STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2015-CP-10-3919

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CLERK OF COURT

ATHAN FOKAS,

Plaintiff,

v.

PHILIP FERDERIGOS, JACOB FERDERIGOS, and SPIROS FERDERIGOS,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS

THIS MATTER came before me for hearing on Defendants Spiros, Phillip and Jacob Ferderigos' Motions for Summary Judgment on June 8, 2017. Each of the Defendants filed his own Motion for Summary Judgment. Present in the Court were the following: Plaintiff and his attorney Stanley Barnett, Esquire; Defendant Phillip Ferderigos and his attorney Jennifer Thiem, Esquire; Defendant Jacob Ferderigos and his attorney John Massalon, Esquire; and Defendant Spiros Ferderigos and his attorney M. Dawes Cooke, Jr., Esquire.

A. BACKGROUND

Plaintiff alleges claims for breach of contract, specific performance, and breach of fiduciary duty/violation of the LLC statute in regard to an alleged oral agreement to build a new building at 229 King Street. Plaintiff and Defendants[1] own the real property located at 229 King Street as tenants in common. The 229 King Street property, located in the downtown portion of the Charleston peninsula, has an existing building which currently contains a restaurant on the first floor, "S&S Old Town Incorporated" (a corporation with Plaintiff Athan Fokas and Defendant Iakovos/Jacob Ferderigos as shareholders), and luxury rental suites on the second and third floors,

[1] Plaintiff and Defendants are cousins who own the 229 King Street property as tenants in common and are also members of Old Towne Suites, LLC. Defendants Phillip, Iakovos/Jacob, and Spiros Ferderigos are brothers.

"Old Towne Suites, LLC" (an LLC with Plaintiff Athan Fokas, Defendant Iakovos/Jacob Ferderigos, Defendant Spiros Ferderigos, and Defendant Phillip Ferderigos as members). The focus of Plaintiff's Complaint is an alleged oral agreement for a proposed project to build a new building on the 229 King Street property.

The oral agreement alleged in this case was two-fold; it was an alleged agreement to build a new building and an alleged agreement to mortgage previously unencumbered property to finance the construction. Plaintiff alleges the parties orally agreed to build a new building (or, as Plaintiff phrases it, "an expansion of the building") above the existing rental suites with the sole contingency being securing of financing for the proposed project. As part of the alleged oral agreement, Plaintiff alleges Defendants verbally agreed to mortgage their individual interests in 229 King Street to secure financing for the proposed project, as well as for Defendants to enter into numerous other contractual obligations and agreements. Plaintiff alleges he spent approximately $45,000 (his share of approximately $86,000) in fees for "engineering, architectural work, planning and zoning approval and design work so that by the time a final loan package was offered by the bank, all designs and plans and zoning approvals for the project were complete." In his Complaint, Plaintiff also alleges he agreed to an ancillary/side agreement Defendant Phillip Ferderigos required.

In contrast, Defendants deny there was an oral agreement or binding contract between the parties and further aver there was no meeting of the minds on the essential elements and material terms of a contract. Defendants further allege material terms were disputed and still being negotiated between the parties when they reached an impasse on multiple material terms. Defendants contend the parties were investigating the possibility of building a new building and

the funds expended toward the proposed project went toward exploring the possibility, feasibility, and desirability of the parties moving forward with the proposed project.

The record also reflects that, from before September 2014 until the parties reached an impasse, there were ongoing negotiations of material terms that were either still being negotiated or were unknown at the time the negotiations ceased and that there was no meeting of the minds between the parties on material terms such as the final cost of the proposed project, the possible financing of the proposed project, the various agreements Plaintiff demanded Defendants sign for the proposed project, the willingness of Defendants Spiros Ferderigos and Phillip Ferderigos to potentially mortgage their property interest in 229 King Street assuming the loan documents were corrected in accordance with Defendants Spiros Ferderigos' and Phillip Ferderigos' requirements, the personal exposure of Defendants Spiros Ferderigos and Phillip Ferderigos for any loan or for the proposed project, the ancillary/side agreement which was still being negotiated by the parties, as well as other material terms of the alleged agreement that were still in dispute at the time Plaintiff filed his lawsuit against Defendants.

B. STANDARD OF REVIEW

"Summary Judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury." Miller v. Blumenthal Mills, Inc., 356 S.C. 204, 616 S.E.2d 722 (Ct. App. 2005). "Summary Judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions of 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 judgment as a matter of law." Id.

"[W]hen plain, palpable, and indisputable facts exist on which no reasonable minds cannot differ, summary judgment should be granted." Id. at 220. Moreover, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Once the party moving for summary judgment meets the initial burden of 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. Rather the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Miller, 356 S.C. at 220. Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law. Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568 (S.C. 2014).

C. SOUTH CAROLINA LAW

To recover for a breach of contract, the plaintiff must establish three elements by the preponderance of the evidence: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). A binding, valid contract must exist for there to be a cause of action for breach of contract. The plaintiff must prove each element of the contract sued on. See also Tidewater Supply Co. v. Industrial Elec. Co., 253 S.C. 483, 171 S.E.2d 607 (1969) (action for damages for breach of contract is predicated on existence of contract). To constitute a valid and binding contract, it is essential all parties assent to the same thing in the same sense. See Player v. Chandler,

299 S.C. 101, 382 S.E.2d 891 (1989) (stating "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between parties with regard to all essential and material terms of agreement").

Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law. Stevens and Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (2014) citing Capital City Garage & Tire Co. v. Elec. Storage Battery Co., 113 S.C. 352, 101 S.E. 838 (S.C. 1920). A valid and enforceable contract requires a meeting of the minds between the parties as to *all* essential and material terms of the agreement. Id. at 578 citing Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 643 S.E.2d 692 (Ct. App. 2007); Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). Thus, for a contract to be binding, material terms cannot be left for future agreement ...[and]... an agreement which leaves open material terms is unenforceable. Id. at 578-579 citing Aperm of S.C. v. Roof, 290 S.C. 442, 351 S.E.2d 171 (Ct. App. 1986); see also id. at 579, citing 1 Corbin on Contracts § 4.1 (stating "A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood."); id. at 582 citing 1 Corbin on Contracts § 2.8 stating ("Frequently, agreements are arrived at piecemeal with different terms being discussed and agreed upon separately. However, as long as the parties know there is an essential term not yet agreed on, there is no contract. The preliminary agreements on specific items are mere preliminary negotiation building up the terms of the final offer that may or may not be made."). The "meeting of the minds" required to make a contract is not based on a secret purpose or intention on part of one party, stored away in his mind and not brought to the attention of the other party, but must be made on purpose and intention which has been made

known or which, from the circumstances, should be known. Id. at 105 citing McClintock v. Skelly Oil Co., 114 S.W.2d 181 (Mo. App. 1938).

Further, in relevant parts, the South Carolina Statute of Frauds provides that no action may be brought whereby: ...to charge any person upon any contract or sale of land, tenements or hereditaments or any interest in or concerning them [or] ...to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some person lawfully authorized to do so by such party. See S.C. Code Ann. § 32-3-10. Therefore, any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. Id.; see also, Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). "[T]he term interest in land as used in the statute of frauds, means some portion of the title or right of possession, and does not include agreements which may affect land but which do not contemplate the transfer of any title, ownership or possession." Carter v. McCall, 193 S.C. 456, 8 S.E.2d 844 (1940). Failure to put such a contract in writing renders it void. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989); S.C. Code Ann. § 27-35-20 (1976)[2]. Thus, by virtue of the Statute of Frauds, certain contracts must be in writing to be enforceable. 30 S.C. Juris Contracts Sec. 16; see Player v. Chandler, 299 S.C. 101 (1989).

In addition, in order to satisfy the Statute of Frauds, there must be a writing signed by the party against whom enforcement is sought, and "the writings must establish the essential terms of the contract without resort to parol evidence." Cash v. Maddox, 265 S.C. 480, 220 S.E.2d 121 (1975). Further, when there is no writing, but part performance is alleged to remove an oral

[2] Similarly, S.C. Code Ann. § 27-35-20 provides "[a]ny agreement for the use or occupation of real estate for more than one year shall be void unless in writing."

contract from the Statute of Frauds, a court must find the following factors before it may compel performance of the oral contract: 1) *clear* evidence of an oral contract; 2) the contract had been partially executed; and 3) the party who requested performance had completed or was willing to complete his part of the oral contract. Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009). A writing sufficient to remove an oral agreement from the Statute of Frauds "must reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, and state with reasonable certainty the essential terms of the agreement." Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) citing Restatement (Second) of Contracts, § 131 (1981). Every essential element must be expressed in the writing for the contract to meet the Statute of Frauds. Cash v. Maddox, 265 S.C. 480, 220 S.E.2d 121 (1975). In regard to the burden of proving an oral contract, the Supreme Court has said: "we are not concerned primarily with the quantity of the evidence offered to establish the oral contract...[r]ather we are concerned more with the quality of the evidence." Parr v. Parr, 268 S.C. 58, 65, 231 S.E.2d 695 (1977). Clear, specific, definite evidence must convincingly prove the existence of the contract. Id. [A party] must establish the contract by "competent and satisfactory proof, such as is clear, definite, and certain." Cash v. Maddox, 265 S.C. 480, 484, 220 S.E.2d 121 (1975). Critically for purposes of this case, in order for part performance of an oral agreement to remove the agreement from the operation of the Statute of Frauds, the party must establish acts which relate clearly and unequivocally to the agreement, exclusive of any other relation between parties touching such agreement. See Player, 299 S.C. at 105-106 citing Aust v. Beard, 230 S.C. 515, 96 S.E.2d 558 (1957); Gibson v. Hrysikos, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987).

D. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon a careful review of the record,[3] I make the following findings of fact and conclusions of law:

1. Statute of Frauds and Part Performance.

I HEREBY FIND the Statute of Frauds bars Plaintiff's claims. Contrary to Plaintiff's arguments, the Statute of Frauds does apply to a 5 year or 6 year or 20 year mortgage obligation (which clearly contemplates a transfer of land/property if the loan/mortgage obligations are not strictly satisfied[4]) and the contract to build a new building on real property. Not only does the alleged loan include a mortgage requirement that certainly contemplates the transfer of title, ownership, or possession of land (i.e. 229 King Street) if the payments are not timely made to the bank, but the alleged agreement is one that is not to be performed in the space of one year from the making thereof, and it is an alleged loan for a set term beyond one year. Further, the Standard Agreement Between Owner and Contractor that Plaintiff unilaterally signed sets forth a commencement date of 1/3/2014 and substantial completion date of 12/31/2015. Also, none of the Defendants signed any contract or agreement to build the new building. Moreover, Defendants

[3] Defendants filed Motions for Summary Judgment on February 28, 2017. The hearing was heard on June 8, 2017, and the Court allowed the parties additional time to provide the Court with any and all evidence, case law, and arguments any party wished to present prior to the Court issuing its decision. On June 13, 2017, Defendant Spiros Ferderigos provided the Court an Appendix with Exhibits. On June 15, 2017, Defendant Phillip Ferderigos provided the Court with Phillip Ferderigos' Supplemental Case Law and Evidence. On June 16, 2017, Plaintiff requested the Court allow Plaintiff additional time until June 22, 2017, to present any additional evidence, case law or arguments of counsel it wished to present in response to Defendants' submissions. The Court granted Plaintiff's request for additional time, and Plaintiff subsequently filed Plaintiff's Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment on June 22, 2017. I find all parties were provided a full and fair opportunity to present any and all evidence, case law and arguments they wished to present in regard to Defendants' Motions for Summary Judgment and, after carefully reviewing all of the evidence, case law submitted by the parties, and considering the arguments of counsel, the Court makes the following findings of fact and conclusions of law as set forth herein.

[4] Plaintiff does not dispute that a mortgage is subject to the Statute of Frauds. Rather, he argues an agreement to enter into a mortgage is not subject to the statute. This is a difference without a distinction, as the purported agreement would clearly effect a transfer of an interest in real estate and would require more than a year to complete.

Spiros and Phillip Ferderigos did not sign the SouthCoast Loan Commitment Letter[5] or any other contract, agreement or signed writing concerning the financing for the proposed project.

Further, I find the part performance exception to the Statute of Frauds does not apply in this case, as the expenditures for the proposed project do not relate clearly and unequivocally to the oral agreement Plaintiff alleges, exclusive of any other relation between the parties touching such agreement. See, e.g., Aust v. Beard, 230 S.C. 515, 96 S.E.2d 558 (1957). By admission of Plaintiff in his Complaint, Plaintiff concedes all expenditures and expenses for the proposed project went to exploring/investigating the possibility of building the new building. In other words, this purported part performance is not clearly and unequivocally related to the purported agreement to build the project and finance it through personal mortgages but is equally consistent with the parties' admitted agreement to explore the feasibility of the project. Therefore, the part performance exception does not take the alleged oral contract to mortgage interests in 229 King Street out of the Statute of Frauds. See Plaintiff's Complaint, Par. 28, stating:

> "The parties entered into part performance in furtherance of their agreement in the form of payment of a total of $86,000 in fees for engineering, architectural work, planning and zoning approval and design work so that by the time a final loan package was offered by the bank, all designs and plans and all zoning approvals for the project were complete."

The alleged verbal agreement Plaintiff seeks to enforce is one *both* to build the new building and to mortgage 229 King Street to pay for it (as well as several other contracts Plaintiff requested of Defendants Spiros and Phillip Ferderigos). The expenditures alleged by Plaintiff as part performance are not related to any alleged agreement by Defendant Spiros and Phillip Ferderigos to mortgage their interests in 229 King Street, but, rather, are related to exploring the feasibility and building the building. Indeed, these expenditures began before the negotiations over

[5] Indeed, per the written communications, Defendants Spiros and Phillip Ferderigos were not sent a copy of the SouthCoast Loan Commitment Letter until sometime in September 2014.

financing even began. For these reasons, the Statute of Frauds applies and bars Plaintiff's breach of contract claims.

2. No Meeting of the Minds.

For the reasons set forth herein, I further find no genuine issue of material fact exists because there were no clear and explicit words to express the contract, there was no assent of all of the alleged contracting parties, there was no mutuality of agreement, and there was no mutuality of obligation between and among the parties concerning the essential elements and material terms of the oral agreement Plaintiff alleges.

a. The interest rate and term for Plaintiff's loan.

The evidence is clear Plaintiff misrepresented the terms on which the proposed project would be financed, and he never secured Defendants' agreement. On September 19, 2014 – long after Plaintiff received the bank commitment letter, and again on September 24, 2014, he enthusiastically informed Defendants he had a 20 year, 5% fixed rate loan:

> 9/19/2014: [Spiros cell] … can you email us the details of the loan sometime this weekend if you have a chance?
>
> Athan: The banker just called me. I won't have the details till next week. **I'm sure it's 5% for 20 years.**
>
> 9/24/2014: [Athan gmail] **Well I don't know how I managed to sweet talk our banker into getting rid of the five year balloons and fixing it at 5% for the life of the loan which is unheard of in the current banking industry.**

Plaintiff misrepresented the terms of the proposed loan, as demonstrated by the SouthCoast Loan Commitment Letter itself[6], as well as the testimony of Plaintiff's banker. As late as February 9, 2017, at Plaintiff's deposition, Plaintiff repeatedly testified Defendants had agreed to, and Plaintiff

[6]Although Plaintiff asserts Defendants Phillip and Spiros Ferderigos knew or should have known of the terms of the SouthCoast Loan Commitment Letter, the written correspondence between the parties reflects they did not even receive a copy of the SouthCoast Loan Commitment Letter until September 2014. Further, Defendants were not to be parties to the SouthCoast loan, and they were not expected to, nor did they, sign the Commitment Letter.

had received from his bank, a 20 year term loan, fixed at a 5% interest rate for the 20 years of the loan from his bank. Plaintiff, however, never actually received such a loan offer, but he actually had only been offered a six-year loan amortized over twenty years with a balloon payment and the hope of being able to refinance it then. Plaintiff testified the parties had an "oral" contract where the parties had agreed to a 5% fixed rate for a 20 year term loan for the proposed project; however, this is something Plaintiff never achieved.[7]

b. No personal guarantee by Defendants Phillip and Spiros Ferderigos.

Plaintiff concedes Defendants Phillip and Spiros Ferderigos never agreed to personally guarantee anything for the proposed project:

> Q. Okay. Any other - any conversation that you had in which they agreed to sign anything other than a mortgage.
> A. Other than a mortgage, hmm, the only stipulation that they have was that they don't want to be personal guarantors on the note. They never said that they wouldn't sign over whatever the other things the bank needed.
> Q. Yes, I'm asking you that question in the affirmative. **Neither Spiros nor Phillip ever agreed to sign anything other than, as you claim, a mortgage.**
> A. **The only thing I remember is Spiros and Phillip Agreeing that they would not personally guarantee the note.**
> Q. I'm going to ask you one more time, and you can say yes or no and then you can explain. **There was no circumstance in any conversation related to Old Towne Suites in which either Spiros or Phillip agreed to sign anything other than the mortgage you claim they were willing to sign.**
> A. **I don't remember.**

Deposition of Plaintiff, p. 412, lines 13 – 25; p. 413, lines 1 – 9.

> Q. **Right, so Phillip and Spiros never agreed to sign anything that exposed them to personal liability, correct?**
> A. **Personally guaranteeing, yes, their deal was they didn't want to personally guarantee the note.**

Deposition of Plaintiff, p. 413, lines 17 – 21.

> Q. **Other than the mortgage, neither Phillip nor Spiros ever agreed to sign anything that exposed them to personal liability.**
> A. **I don't know what that other thing would have been that they would have to agree that it would expose them to personal**

[7] There can be no meetings of the minds between Plaintiff and Defendants when Plaintiff himself misrepresented and/or did not understand the loan offer and term of the loan he believes he received from SouthCoast bank.

liability, but they said from the beginning, before we even started the note or before we even moved forward to spend money, big money on the project, that they would not personally guarantee the note.
Q. Okay. I understand that.
A. Okay.
Q. They never agreed to sign anything that exposed them to personal liability other than to the extent that we're talking about the mortgage.
A. Is that the same thing as them not personally guaranteeing the note?
Q. No, it's more expansive.
A. More expansive, then I don't know.
Q. Okay. You don't know of anything that you can testify to that they -
A. Nothing I can testify today.

Deposition of Plaintiff, p. 414, lines 14 – 25; p. 415, lines 1 – 10. Plaintiff further concedes this was a material term that was important for all parties:

Q. And the ability to obtain a mortgage under this agreement would be an important or material term, correct?
A. The ability to obtain a mortgage?
Q. Yes.
. A bank would have to agree.
Q. How about a personal guarantee, would that be an important or material term?
A. It's not important to me, but it was important to Phillip to not be a personal guarantor.
Q. Okay. So it's fair at least as to Phillip that's an important or material term.
A. For Phillip, yes.
Q. How about the exposure of risk, would that be an important or material term to the people that were going to participate in a deal?
A. Risk.
Q. Mm-hmm.
A. I'm sure that's important for everybody.

Deposition of Plaintiff, p. 245, line 24 – p. 246, line 18.

I also find the requirement to have the LLC as a borrower on the note (or signing the HUD statement personally) potentially exposed Defendants Phillip and/or Spiros Ferderigos to personal liability on that note, which Plaintiff concedes was never part of the alleged oral agreement. Defendant Phillip Ferderigos emphasized this to Plaintiff during their negotiations. See Email from Defendant Phillip Ferderigos to Plaintiff, dated November 21, 2014:

> "As for all the other stuff, I hope we can get there, I really do, but I want it to be done right and everyone knows what they are agreeing to. **Putting the LLC on the note is not necessary and in this fine State makes me indirectly liable for payment on the note. All the bank needs to do is revise the HUD and the note, putting you and Jacob on both, which y'all are personally guaranteeing. As I have indicated, if the side agreement that we forwarded is agreed to and signed, I am happy to sign a mortgage, even though I do not have to. This is a tremendous leap of faith on my end because, if you do not make the payments on time, I could lose Old Towne.**
>
> On the flip side, I have not asked you to sign anything for me. If I don't make my payments for my loan I am getting, it does not affect you in the least. You cannot conflate the two issues … it is not you are making me sign something, so you need to sign something… You have asked me to do you a favor and, thus far, I have been willing to do it, but you are making it difficult."

Thus, there was no meeting of the minds on this material term. Even Plaintiff's closing attorney conceded this point when she said personal exposure existed for the note if the LLC's corporate veil were pierced:[8]

> 11/24/14: Email of Amy Haines (closing attorney) stating **"Nothing in the documents I have makes you personally liable for the debt … assuming the LLC corporate veil could not be pierced for some reason."**

c. The LLC being on the note.

It is undisputed Old Towne Suites, LLC, does not own the real property (229 King Street); rather, the individual parties own the real property as tenants in common. Accordingly, I HEREBY FIND no genuine issue of material fact exists because the SouthCoast Loan Commitment Letter executed by Plaintiff and Defendant Jacob Ferderigos (and not executed by Defendants Phillip and Spiros Ferderigos) does not bind Defendants Phillip or Spiros Ferderigos or Old Towne Suites, LLC. In key parts of his sworn testimony, Plaintiff admitted Old Towne Suites, LLC, took no formal action or vote concerning the SouthCoast Loan Commitment Letter. Originally, Defendants

[8] Also, SouthCoast's purported HUD Statement required Defendants Phillip and Spiros Ferderigos to personally sign the HUD statement individually, not in their capacity as LLC members, also potentially exposing them to personal liability for the note. Further, SouthCoast would require Defendants Phillip and Spiros Ferderigos to execute an LLC Resolution which would also potentially expose them to personal liability for the note. No evidence in the record exists that Defendants Phillip or Spiros Ferderigos agreed to any such material terms.

believed Plaintiff was seeking a loan where Plaintiff and Defendant Iakovos/Jacob Ferderigos were to obtain a mortgage over their own portion of the real property (as well as their own interest of the LLC). This is consistent with South Carolina tenants in common law cited above. At the hearing, Plaintiff's counsel argued the LLC was always supposed to be on the note. However, this is refuted by Plaintiff's own sworn testimony. Indeed, Plaintiff himself testified the LLC did not approve, vote for, or take any formal action concerning the proposed project[9] or any loan commitment letter:

> Q. Okay. Very good. **And are you aware of any formal action within the LLC, a referendum, a vote, minutes of any meeting, that would confirm that?**
> A. If the - **we discussed this as owners of the building.** The owners of the building don't have this LLC. We discussed as owners of the building that we would add property on top of our existing building.
> Q. Well, the LLC -
> A. **I don't think it has to go through the LLC. There's no documents that it go through the LLC. I make 50 percent of the decisions. The Ferderigos brothers make 50 percent of the decisions. If we both agree, then we continue.**
> Q. I want you to explain what you just said. You said there's no documents that say - I got confused. There's no documents that say what?
> A. You're trying to pin this and say, well, **Old Towne, LLC didn't have a meeting that made this. We had the meeting amongst the owners of the building. We don't have an LLC for the building. We, as owners of the building, decided to build another part of the building.**

Deposition of Plaintiff, p. 170, lines 7 – 25; p. 171, lines 1 – 4.

However, at the hearing, Plaintiff's counsel represented the opposite as arguments of counsel, contradicting Plaintiff's own sworn testimony.

d. No agreement as to Hypothecation Agreement.

Plaintiff concedes he and Defendants did not receive the Hypothecation Agreement until the day of or the day before closing. Indeed, Plaintiff's bank's counsel did not even know if the

[9] Further, Plaintiff did not even purport to sign the contract to build a new building on behalf of Old Towne Suites, LLC (and Defendants Iakovos/Jacob, Phillip or Spiros Ferderigos did not sign the contract to build the new building; rather, Plaintiff unilaterally signed this contract himself).

parties were being asked to sign a hypothecation agreement on November 21, 2014, when Plaintiff's bank's counsel stated, "There will also be hypothecation agreements, **I believe**." However, the written correspondence between the parties sets forth that Defendant Phillip Ferderigos never agreed and had rejected executing any such agreements. See Email from Defendant Phillip Ferderigos to Plaintiff, dated November 20, 2014:

> **I am not on your loan … my 1/6 monthly profit will be distributed to me timely and you can not float or make your payments out of my portion of the profit … if there is any misunderstanding about that, let's not move forward….**

In fact, Plaintiff was not even aware his bank documents would require the parties to sign a Hypothecation Agreement until the parties received the closing documents:

> Q. When did you first learn that there would be a hypothecation agreement required?
> A. Phillip was the first one that told me that. I didn't know what it was. He said, and this thing's asking for a Hypothecation Agreement.

Deposition of Plaintiff, p. 292, lines 7 – 11.

e. No agreement as to assignment of rents.

Similarly, Plaintiff testified he and Defendants agreed the first floor rent was not part of any assignment of rents for the proposed project:

> Q. **And you agree that neither Phillip nor Spiros nor Jacob nor you agreed to assign rent that the owners of 229 King received from S&S Old Town for this project.**
> A. That's lengthy. I can't put my head around it. Will you say that again?
> Q. Yes, I'll break it down. There was an assignment of rents that was tendered in the closing package, right?
> A. Assignment of rents, oh, with the bank, yes.
> Q. But leading up to the closing none of the owners of 229 King had discussed or agreed to assign rents that S&S Old Town pays to the owners as part of that assignment of rents.
> A. **S&S Old Town. Do you mean Old Town's rent, that Old Town's rent would have anything to do with Old Towne Suites?**
> Q. **Yes.**
> A. **No, I don't think so.**
> Q. **Okay. And it wasn't part of the deal.**
> A. **Old Town's rent and Old Towne Suites, no, I don't think that was part of the deal.**

Deposition of Plaintiff, p. 415 line 19 – p. 416 line 15.

> Q. The rent that S&S Old Town pays to 229 King, to the owners of 229 King, had nothing to do with the Old Towne Suites project.
> A. I think that's correct.

Deposition of Plaintiff, p. 416 line 21 – 25. However, the bank's Assignment of Rent and Hypothecation Agreement applied to all rent from 229 King Street, including the first floor restaurant (S&S Old Town Restaurant). Pursuant to the Plaintiff's own testimony, no party ever agreed to such material terms.

f. The final cost of the proposed project.

The SouthCoast Loan Commitment Letter and the contract to build the new building (which Plaintiff unilaterally signed himself) prove there was no meeting of the minds and no agreement as to the material terms as far as final cost of the proposed project. The SouthCoast Loan Commitment Letter as of 9/24/2014 sets forth that the new building, including the furnishings for the units, would be $1,800,000; whereas the contract to build the new building (executed unilaterally by Plaintiff) as of 10/15/2014 sets forth a construction price of $1,728,900.00; whereas Plaintiff conceded that, up to the present, the sprinkler system price had not yet been determined (much less negotiated or price agreed upon) and could cost anywhere between $10,000 and $100,000, and the furnishings would cost an additional $225,000. Accordingly, there was no meeting of the minds concerning the final price of the proposed project, and, as a result, each individual party's share of the proposed project.

g. Contract to build the new building signed by Plaintiff only.

Importantly, Plaintiff conceded he did not know if he ever even showed the contract to build the new building to Defendants before Plaintiff unilaterally signed it:

> Q. The contract with Kevin Carroll.
> A. Yes.
> Q. You never showed that to the Ferderigos brothers before you executed it, did you?

A. I probably have. I can't remember.

Deposition of Plaintiff, p. 430, lines 21 – 25.

Q. Do you recall when you or if you sent a copy of the contract signed with a contractor to any of the three brothers?
A. No. I don't recall when it was.

Deposition of Plaintiff, p. 197, lines 12 – 15.

Further, Plaintiff did not even purport to sign the contract to build a new building on behalf of Old Towne Suites, LLC (and that Jacob, Phillip or Spiros Ferderigos did not sign the contract to build the new building); rather, Plaintiff signed this contract himself. The written record reflects Defendants never agreed to be bound by (and did not even know about) any such contract to build a new building as is evidenced by the fact they never signed any such contract.

h. Details

The lack of a binding agreement between the parties and lack of a meeting of the minds on material terms is also reflected by Plaintiff's view of details that were never agreed to:

11/24/14: Email from Athan Fokas to Ferderigos Brothers stating: "I think it's best to think of the big picture of this new project which will put us in a boutique hotel category and forget about stupid details that carry no wait [sic] in the big picture." "In the end the building is what the bank wants and none of these side agreements really matter. I suggest you forget your agreement and I will forget mine and we move forward on a very profitable venture and get it done the way the bank allows."

Email from Plaintiff to Defendants, dated 11/24/14.

Plaintiff acknowledges in his written correspondence these "stupid details" were never agreed to and Plaintiff was still negotiating the terms of financing for the proposed project when negotiations failed, and, thereafter, Plaintiff sued Defendants about an agreement that was still being negotiated. Ultimately, these details, which are material terms of any alleged agreement, resulted in the proposed project never being agreed to.

i. Ancillary/Side Agreement.

The evidence in the record reflects there was also no meeting of the minds as to an ancillary/side agreement protecting Defendant Phillip Ferderigos' collateral (his portion of the 229 King Street property). Initially, Plaintiff's Complaint alleges he agreed to sign Defendant Phillip Ferderigos' proposed ancillary/side agreement (See Complaint Par. 20, stating **"Plaintiff agreed to sign the agreement presented to him by Defendant Phillip Ferderigos in early 2015"**). In key parts of his testimony, Plaintiff admitted the same:

> **Q. . . . Did you agree to sign the Side Agreement, yes or no?**
> **A. I did.**

Deposition of Plaintiff, p. 417, lines 4 – 6.

However, Plaintiff also testified to the opposite, that he never agreed to sign the ancillary/side agreement:

> Q. Well, do you agree that the side agreement that was being negotiated between you and Phillip was material to these negotiations?
> A. **No, that was something that was sprung on me, and we never agreed to any side agreement.** He just brought that up all of a sudden out of the blue.

Deposition of Plaintiff, p. 242, lines 9 – 10.

Finally, Plaintiff also testified he was not sure if he agreed or did not agree to sign the ancillary/side agreement:

> Q. You and Phillip, **did you ever agree to every term in a proposed Side Agreement?**
> **A. I'm not sure.**

Deposition of Plaintiff, p. 428, lines 4 – 6.

At the hearing, contrary to Plaintiff's pleadings, Plaintiff's counsel argued Plaintiff had not agreed to the ancillary/side agreement. Accordingly, based on Plaintiff's inconsistent pleadings, testimony and arguments, Plaintiff apparently has no idea whether or not he ever agreed to such material term (again, evidencing no meeting of the minds as to material terms).

j. No binding agreement.

Finally, also demonstrating the absence of a meeting of the minds or intent to form a binding contract, Plaintiff's written correspondence repeatedly confirmed no party was bound by any agreement and any party could simply move forward with negotiations or "forget about it" at any time. Plaintiff has also purported to release Defendants from any alleged binding oral agreement he claims the parties reached regarding the proposed project being explored. See Exhibit V to Phillip's Answer and Counterclaim:

a. 10/21/14: Text from Athan Fokas to Ferderigos Brothers stating "I would rather leave it in your hands now and **keep me in the loop if and when you all are ready." "It's in your court now. I could care less**. My Zeus deal is bringing in plenty to keep my family happy."

b. 11/21/14: Email from Athan Fokas to Ferderigos Brothers stating **"Think about the big picture talk to the bank yourselves and get things done if you like."**

c. 11/21/14: Email from Athan Fokas to Ferderigos Brothers stating "I think it's best to think of the big picture of this new project which will put us in a boutique hotel category and forget about stupid details that carry no wait [sic] in the big picture." "In the end the building is what the bank wants and none of these side agreements really matter. I suggest you forget your agreement and I will forget mine and we move forward on a very profitable venture and get it done the way the bank allows."

d. 11/24/14: Email from Athan Fokas to Ferderigos Brothers stating "Are ya'll [sic] contacting the bank, my attorney, and the closing attorney **or are we just forgetting about it?"**

e. 11/24/14: Email from Athan Fokas to Ferderigos Brothers stating "If you are intelligent you will already know that the money will be there with the original suites income to pay for the loan. Cut your pompous attitude and **either get it done or not**."

f. 11/24/14: Email from Athan Fokas to Ferderigos Brothers stating "Well then it's done. I'll reverse as much as I can and just right [sic] it off as a stupid transaction dealing with the Ferderigos Family."

g. 12/15/14: Text from Athan Fokas to Ferderigos Brothers stating **"We can discuss all options when we meet and hopefully come to a mutual agreement."**

The above texts/emails from Plaintiff himself prove there was never a binding agreement between the parties, and Plaintiff himself or Defendants could walk away from the negotiations at any time and that negotiations were on-going.

k. Plaintiff admits there was no agreement or even negotiations as to numerous material terms.

Further, in his deposition testimony, Plaintiff concedes he never told Defendants Phillip or Spiros Ferderigos about (much less negotiated, or reached an agreement on) the numerous agreements his bank would require Defendants Phillip or Spiros Ferderigos to execute (such as an Hypothecation Agreement, an Assignment of Rents, a HUD Statement, a Construction Mortgage, an Agreement to Provide Insurance, a Construction Loan/Agreement, a Guarantee of Completion and Performance Agreement, a Commercial Security Agreement, a Hazardous Substance Certificate and Indemnity Agreement, a UCC Financing Agreement and other agreements as well):

Q. The question was is it true that you had not seen this hypothecation agreement prior to the day of closing.
A. **I'm not sure when I saw it. It's whenever the attorney sent me the documents. Whenever the attorney sent me the documents, I gave it to them. I don't know if it was the day before the closing or the day of the closing.**
Q. **Do you remember ever having told Spiros that he would be signing an assignment of rents document prior to the day of the closing?**
A. **To me this is a standard closing document. I didn't go through and say, okay, this is an assignment of rent. I'm not sure. It's a standard closing document.**
Q. **Is the same true for the settlement statement, the HUD statement?**
A. **Yes, it's all part of what the bank requires.**
Q. **And so you did not see it, and therefore Spiros probably didn't see it until the attorney sent them to you.**
A. **Until the attorney sent them to us, that's correct.**
Q. **Would the same be true for the next document, the construction mortgage?**
A. **If it was all in the same closing document. Is this all the same closing document?**
Q. **Yes.**
A. **Yes, then that's when we got it from the attorney.**
Q. What about the **agreement to provide insurance**, when did you first learn that you were going to have to sign an agreement to provide insurance?
A. I'm not sure. I think the attorney had it listed. It was in an email, what would be signed that day; and maybe he sent that out and I sent it to Phillip and he said - he might have said he's not signing this before he even received it. I don't remember.

Q. Is the same true for the **construction loan agreement**, that is, that you did not see that agreement until the lawyer sent it to you?
A. Correct.
Q. Was that sent with the rest of the closing package?
A. Yes. I didn't receive the closing packet until the lawyer sent it to me and I forwarded it to the cousins.
Q. And what about the **guarantee of completion and performance document**, was that the same thing?
A. If it was all part of the closing document, when the attorney sent it to me, that's when I saw it.
Q. Same for the **commercial security agreement**?
A. I would think so if it was in the same closing document.
Q. Same for the **hazardous substances certificate and indemnity agreement**?
A. Yes, if it was in the closing documents.
Q. Same for the agreement to provide insurance?
A. Yes, if it was in the closing documents.
Q. And for the **UCC financing statement**?
A. If it was in the closing documents, yes.

Deposition of Plaintiff, p. 293, lines 8 – 25; p. 294 - 296, line 1.

Q. Okay. Any other - any conversation that you had in which they agreed to sign anything other than a mortgage.
A. Other than a mortgage, hmm, the only stipulation that they have was that they don't want to be personal guarantors on the note. They never said that they wouldn't sign over whatever the other things the bank needed.
Q. Yes, I'm asking you that question in the affirmative. **Neither Spiros nor Phillip ever agreed to sign anything other than, as you claim, a mortgage.**
A. **The only thing I remember is Spiros and Phillip Agreeing that they would not personally guarantee the note.**
Q. I'm going to ask you one more time, and you can say yes or no and then you can explain. **There was no circumstance in any conversation related to Old Towne Suites in which either Spiros or Phillip agreed to sign anything other than the mortgage you claim they were willing to sign.**
A. **I don't remember.**

Deposition of Plaintiff, p. 412, line 13 – p. 413 line 9.

E. CONCLUSION

Accordingly, based on the written correspondence and sworn testimony of the Plaintiff himself, I find no genuine issue of material fact exists because there was no meeting of the minds and no binding agreement existed between the parties as set forth above. I further find each one of these items listed above, in and of itself, is a material term which would defeat Plaintiff's claims

for breach of contract or specific performance. This case illustrates just why the law requires contracts involving large, complex transactions be reduced to writing. Every material term is critical, and there is too much opportunity for misunderstanding if all the material terms are not finalized and written out and the final agreement is not signed before it becomes binding. Plaintiff's claims fail as a matter of law, not only pursuant to the Statute of Frauds, but also because the multiple documents/contracts Plaintiff is asking Defendants to sign reflect material terms that are different than what Plaintiff himself alleges was the oral agreement the parties agreed to.

Furthermore, as for Defendant Iakovos/Jacob Ferderigos, Plaintiff has failed to set forth any evidence he breached any agreement or contract. Rather, as there was no binding agreement as to all parties, there was no binding agreement or contract which Defendant Iakovos/Jacob Ferderigos could have breached. Additionally, there is no evidence or genuine issue of material fact Defendant Iakovos/Jacob Ferderigos breached any contract or agreement with Plaintiff.

As for Plaintiff's breach of fiduciary duty/violation of the LLC statute S.C. Code § 33-44-409, I find no genuine issue of material fact exists as to such cause of action as to Defendants. Plaintiff has presented no evidence to the Court to create a genuine issue of material fact concerning such claim; moreover, as set forth previously, in key portions of his sworn testimony, Plaintiff testified Old Towne Suites, LLC, did not take any formal action, vote or even discuss the proposed project as part of Old Towne Suites, LLC, business. To the contrary, Plaintiff testified the parties allegedly agreed "as owners of the building [i.e. as individual tenants in common of 229 King Street]" to build the new building, not as members of an LLC. Accordingly, the LLC statute does not apply to Plaintiff's claims against Defendants.

Moreover, for the reasons set forth herein, the Court rejects Plaintiff's equitable specific performance claim. I find it would be inequitable to require Defendants to specifically perform an alleged oral agreement upon material terms Defendants never agreed to.

Based on the above, I hereby grant Defendants' Motions for Summary Judgment as to all claims/causes of action as to all Defendants.

IT IS SO ORDERED.

J.C. Nicholson, Jr., Judge
Presiding Judge, Ninth Judicial Circuit

August 22, 2017
Charleston, SC