a possible solution. *Id.* Kirkland, however, did not elect to terminate the PSA during the Inspection Period pursuant to paragraph 6 of the PSA.

During the Inspection Period, Kirkland asked a drainage contractor, Bankston, the owner of Mississippi Foundation Repair Specialist Corp. (hereinafter, "Mississippi Foundation"), to inspect the Property and provide a recommendation for fixing the drainage problem. *Tr. Trans.* at 24-25, 129. After inspecting the premises, Bankston provided Kirkland an Agreement and Contract dated April 1, 2019, which recommended the installation of a subsurface (French) drain system for a price of $78,900 ("Bankston

Proposal"). Ex. 4. The Bankston Proposal did not warranty Mississippi Foundation's work, did not identify the location of the drain, did not assume responsibility for any damage caused to the infrastructure, and disclaimed responsibility for "heavy duty rain falls." *Id.* However, Bankston testified at trial and was qualified as an expert in drainage system design and installation. *Tr. Trans.* at 133. He testified about the basis for his recommendation, the specifications for the installation of the subsurface drain system, and how he calculated the price for his work. *Tr. Trans.* at 129, 134, 161.

Nail forwarded Bruce's March 22 letter to Davis and Cone. Even though they were employed by Pillar and not directly in the "TCI ownership chain" of FBH, Cone testified that he and Davis were proper recipients of Kirkland's letter because they were "facilitating the transaction." *Tr. Trans.* at 272-75, 294. When asked by the Court if they sent Bruce's letter on to someone else within the organization for handling, Cone could not recall, but he assumed someone within the "TCI ownership chain" would have reviewed and decided how to respond. *Id.* at 275-76.

Kirkland's concerns and the Bankston Proposal obviously "made it through" to Phillips because, on April 1, 2019, Phillips, vice president of construction for Pillar, drafted and signed a letter regarding the Property. The letter stated, in toto:

> To Whom it May Concern:
>
> The Mississippi Foundation repair specialist proposal attached has been fully reviewed by Pillar Income. Pillar Income agrees to do the work as described. In addition, we also agree to do a property inspection and remove and/or replace any rotted wood found. Work should be completed within 30 days. Ex. 5.

Phillips had worked at Pillar since 1991. His job duties included construction supervision, due diligence inspections, overseeing new construction, and anything to do with maintenance and repairs of buildings subject to the contract between Pillar and TCI. *Tr. Trans.* at 302-03. Pillar, in turn, contracts with an on-site management company, in this case, SunRidge Property Management ("SunRidge"), to manage the day-to-day affairs of the apartment complex. *Tr. Trans.* at 305. Phillips does not participate in any manner, and did not on this occasion, in the negotiation of the sale or acquisition of properties. *Tr. Trans.* at 306. Phillips further testified that there is no corporate relationship (parent, affiliate, subsidiary or sister corporation) between FBH and Pillar. *Tr. Trans.* at 316.

Phillips testified that the April 1 letter was written to notify SunRidge of the work that Pillar would be overseeing at the Property. He testified that he sent it *only* to the SunRidge property manager at the Property. *Tr. Trans.* at 316-317. When asked how he received a copy of the April 1 letter, Kirkland testified, "Everything that came between us, in other words, was funneled through Nick Nail." Tr. Trans. at 27.

Phillips testified that, when he inspected the property (as he said he would do in his letter), he was "extremely disappointed that our management company let the property get to the condition it was in." *Tr. Trans.* at 307. Phillips testified that, as Pillar's VP of Construction, he was the right person within the organization to handle a request like Kirkland's which would entail making capital improvements at a portfolio property. Phillips also testified that he had *"carte blanche"* authority to agree to make whatever repairs he determined were reasonable and necessary at a portfolio property. *Tr. Trans.* at 233-34, 241-42, 333. Cone conceded that someone within the "TCI ownership chain" must

have authorized Phillips to send his letter agreeing to make the requested repairs in response to Kirkland's demands. *Id.* at 280-81.

Phillips testified that he hired a company, Green Eagle Construction ("Green Eagle"), with whom he had worked on other occasions, to address the rotten wood and to reestablish, or make in good working order, the drainage system originally designed by the architects/engineers when the property was constructed. *Tr. Trans.* at 307. After the work was completed, Phillips inspected the repair work and deemed it satisfactory, other than a few punch items. *Tr. Trans.* at 311. During the month of May, Green Eagle addressed the drainage issue by installing 932 linear feet of a surface drainage ditch, removed the rock retaining wall as needed, installed a barrier on sidewalks to prevent water from entering, cleaned out the silt in the rock drainage area near the buildings, and power washed the parking lot. Green Eagle was paid $19,600 for this work. Ex. 34.

Kirkland contends that he believed that Phillips' letter was FBH's response to his March 22 letter and that Phillips was authorized to speak for FBH when he committed to do what he said he would do regarding the drainage and rotten wood repairs. *Tr. Trans.* at 27-29. Further, Kirkland argues that it was reasonable for him to believe that, based on this exchange of written correspondence and Phillips' subsequent conduct, the parties had modified the "as-is" nature of the PSA with regard to these particular repair items. *Id.* at 29-31. Kirkland alleges that in reliance on Phillips's letter, he initiated the process of assuming and obtaining an assignment of FBH's HUD loan. *See* Ex. 6; *Tr. Trans.* at 32-33. Kirkland also tendered the other half of the earnest money deposit.

Nearly two months later, on May 30, 2019, Nail forwarded Kirkland an email from Phillips regarding the status of the drainage repairs at Vista Ridge. Ex. 7. In this email, Phillips stated that he had decided to improve/clean out the existing open (above-ground) drain system and not do a French drain because require it would constant maintenance with many possible problems. *Id.* at pp. 5-6. The next day, May 31, Kirkland sent a letter in response to Phillips's email. *Id.* at p. 1. Kirkland stated that Phillips's description of what he intended to do about the drainage issue was not what the Parties agreed. Kirkland stated that it expected FBH to do what Phillips had previously agreed to do, which was perform the work "as described" in the Bankston Proposal. Phillips did not respond to Kirkland's May 31 letter and claims that he never saw it prior to trial. *Tr. Trans.* at 240.

In June 2019, Kirkland personnel had a meeting with Phillips at the Property to walk through and check on the progress of the repair work. Kirkland personnel observed that some efforts had been made to repair the rotten trim. However, they alleged at trial that the work was far from complete, and they pointed out to Phillips many areas which either had not been repaired or the repairs were substandard. *Tr. Trans.* at 114-16. Kirkland personnel also noticed that some dirt swales and berms had been constructed and that FBH had not constructed a subsurface drain "as described" in the Bankston Proposal. *Id.* at 118-19.

Meanwhile, in early July 2019, HUD preliminarily approved Kirkland's assumption of FBH's loan. Ex. 8. With Kirkland having satisfied this condition of Closing, the Parties began drafting a document to effectuate the assignment and assumption of FBH's leases and contracts. Ex. 27.

On July 10, 2019, Kirkland's closing attorney, Paul Randall (hereinafter, "Randall"), sent a letter to FBH regarding the status of the transaction. Randall's letter stated:

> Prior to the expiration of the Inspection Period, the Purchaser provided notice to the Seller of repairs the Purchaser required to be made as a contingency to Closing. By letter dated April 1, 2019, the Seller agreed to make such repairs. To date, the repairs have not been made; such continued failure to make these repairs is a material default of the agreements between the parties.
>
> The Purchaser demands the Seller make the agreed upon repairs by July 25, 2019. Further, the Purchaser agrees to extend the Agreement a reasonable time for such repairs to be made. Ex. 9.

The Court notes that the letter made no mention of extending the due diligence and/or inspection period and termination "for no reason." Phillips claims that he had not seen this letter before trial and that no one on the FBH's side asked him about Kirland's dissatisfaction with the repair work he was directing and supervising at Property. *Tr. Trans.* at 239, 249.

With respect to the trim issue, Kirkland asked a local contractor, Pannell Builders (hereinafter, "Pannell"), to inspect the Property and provide an estimate to repair the rotten sections. Pannell provided a Quote dated July 17, 2019, to remove, replace and paint all wood trim for a total price of $327,112.50. Ex. 10. The property on the quote was identified as Grand Old Oaks Apartments, a different apartment complex in a different city. The reference, though, was to Vista Ridge Apartments. The Court is not convinced that the Pannell quote was actually for the Property in question because, in addition to the

reference to Grand Old Oaks Apartments twice in the quote, there is also mention to a need for a "telescopic man lift," which testimony showed would not be needed for this job.

On July 23, 2019, Randall sent an email to the FBH's attorney, Garrett Roberts (hereinafter, "Roberts"), regarding the Pannell quote. Randall explained that Pannell's recommendation was to remove and replace all of the trim rather than trying to salvage some areas. Randall also suggested another meeting at the Property to discuss a path forward. Ex. 11. Roberts responded to Randall the following day and stated that FBH's construction manager (Phillips) would be on-site conducting repairs tomorrow (July 25) and would be available for a meeting, but the meeting did not occur. *Id.*

Green Eagle made repairs to the rotten wood at the Property. Prior to the repairs, Phillips had personally identified the rotten wood that needed to be replaced, and Green Eagle replaced that rotten wood with new trim, prime, caulk and paint. *Tr. Trans.* 309. Green Eagle invoiced Pillar for the work done during the month of July. Ex. 34.

In late July 2019, Kirkland personnel conducted a pre-closing inspection of the Property. Kirkland's Construction Manager, Hutchinson, attended the pre-closing inspection as well as a later inspection in 2022 during this litigation. Hutchison testified at trial and was qualified as an expert in construction. *Tr. Trans.* at 201. Hutchison testified concerning his observations and identified numerous inspection photographs showing what he described as "scabbing" of trim pieces and mismatched paint. Hutchison further testified that he believed, in many areas of the complex, the trim repairs were substandard and not performed in a workmanlike manner. *Tr. Trans.* at 206-10

Following the pre-closing inspection, Randall sent FBH another letter dated August 5, 2019. Ex. 12. Randall advised that Kirkland's position was that FBH was still in default of the PSA to make the repairs as a condition of Closing. Randall enclosed photographs from the recent inspection which showed "examples of the rotten and unrepaired exterior wood along with standing water and evidence the French drain has not been installed as agreed." *Id.* Randall proposed an alternative—he indicated Kirkland would accept a "repair credit" in lieu of performance as a means to cure the alleged default. Kirkland also proposed an extension of the closing date until August 6, 2019. The amount of the proposed "repair credit" was $406,012.50, which was the combined amount of the Bankston Proposal and the Pannell Quote. *Id.* Kirkland gave FBH until August 6, 2019, at 3:00 P.M. CDT to accept their offer. At FBH's request, the deadline was extended 24 hours. Ex. 13.

The negotiations continued between the parties. FBH offered a credit of $35,000, which was rejected by Kirkland. Kirkland countered with a credit of $350,000. Ex. 14. Kirkland also stated:

> In the event this offer is not accepted by the Seller, this letter shall serve as Purchaser's notice of termination of the Agreement because of a material default by the Seller, namely the breach of Seller's agreement to make repairs and install the French drain as set forth in Seller's April 1, 2019, letter and a demand for the return of the Deposit together with all interest earned hereon. *Id.*

At 2:26 P.M. that day, Roberts advised Randall that FBH "declines to extend Purchaser a credit of $350,000." Ex. 15. FBH did not accept Kirkland's proposal by the deadline. *Tr. Trans.* at 97; Ex. 15.

Thereafter, both Kirkland and FBH laid claim to the $150,000 in escrow, each claiming the other had materially defaulted. Kirkland claims that the failure to make the repairs constitutes a material default, while FBH takes the position that Kirkland's failure to go forward with the "AS-IS, WHERE-IS" purchase constituted a material default. The escrow agent eventually deposited the funds into the registry of this Court pending the outcome of this Court's decision.

Kirkland originally filed suit on January 6, 2020 in the Northern District for the United States District Court for the State of Mississippi. FBH and Pillar filed a motion to dismiss based on the forum selection clause set forth in the Agreement which required suit to be filed in "a Court of competent jurisdiction in Madison County, Mississippi." Ex. 2, ¶ 20(c). The federal district court granted the motion and dismissed Kirkland's complaint without prejudice. The case was dismissed on August 20, 2020, and Kirkland filed the instant action in this Court on August 27, 2020. MEC Doc. No. 3. Kirkland asserts one count, breach of contract.[1] Kirkland seeks an order of specific performance, requiring FBH to sell the Property. Kirkland also contends that Pillar should perform the work set forth in the March 22 letter, or give a credit on the purchase price.[2] In the alternative, it asks the Court to order the clerk to disburse the interpled escrow funds to Kirkland. FBH contends that it should be awarded the funds in escrow. All parties reserved the right to seek attorney's fees after the Court renders its decision and enters judgment in this matter.

[1] The Court notes there was a second count for interpleader of the funds but said count is moot.
[2] The court notes that in the Complaint, Plaintiff sought other damages such as loss opportunity cost, loss rents and revenues. However, no evidence was offered to support such a claim and in closing Kirkland abandoned those claims for damages.

II. CASE LAW AND ANALYSIS

A. Modification and/or Amendment of the PSA

Kirkland contends that Phillips's April 1 letter constitutes an effective modification of the PSA because Phillips possessed the apparent authority of FBH to modify the PSA. Kirkland claims the modified PSA included an obligation on the part of FBH to do the repair work set forth in the Mississippi Foundation estimate and the Pannell quote, and that the drainage work was not done as requested and the rotten wood that was repaired was not done in a workmanlike manner.

The PSA contains a merger clause which prescribes how the parties may effectively modify the agreement. It states:

> **21. Entire Agreement.** This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes and terminates any other agreements, representations, warranties, or understandings relating to the Property. This Agreement may not be changed, altered or modified except by an instrument in writing signed by the party against whom enforcement of such change would be sought. This Agreement shall be binding upon the parties hereto only after it has been executed and delivered by Seller and Purchaser. The submission of this Agreement shall not be considered an offer to sell the Property and no liability or obligations shall arise hereunder until this Agreement is executed by both Seller and Purchaser. Ex. 2.

"A standard merger clause 'achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, ***as well as negat[es] the apparent authority of an agent to later modify the contract's terms.***'" *Willis v. Tower Loan of*

Mississippi, LLC, 579 B.R. 381, 383 n.3 (S.D. Miss. 2017) (reversed on other grounds) (emphasis added).

In 2019, Cone worked for Pillar in asset management, acquisition and sales of residential and commercial properties. Cone testified that any changes in the PSA required a formal amendment by FBH and there was no contractual obligation to make repairs. Kirkland did not dispute that the letter was not signed by FBH and does not facially meet the legal requirements to modify the PSA

Instead, Kirkland relies upon its claim that Pillar had the actual or apparent authority to modify the PSA. Actual authority may be express or implied. *See Newsome v. Peoples Bancshares*, 269 So. 3d 19, 28 (Miss. 2018). Express authority is the authority actually conferred by the principal in either written or oral specific terms. *See McFarland v. Entergy Miss., Inc.*, 919 So.2d 894, 902 (Miss. 2005). Implied or inherent authority gives the agent the power to "do that, which would be proper, usual and necessary . . . in the exercise of his express authority." *See* 1 MS Prac. Encyclopedia MS Law § 4:8 (2d ed.). Actual authority may be implied where the agent has been given express authority to perform certain acts and, given the circumstances, it is reasonable for a third party to believe the agent's authority necessarily encompasses the acts in question. *See Newsome*, 269 So.3d at 29. The Court does not find any real evidence that Phillips had an actual, express authority to modify the PSA.

"Apparent authority exists when a reasonably prudent person, having knowledge of the nature and usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed

to have." *Andrew Jackson Life Ins. Co. v. Williams,* 566 So. 2d 1172, 1180 (Miss.1990). Apparent authority exists when "persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have." *Eaton v. Porter*, 645 So. 2d 1323, 1325 (Miss. 1994) (citations omitted). To establish apparent authority, one must prove "(1) acts or conduct on the part of the principal indicating the agent's authority, (2) reasonable reliance on those acts, and (3) a detrimental change in position as a result of such reliance." *Hutton v. Am. Gen. Life & Acc. Ins. Co.,* 909 So. 2d 87, 94 (Miss.Ct.App.2005).

Kirkland was unable to identify any acts on the part of FBH that indicated Pillar was an agent with the authority to modify the PSA. Kirkland testified that all communications and negotiations were through Nail, and he never spoke to Moos, President of FBH. Kirkland admitted that the PSA was signed by Moos as President of FBH. Pillar is not a party to the PSA. Although Pillar agreed to pay Nail's company a commission if the sale went through, Pillar had no more authority under the PSA to amend the PSA than Nail's company possessed. Kirkland testified he "assumed" Pillar was an owner of FBH and that he "believed" Phillips had authority to speak on behalf of the FBH, but never discussed Pillar's relationship with Nail. Instead of relying upon specific acts by FBH indicating authority, Kirkland relies on the fact that no one told him otherwise. Kirkland fails to satisfy the first element of apparent authority.

Reasonable reliance "is a reasonable person standard in which the person would investigate the truth or falsity of all representations made to him or her." *Illinois Cent. R. Co. v. Harried*, 681 F.Supp.2d 772, 775 (S.D. Miss. 2009) (quoting *Field v. Mans,* 116

S.Ct. 437 (1995)). Kirkland acknowledged in the PSA that it was "a sophisticated and experienced purchaser of real estate." Ex. 2. Kirkland testified that he has entered into "a lot" of real estate purchase and sale agreements in his thirty plus years of being in the commercial real estate business. Further, Kirkland was familiar with what constitutes a valid modification agreement, having received one as part of his due diligence. Ex. 28. The Court does not find it reasonable that Kirkland would believe the PSA, which was 35 pages long, outlining the terms and conditions of the purchase and sale of the Property for $17,250,000 could be modified by a short, 4 sentence letter addressed "to whom it may concern" and not signed by the FBH. In addition, the letter itself does not purport to represent that it is being made on behalf of FBH. Kirkland fails to satisfy the second element of apparent authority.

Kirkland failed to identify any detrimental change in position based upon the letter. Kirkland testified that if he had not received the letter, he "could have elected to cancel the contract at that point or I could have accepted the property like it was and move forward." *Tr. Trans.* at 30. The fact that he held out hoping for a better deal than that to which he agreed does not constitute a detrimental change in position.

Modifications to an existing agreement must meet the requirements for a valid contract. *Anderton v. Business Aircraft, Inc.*, 650 So. 2d 473, 476 (Miss. 1995). A modification must be supported by new or additional consideration. *Iuka Guaranty Bank v. Beard*, 658 So.2d 1367, 1372 (Miss. 1995).

The April 1 letter does not contain or recite any additional consideration. According to Cone, because the Property was being sold "As-Is," the sale price was below the full

market value. Completing the sale itself when there is already a purchase and sale agreement in place does not constitute "additional" consideration.

Further, the April 1 letter lacked the specificity necessary for including all the essential terms. Under Mississippi law, a meeting of the minds has occurred "[w]hen the terms of a contract are clear and minimally specific such that the parties can comprehend the obligations required and benefits conveyed, and the parties have assented to those terms." *Logan v. RedMed*, LLC 377 So. 3d 956, 962 (Miss. 2024). Phillips's April 1 letter stated he would perform an inspection of the Property and "replace any rotted wood found." There is no dispute that was done. But, Kirkland apparently interpreted the letter as an agreement to replace all the trim around every window of every building along with caulking and two coats of paint. The Mississippi Foundation estimate placed a burden on FBH that was unlimited, vague, and non-specific. That is, the burden of being responsible for repairing any utility lines that Mississippi Foundation severed or change orders should Mississippi Foundation determine that the parking lot needed to be excavated to allow for additional sub-surface lines. This wildly disparate view of what the April 1 letter supposedly committed FBH to do establishes that the letter did not contain the requisite essential terms and there was not a meeting of the minds. For all of the aforementioned reasons, the Court, therefore, finds that the April 1 letter was not a modification of the PSA.

B. Material Breach and Substantial Performance

Under Mississippi law, a breach is material where there is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there

is such a breach that substantially defeats the purpose of the contract. *Ferrara v. Walters*, 919 So.2d 876, 886 (Miss. 2005).

Notwithstanding that the Court finds that the PSA has not been modified by the April 1 letter, FBH did not materially breach the PSA. Kirkland argues that the failure to install the sub-surface drain and failure to replace all the trim around all the windows of every building constituted a material breach. Kirkland further argues that implied in the April 1 letter is the requirement that the repairs be done in a workmanlike manner and that such was not done in this case. Kirkland called Hutchison as its construction expert and Bankston as its drainage expert. FBH and Pillar called both Phillips and Brett Sanders (hereinafter, "Sanders") as their experts in construction and drainage.

In his April 1 letter, Phillips states that he would inspect the property and "replace any rotted wood found." It does not state that Pillar would replace, caulk and paint two coats on every piece of window trim on the property. Kirkland's own expert, Hutchison, agreed that not all of the trim needed to be replaced. Rather, it was on one side on "most" of the buildings.

Phillips testified as to a number of problems with Pannell's quote: it lacked details such as the linear footage and kind of wood to be used, included repairs to windows in the 12 garages where there are no windows, and needlessly included the cost of renting a bucket lift. Phillips testified that he inspected the repair work done by Green Eagle in 2019 and determined it had replaced all of the rotten wood in a satisfactory manner. FBH also elicited expert testimony from Sanders, a construction and maintenance expert with 34 years of experience. Sanders, too, found fault with Pannell's quote because of lack of a

unit cost breakdown, a linear foot breakdown and labor rates. Sanders was asked to opine on the state of the trim around the windows. He inspected the Property in 2022 and compared photographs taken in 2019 to the condition of the Property when he inspected it. In Sanders's opinion, there was much improvement from 2019 and Pillar had replaced all of the rotten wood. Sanders also testified that additional wood could have rotted in 3 years because of Mississippi's weather. Sanders also offered dozens of photographs depicting the condition of the Property in 2022, each of which were admitted into evidence. Ex. 35.

The Court has considered the content of the April 1 letter and the testimony of Hutchison, Bankston, Phillips, and Sanders regarding sufficiency of the repairs to the Property and assessed their credibility. The Court concludes that Pillar did repair/replace the window trim as it said it would in the April 1 letter.

Kirkland claims that the April 1 letter was a promise to do the exact work contained in the Mississippi Foundation estimate. Phillips testified that his letter was informing the property manager, SunRidge, that he was going to do the following:

> Fix the water problem and the drainage. And as you can see it was addressed to Vista Ridge Apartments. And I was telling the apartment complex that if they had that proposal and the questions, that I was going to take care of it, and they did not need to go out and hire someone to do it. *Tr. Trans.* at 235.

The Court finds the testimony of Phillips credible, particularly because the intended recipient of the letter was the onsite property manager and not Kirkland, and because Pillar would have performed the work it did regardless of whether the sale went through.

There is no dispute that Pillar did address the drainage issues by restoring the Property to its original design and by adding additional surface drains. Both Phillips and Sanders testified that the combination of surface and subsurface drains as designed by the original architects and engineers when the Property was built was sufficient to address the drainage at the Property. Green Eagle did the work described in its invoice to address the drainage issue. Ex. 34. Sanders opined that the approach taken by Pillar was superior to that proposed by Bankston. He found fault with Bankston's proposal to put a French drain behind the garages because it unnecessarily introduced water close to the foundation. The Court finds that, based on the testimony of Hutchison, Bankston, Phillips and Sanders, the remedial work to the drainage done by Pillar satisfied any commitment made in the April 1 letter.

The two repair issues that Kirkland focuses on in its *Complaint for Specific Performance Or in the Alternative Damages* are (a) the alleged inadequate water drainage and (b) wood rot/painting on window trim. According to Kirkland, the total cost to repair these alleged deficiencies amounted to $406,012.50. Kirkland's claims of alleged breach are not material as a matter of law under both well-established Mississippi jurisprudence and under the PSA itself.

Even assuming the Defendants breached the Agreement, "[e]very breach of contract does not give a party the right to unilaterally terminate the contract, as long as the breaching party has substantially performed its duties under the contract." 17A Am.Jur.2d Contracts § 557 (2004); *see also, Hooker & Sons v. Roberts Cabinet Co.*, 683 So. 2d 396, 402 (Miss. 1996). In other words, termination of a contract is only warranted if the breach in question

is "substantial, fundamental, and material as to defeat the very object of the contract." 17A Am.Jur. 2d § 557 (2004).

The question of substantial performance is one to be determined in each case with reference to the existing facts and circumstances. "[S]ubstantial performance is not literal, full or exact performance in every slight or unimportant detail, but performance of all important particulars [.] Substantial performance exists where the building or structure as a whole is not impaired, where it can be used for its intended purpose." *Jackson v. Caffey*, 78 So.2d 361, 223 Miss. 368, 371 (Miss. 1955).

The doctrine of substantial performance is well-recognized under Mississippi law.

> A breach is material when there is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose, or when the breach of the contract is such that upon a reasonable construction of the contract, it is shown that the parties considered the breach as vital to the existence of the contract." *UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc.*, 525 So.2d 746, 756 (Miss. 1987) (quoting *Gulf South Capital Corp. v. Brown,* 183 So.2d 802, 805 (Miss. 1966); *Matheney v. McClain,* 161 So.2d 516, 520 (Miss. 1964).

Applying these legal tenets to the facts of this case, it cannot be said that the Defendants' conduct amounted to a material breach – and this is so even if the Court accepts Kirkland's argument that the April 1 letter amended the AS-IS segment of the PSA. For one thing, a repair cost of $406,012.50 (the monetary figure that Kirkland referenced in its Complaint, pleadings, and at trial) is insignificant considering that the price reflected in the PSA for the sale of the Property was $17,250,000. In fact, the total amount of the alleged repairs which Kirkland contends were "material" amount to only 2.35% of the

purchase price set forth in the PSA. Kirkland's claimed repairs totaling $406,012.50 are immaterial as a matter of law, and, therefore, cannot support Kirkland's claim that a material breach of the PSA occurred.

Further, Kirkland's own testimony demonstrates the alleged breach did not prevent the Property from being used for its intended purpose. Kirkland testified that the purpose of the Property is to rent living quarters to people for profit, and he recalled the occupancy rate in 2019 was in the "low 90s." *Tr. Trans.* at 109. Phillips testified that as of the date of trial, the occupancy rate was 96.5%. *Id.* at 390. Obviously, the failure of Pillar to do the repairs exactly as Kirkland wanted did not impair or impede the use of the Property for the purpose for which it is intended.

Finally, the PSA itself defines what is deemed to be material from a monetary standpoint. In paragraph 18 pertaining to Risk of Loss, the Agreement states that any damage to the property in an amount less than $500,000 is "**non-material**," and only claims in "which the estimate to repair is more than or equal to Five Hundred Thousand and 00/100 Dollars ($500,000) shall be considered '**material**.'" Ex. 2 at ¶18. (emphasis in original). Kirkland's estimated repair cost is below $500,000.

For all of these reasons, the Court concludes that FBH did not breach the Agreement, much less materially breach the Agreement.

The PSA provides that specific performance is a remedy available to Kirkland only when there is a material default by FBH. Ex.2, ¶10(b). As the Court has already concluded that there was no material default or breach by FBH, Kirkland is not entitled to specific performance. Furthermore, Kirkland was not ready and willing to pay the purchase price

at the time of the alleged breach. *See Polk Prods. Inc. v. Dowe*, 331 So. 3d 1124, 1129-30 (Miss. Ct. App. 2021) (specific performance requires that one party must be "ready, willing and able to perform his part of the contract").

On the other hand, FBH was prepared to close on August 7, but Kirkland failed to deliver the balance of the purchase price, deliver the closing agreement and execute documents required by the Agreement. (Ex. 2, ¶14(c)).

By not closing, Kirkland breached the Agreement. The Agreement states:

> **10. Default Provisions.**
> (a) In the event of the default by Purchaser under this Agreement, Seller may terminate this Agreement by giving written notice thereof to Purchaser, and in such event, Seller shall receive the entire Deposit together with all interest earned thereon, as Seller's sole and exclusive remedy and as agreed and liquidated damages for such default, whereupon the parties shall be relieved of all further obligations hereunder, except for those obligations that expressly survive the termination of the Agreement pursuant to the terms hereof. Ex. 2, ¶ 10(a).

FBH gave Kirkland written notice of its default; therefore, FBH is entitled to the entire escrow deposit. Ex. 16.

Based upon the clear and unambiguous provision set forth in the PSA, the Defendants were not required to make any improvements or repairs. The fact that the Defendants may have acquiesced or even agreed to such repairs does not alter the fact that no repairs were *required* pursuant to the specific terms and conditions of the PSA prior to closing. According to the PSA, Kirkland's sole remedy in the event it found or considered the Property to be in need of repairs or improvements was to terminate the PSA under Paragraph 6 of the PSA. Because he did not do so, he was in default of the PSA by not

closing. Therefore, the escrow deposit must be relinquished to FBH under the terms of the PSA.

III. CONCLUSION

For all of the above and foregoing reasons, the Court finds in favor of the Defendants, and rules that *Kirkland Properties, LLC's Complaint for Specific Performance Or in the Alternative Damages* is without merit and should be dismissed with prejudice. The Court further holds that the escrow funds previously deposited into the registry of the Court should be disbursed to FBH.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Kirkland's request for specific performance, or in the alternative for the return of the escrowed funds, is denied for the reasons set forth herein.

IT IS FURTHER ORDERED AND ADJUDGED that the clerk of the Chancery Clerk is instructed to disburse to FBH the escrowed funds previously deposited into the registry of the Court.

IT IS FURTHER ORDERED AND ADJUDGED that Kirkland's claims against the Defendants are hereby dismissed with prejudice.

SO ORDERED AND ADJUDGED this the 17th day of September, 2024.

CHANCELLOR