THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-3919

Appellate Case No. 2017-002032

Athan Fokas.....Respondent/Appellant,

v.

Philip Ferderigos, Spiros Ferderigos,
and Jacob Ferderigos..... Defendants,

of Whom

Spiros Ferderigos and Philip Ferderigos are..... Appellants/Respondents,

And

Jacob Ferderigos is .....Respondent.

FINAL JOINT BRIEF OF RESPONDENTS SPIROS FERDERIGOS, PHILLIP FERDERIGOS, and JACOB FERDERIGOS

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COUNTERSTATEMENT OF THE CASE

I. PROCEDURAL HISTORY

In this action, Appellant Athan Fokas (hereinafter referred to as "Fokas") seeks to enforce an alleged oral agreement to build a new building at 229 King Street in Charleston and mortgage Respondents' interests in the existing real property located at 229 King Street to finance Fokas' share of the proposed project. The evidence is uncontroverted that the parties never agreed on material terms of the proposed project and never reduced any agreement to writing.

On July 15, 2015, Fokas filed the instant action against Respondent Spiros Ferderigos (hereinafter referred to as "Spiros"), Respondent Phillip Ferderigos (hereinafter referred to as "Phillip"), and Respondent Jacob Ferderigos (hereinafter referred to as "Jacob")[1] alleging causes of action for breach of contract, specific performance, and breach of fiduciary duty pursuant to the LLC statute. (R. pp. 48-56). Phillip and Spiros filed their respective Answer and Counterclaims on October 1, 2015, asserting numerous affirmative defenses and counterclaims for negligent misrepresentation, fraud, breach of fiduciary duty, abuse of process, and defamation. (R. pp. 205-352; R. pp. 57-204). Jacob filed his Answer and Counterclaims on December 29, 2015. (R. pp. 353-496). Fokas filed his replies to the various counterclaims on March 31, 2016, and April 29, 2016. (R. pp. 497-513).

Each of the Ferderigos Brothers filed a Motion for Summary Judgment on February 28, 2017. (R. pp. 710-736). Fokas filed a memorandum in opposition to the Ferderigos Brothers' Motions for Summary Judgment on June 5, 2017. (R. pp. 857-1142). The trial court held a hearing on June 8, 2017, and the Court allowed the parties additional time to submit any and all evidence, case law, and arguments they wished to present prior to the Court issuing its decision. On June 13, 2017, Spiros provided the trial court an Appendix with Exhibits. (R. pp. 1335-1442).

[1] Spiros, Phillip, and Jacob are sometimes collectively referred to as the Ferderigos Brothers.

On June 15, 2017, Phillip provided the Court with his Supplemental Case Law and Evidence. (R. pp. 1244-1334). On June 22, 2017, Fokas submitted a Supplemental Memorandum in Opposition to Respondents' Motion for Summary Judgment.

On August 9, 2017, the trial court informed the parties it would grant the Ferderigos Brothers' Motions for Summary Judgment and asked counsel to prepare a proposed order. Counsel for the Ferderigos Brothers submitted a proposed order on August 18, 2017. The trial court modified the proposed order and entered its final Order Granting Summary Judgment to all Defendants on September 28, 2017. (R. pp. 10-32).

II. FACTUAL BACKGROUND

A. The parties owned the real property at 229 King Street as tenants in common.

Fokas and the Ferderigos Brothers are first cousins, and they own the real property located at 229 King Street, Charleston, SC 29401 (hereinafter referred to as the "Property"), as tenants in common. (R. p. 914). Fokas owns a one-half interest in the Property, and the Ferderigos Brothers own the other one-half interest in the Property evenly among themselves. (R. p. 878). As a three-story building located in downtown Charleston, for many years, Fokas and the Ferderigos Brothers received rental proceeds from Old Towne Restaurant, which occupied the first floor of the Property[2]. (R. p. 65, ¶ 62; R. p. 504, ¶ 10).

B. The Property burned in a fire, and the parties renovated the Property to include short term rental units on the second and third floors.

In 2009, the Property burned in a fire causing significant damage. As part of the restoration, Fokas and the Ferderigos Brothers converted the second and third floors into short-term rental units (hereinafter referred to as the "original rental units"). (R. p. 65, ¶ 63; R. p. 504, ¶ 10). Insurance proceeds paid for part of the conversion, and Fokas and the Ferderigos Brothers

[2] Fokas and Jacob each own a fifty percent (50%) interest in Old Towne Restaurant a/k/a S&S Old Town Incorporated. They operate the restaurant. Phillip and Spiros do not have any interest in Old Towne Restaurant.

paid their respective fifty percent (50%) of the remaining expenses for the original rental units in cash. (R. p. 65, ¶ 64; R. p. 504, ¶ 10; R. pp. 933-934). Fokas and the Ferderigos Brothers did not mortgage the Property in order to construct the original rental units. (R. p. 65, ¶ 65; R. p. 504, ¶ 10; R. p. 879). Similarly, Fokas and the Ferderigos Brothers did not personally guarantee any loans to construct the original rental units. (R. p. 65, ¶ 66; R. p. 504, ¶ 10). Neither Fokas nor the Ferderigos Brothers encumbered any assets to benefit the others to construct the original rental units. (R. p. 65, ¶ 67; R. p. 504, ¶ 10).

C. The parties operated the original rental units.

Fokas and the Ferderigos Brothers created Old Towne Suites, LLC (hereinafter referred to as the "LLC"), to operate and distribute profits from the operation of the original rental units. (R. p. 65, ¶ 68; R. p. 504, ¶ 10). At the time relevant to this appeal, Fokas and each of the Ferderigos Brothers were members of the LLC, with each member having an interest in the LLC's profits equal to his interest in the Property. The LLC was member managed and owned no real property. (R. pp. 878, 914).

Sometime after the construction of the original rental units and the creation of the LLC, but no later than 2012, Fokas informed one or more of the Ferderigos Brothers he wanted to explore the possibility of adding a new building over the existing building at the Property for additional short-terms rental units (hereinafter referred to as the "Proposed Project"). (R. p. 65, ¶ 69; R. p. 504, ¶ 10). Fokas and the Ferderigos Brothers began investigating this possibility and negotiating the terms for the Proposed Project. (R. pp. 878-879). The record demonstrates that two distinct phases transpired during the parties' negotiations for the Proposed Project. The Ferderigos Brothers refer to these as "Phase I" and "Phase II".[3]

[3] Fokas often conflates these two very different phases of negotiations. During Phase I, Phillip and Spiros intended to fund their portion of the construction costs in cash and did not agree to mortgage their interests in the Property.

D. The parties' Phase I negotiations for the Proposed Project began in 2012.

Sometime in 2012, Fokas and the Ferderigos Brothers began to investigate the possibility of, feasibility of, and their interest in constructing a new building above the Property to be used as additional rental units. (R. p. 58, ¶ 8; R. pp. 878-879). During this time, Fokas and the Ferderigos Brothers incurred costs associated with their investigation into the feasibility of the proposed project. (R. p. 66, ¶ 72; R. pp. 92-94). Fokas and Jacob coordinated with an engineer, an architect, and a contractor to develop plans to submit to the City of Charleston for consideration of a building permit and to determine the cost, details, scope, and feasibility of the proposed project. The parties performed these activities to determine if the Proposed Project was even feasible from a construction and cost perspective. They entered into no agreements whatsoever, and all parties understood that any party could decide not to participate at any time. By December 11, 2012, the architect was approximately eighty percent (80%) complete with his concept drawings regarding the Proposed Project. (R. p. 66, ¶ 73; R. p. 94). For convenience, the Ferderigos Brothers and Fokas paid their respective share of exploration expenses for the Proposed Project from their respective LLC profits. (R. p. 66, ¶ 71; R. p. 881).

In December 2012, Fokas informed the Ferderigos Brothers the total cost of the proposed project would be approximately Nine Hundred Thousand Dollars ($900,000.00). (R. p. 66, ¶ 74; R. pp. 95-96). Fokas and Jacob began searching for personal loans in the event the City approved the initial plans for the Proposed Project and assuming the parties could reach an agreement for all material terms to build the Proposed Project. (R. p. 66, ¶ 75; R. p. 504, ¶ 12). However, at this

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During Phase II, which occurred after negotiations in Phase I failed, the parties were negotiating the terms on which Phillip and Spiros would agree to mortgage their interests in the Property to secure Fokas' and Jacob's loan. They were willing to do so only under the condition the parties reached an ancillary/side agreement further securing Fokas' fulfillment of his obligations and assuming the closing documents were correct. In arguing that the parties had an agreement during Phase I, Fokas quotes or cites communications from Phase II out of context. In order to understand the true progression of the parties' negotiations, it is important for the Court to understand the timeline and the separate and distinct negotiations that occurred. Where appropriate, the Ferderigos Brothers will address instances where Fokas conflates the Phase I and Phase II negotiations.

time, Fokas did not even know if a bank would lend funds for the Proposed Project. (R. pp. 95-96). Spiros and Phillip believed Fokas and Jacob were seeking personal loans to fund their respective portions of the Proposed Project via a mortgage of Fokas' and Jacob's respective share of the Property, their respective portion of the LLC, and their own personal guarantees.[4] Phillip and Spiros were going to pay cash for their part of the proposed project, and they refused to incur additional debt, guarantee any loans, or pledge any of their assets to secure any loans in order to fund the Proposed Project. (R. p. 67, ¶ 77; R. p. 97). In fact, on December 19, 2012, in response to Fokas informing the Ferderigos Brothers of the projected construction cost and a discussion of personal guarantees, Spiros responded by stating:

> Thanks for sending the detailed emails. I am sure it will answer a lot of the questions that we have. I will take a look at it in detail as soon as I can and let you know what other questions I have. Of course, the issue of what we are currently making on the units and the cost to construct new ones are obvious questions which you appear to go into detail below (give the hour have only quickly glimpsed over your email).
>
> Assuming all that pans out, there will be a continuing issue on how we finance. If the bank is looking for me (and I assume this goes for Phillip as well but I will let him speak for himself) to personally guarantee a loan I am not going to do it. There is to [sic] much that can go wrong with a personal guarantee. I am confident that Phillip, Jacob and I will be able to come up with our end of the amount needed and we can move forward without accumulating debt as we did for the first round of units. The question is how do we get there, will it be by personally guaranteeing loans that could be catastrophic to our individual families or each individual raising the necessary funds and doing it without a million dollars in debt so we can greatly limit liability. I for one already have plenty of money sitting in a bank account for my share of the additional units.

[4] In South Carolina, a tenant in common can mortgage his interest of the property only. Specifically, in South Carolina, "a cotenant has the authority to mortgage his undivided interest in the property, and a mortgage may be foreclosed on this interest" See 6 S.C. Juris. §41; Ex parte Johnson, 147 S.C. 259, 145 S.E. 113 (1928); Z. V. Pate, Inc. v. Kollock, 202 S.C. 522, 25 S.E.2d 728 (1943). Further, "it is equally clear that one cotenant cannot mortgage the entire common property without the consent of the other cotenants. The effect of a mortgage that purports to convey the entire interest and which is executed by fewer than all cotenants results in a lien on the interest of the mortgaging cotenants only." See 6 S.C. Juris §41; 20 Am. Jur. 2d Cotenancy and Joint Ownership § 102 (1965).

(R. p. 67, ¶ 77; R. p. 97) (emphasis added). In other words, the attempts by Fokas and Jacob to seek a loan for their shares of the Proposed Project did not involve Phillip or Spiros or their interests in the Property or the LLC. In fact, when Fokas suggested all parties personally guarantee the loan and mortgage their interests in the Property to secure the loan, Spiros immediately responded that he anticipated paying cash for his share and he would not personally guarantee anyone else's loan or incur additional debts to build the Proposed Project. (R. p. 67, ¶ 77; R. p. 97).

Fokas and Jacob attempted several times to receive personal loans for the proposed project from numerous banks to no avail. (R. p. 67, ¶ 79; R. p. 97; R. p. 883). Phillip and Spiros were not involved in these attempts to get personal loans and did not provide any financial information or make any assurances to any bank. (R. pp. 1020-1022; R. pp. 1012-1013). In January 2013, Fokas made initial contact with his SouthCoast Bank loan officer seeking a loan/loan commitment. (R. p. 98).

Unknown to Phillip and Spiros at the time, Fokas secured a personal loan commitment for himself and Jacob from SouthCoast Bank on February 5, 2013. Fokas secured this personal loan commitment without the knowledge, assistance, or participation of Phillip and Spiros. (R. pp. 100-103; R. p. 905; R. pp. 1012-1013; R. pp. 1017-1019; R. pp. 1020-1027). Based upon prior and subsequent written communications from Fokas, the Ferderigos Brothers believed any loan commitment secured by Fokas would be a personal loan to Fokas and Jacob and would only require Fokas and Jacob to provide a mortgage for their interests in the Property, their interests in the LLC, and an assignment of their rents and leases, in addition to other conditions. (R. pp. 95-96; R. p. 97; R. p. 99). The SouthCoast loan commitment did not list Phillip or Spiros as borrowers and did not identify Phillip and Spiros as needing to provide a mortgage on the

Property. (R. pp. 100-103). Rather, the loan commitment letter identified the LLC, Fokas, and Jacob as borrowers and required the LLC to mortgage the Property in order to secure the loan. (R. pp. 100-103). However, as all parties admit, the LLC did not own the Property or have authority to mortgage the Property because Fokas and the Ferderigos Brothers owned the Property as tenants in common, not through the LLC. (R. pp. 1441-1442). The loan commitment[5] expired February 15, 2013.

Contrary to Fokas' repeated assertions in his Brief, the Ferderigos Brothers did not receive a copy of this loan commitment letter until 2014. There is no evidence Fokas, SouthCoast, or anyone else provided the initial SouthCoast loan commitment to Phillip or Spiros prior to September 2014. Fokas testified he had no evidence to support this assertion and even testified he personally "may not have provided it" but that Jacob may have. (R. p. 904). The bankers at SouthCoast also testified they did not provide a copy of the commitment letter to Phillip or Spiros. (R. pp. 1020-1022; R. pp. 1012-1013). Fokas offered no evidence to the trial court to support his assertion Phillip and Spiros had the loan commitment letter prior to September 2014.[6]

Also contrary to Fokas' assertions in his Brief, Phillip and Spiros were not directly or actively involved in the discussions with SouthCoast. While Spiros sent an e-mail to Jeffrey Odom regarding the LLC's ownership interests, the SouthCoast bankers testified they had no

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[5] In his Brief, Fokas alleges the commitment letter "reflects the discussions Fokas had with the Defendants over a period of months, often at their church, in which the Defendants agreed to go forward with the expansion of the building based on a loan as reflected in the commitment letter." First, Phillip and Spiros deny any verbal communications with Fokas occurred except for one communication wherein Phillip informed Fokas he intended to pay cash for his portion of the construction costs and would not mortgage his interest in the Property. Second, Fokas' assertions are nothing more than a veiled attempt to overshadow his own misunderstandings and misrepresentations of the loan terms to the Ferderigos Brothers, as more fully discussed below.

[6] Because there is no evidence to support the assertion Phillip or Spiros received the loan commitment prior to September 2014, many of Fokas' arguments regarding the existence of a contract, which are premised on this assumption, immediately fail as further discussed below.

other communications or conversations with Phillip or Spiros regarding the loan commitment letter. (R. pp. 1012-1013; R. pp. 1017-1019; R. pp. 1020-1027).

As investigation into the Proposed Project continued, the SouthCoast loan commitment, which already expired, was insufficient for the Proposed Project. Costs for the Proposed Project continued to increase because the proposed plans were repeatedly rejected for permits and had to be modified numerous times. (R. p. 68, ¶ 83; R. pp. 95-96; R. pp. 100-103; R. p. 104). Fokas did not inform Phillip and Spiros the approximate cost for the Proposed Project increased to approximately Two Million Dollars ($2,000,000.00), more than double the original projected cost, until September 9, 2014. (R. p. 104). Accordingly, based upon the information provided by Fokas, Phillip and Spiros paid expenses toward exploring the Proposed Project from as early as August 2012 through September 9, 2014, under the incorrect belief that the approximate cost of the Proposed Project was Nine Hundred Thousand Dollars ($900,000.00).

With the construction costs increasing, Fokas and Jacob obtained a revised personal loan commitment from SouthCoast in the amount of One Million Eight Hundred Thousand Dollars ($1,800,000.00) on or about September 24, 2014. (R. pp. 68-69 ¶¶ 84-87; R. pp. 100-103; R. p. 105). Fokas misunderstood the loan terms. Upon approval, Fokas incorrectly informed the Ferderigos Brothers that his loan terms were for a fixed five percent (5%) interest rate for twenty (20) years. (R. pp. 69-70, ¶ 88; R. pp. 106-108). In fact, Fokas did not have such a loan. Rather, Fokas had a six (6) year loan with payments amortized over twenty (20) years with a balloon payment at the conclusion of six (6) years.[7] (R. pp. 1379-1383; R. pp. 106-108). When Fokas subsequently became aware he was incorrect about his loan terms, he attempted to get his banker

[7] Fokas' misunderstanding and subsequent misrepresentation of the loan terms to the Ferderigos Brothers further negate any possibility for an enforceable agreement between the parties. The parties could not have an agreement for the Proposed Project, including the loan to Fokas and Jacob, when Fokas himself did not understand the loan terms.

to change the terms to what Fokas believed he had, and the bank rejected the proposal. (R. pp. 106-108).

In addition to the significant changes to the Proposed Project's cost and the personal loan terms for Fokas and Jacob, the City did not approve the Proposed Project's plans until October 2014, with Fokas informing the Ferderigos Brothers of the approval on October 10, 2014.[8] (R. p. 70, ¶ 89; R. p. 109). When the City issued the permit, Fokas unilaterally scheduled a closing for what was to be the personal loan for Fokas and Jacob. (R. p. 99). A few days prior to the first closing, Fokas contacted Jacob and informed him that Phillip and Spiros would need to be present at the closing and would need to mortgage their interests in the Property for the loan. (R. p. 70, ¶ 92; R. pp. 1089-1090). Jacob informed Fokas that Phillip and Spiros never agreed to mortgage their interests in the Property and that such a mortgage was outright rejected and never considered for the Proposed Project. (R. p. 70, ¶ 92; R. p. 97; R. pp. 1089-1090). Jacob further informed Fokas that he did not believe Phillip and Spiros would agree to Fokas' new material demand that they mortgage their interests in the Property. (R. p. 70, ¶ 92; R. p. 97; R. pp. 1089-1090).

Jacob then informed Phillip and Spiros that Fokas had scheduled a closing to be held in a few days and that Fokas demanded Phillip and Spiros mortgage their interests in the Property to secure the personal loan on behalf of Fokas and Jacob. (R. p. 70, ¶ 93; R. pp. 1089-1090). To this date, Phillip and Spiros never agreed to mortgage their interests in the Property in order for Fokas and Jacob to secure personal loans for their share of the Proposed Project[9], and, initially,

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[8] Around this time, Fokas entered into a written contract with the contractor to build the Proposed Project without obtaining consent from the Ferderigos Brothers. (R. p. 76; R. pp. 196-201). In fact, he did not even inform the Ferderigos Brothers about the contract, and the Ferderigos Brothers learned of the contract after Fokas filed the lawsuit.

[9] Fokas admitted there was no written communication from Phillip or Spiros supporting his contention they agreed to mortgage their interest in the Property. Rather, Fokas alleges they verbally agreed to do so. (R. pp. 1338-1340).

they rejected these new demands by Fokas.[10] However, after a discussion among the Ferderigos Brothers, Phillip and Spiros informed Fokas they would consider these new demands, including mortgaging their interests in the Property, but, in order to do so, Fokas would need to accept additional terms to secure his performance. At this time, the parties began to negotiate these new terms, and negotiations transitioned into Phase II.

E. The parties' Phase II negotiations for the Proposed Project began in October 2014 following the increase in the Proposed Project's cost and new demands by Fokas.

Phase II of negotiations began when Phillip and Spiros attempted to negotiate terms upon which each would be willing to mortgage their respective portion of the Property for the Proposed Project in response to Fokas' new demand that Phillip and Spiros mortgage their interests in the Property to secure Fokas' and Jacob's loan. On October 19, 2014, upon learning for the first time that Fokas demanded Phillip and Spiros mortgage their interests in the Property to secure Fokas' and Jacob's loan, Spiros specifically wrote to Fokas as follows:

> I need to hold off signing anything for old [sic] Towne until I am done with the judgeship process. Should be mid-November. Will create too much of a headache to amend everything I have filed. That will also give Phillip time to do what he needs to do and also any ancillary contracts we need to do to go along with the loan.[11]

(R. pp. 1388-1392) (emphasis added). It was during this time that multiple material terms and material details were argued over and disputed, all of which were still being negotiated when an

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[10] On October 23, 2014, Fokas acknowledged in a private e-mail to one of the SouthCoast bankers that Spiros did not "know he had to sign the paperwork on the mortgage until the closing attorney notified us." (R. pp. 1384-1387). Contrary to Fokas' arguments, Fokas admitted in this e-mail the alleged agreement never included Phillip and Spiros mortgaging their interests in the Property.

[11] At this time, Spiros was a candidate for the Family Court Bench. He had already submitted his financial documents for the application process. He did not include any potential liabilities related to the Proposed Project on his financial declarations, which is further evidence he never agreed to be part of any loan or pledge any assets to secure any loan for anyone's behalf during Phase I negotiations. Rather, when the new demand came from Fokas for Phillip and Spiros to mortgage their interests in the Property and the parties began negotiating the terms for Phillip and Spiros to do so, Spiros responded that it would need to be after the judicial application process because he already submitted his financial declarations and the new demand would require him to amend those declarations.

impasse was reached. Phillip and Spiros communicated with all parties in writing that they would consider mortgaging their interests in the Property in order to secure the personal loan of Fokas and Jacob in exchange for the parties agreeing to ancillary agreements that protected Phillip and Spiros from Fokas and Jacob defaulting on the personal loan. (R. p. 70, ¶ 94; R. pp. 1388-1392). The parties agreed the first closing scheduled by Fokas would not proceed as scheduled in order to provide sufficient time for the creation of these ancillary/side agreements required for Phillip and Spiros to mortgage their interests in the Property. Fokas then unilaterally scheduled a second closing date for November 21, 2014. Phillip and Spiros prepared a proposed ancillary agreement for Fokas' consideration, and they provided a copy to Fokas. (R. pp. 934-935).

Phillip and Spiros were prepared to attend the second closing, including to mortgage their interests in the Property so long as Fokas agreed to and signed the ancillary agreement before the closing and so long as all closing documents were correct. (R. p. 71, ¶ 97; R. pp. 110-111). However, Fokas rejected the terms contained in the ancillary agreement necessary for Phillip and Spiros to mortgage their interest in the Property. (R. pp. 71-72, ¶ 98; R. pp. 112-117; R. pp. 934-935). Furthermore, when the Ferderigos Brothers and Fokas received the proposed closing documents to review just a few hours prior to the second closing, the closing documents included requirements that were never discussed and never agreed upon by Phillip and Spiros. (R. p. 72, ¶ 99; R. pp. 118-171). Despite Fokas admitting that Phillip and Spiros never agreed to personally guarantee any loan, the closing documents included terms that exposed Phillip and Spiros to personal liability, including: (1) listing the LLC as a borrower on the loan[12]; (2) Phillip and Spiros signing a hypothecation agreement for the entire Property; (3) Phillip and Spiros

[12] Fokas' closing attorney admitted this could expose Phillip and Spiros to personal liability if the corporate veil were to be pierced, and Fokas admitted only he and Jacob were the only ones required to guarantee the loan. (R. pp. 172-173).

assigning their rent profits from the entire Property for the benefit of the lending bank; (4) Phillip and Spiros personally signing the HUD Statement in their individual capacities; (5) Phillip and Spiros signing an agreement to provide insurance in their individual capacities; (6) Phillip and Spiros signing a UCC Financing Statement/Addendum in their individual capacities; and (7) Phillip and Spiros signing their interests in the LLC for a construction loan agreement, guaranty of completion and performance agreement, commercial security agreement, hazardous substances certificate and indemnity agreement, agreement to provide insurance, and UCC Financing Statement/Addendum, among other provisions. (R. p. 72, ¶ 100; R. pp. 118-171; R. pp. 172-173). Because of Fokas' rejection of the ancillary agreement and the inclusion of new material terms in the closing documents, the parties' canceled the closing. (R. p. 73, ¶ 101; R. p. 174).

Later that day, Fokas informed the Ferderigos Brothers for the first time that he would be receiving approximately Two Million Seven Hundred Thousand Dollars (~$2,700,000.00) on April 1, 2014, and that he intended to pay off his loan obligations related to the Proposed Project at that time if Phillip and Spiros mortgaged their interests in the Property for his loan. (R. p. 73, ¶ 102; R. p. 175). Given this infusion of cash, Phillip and Spiros communicated to Fokas that they would like to consider Fokas, Phillip, and Spiros paying cash for their portions of the Proposed Project. (R. p. 73, ¶ 103; R. pp. 176-181). Fokas rejected this overture and refused to move forward unless Phillip and Spiros agreed to mortgage their interests in the Property and signed the incorrect closing documents. (R. p. 73, ¶ 103; R. pp. 176-181). Fokas informed the Ferderigos Brothers he was interested in doing the Proposed Project now and would not do the Proposed Project later. (R. p. 74, ¶ 108; R. pp. 184-185). He rejected moving forward without the parties incurring significant debt despite Phillip and Spiros maintaining since 2012 that they

were unwilling to pledge assets or accumulate debt for the Proposed Project. As a result, the parties reached an impasse in negotiations.

F. The parties' impasse in negotiations continued, and Fokas filed the lawsuit.

Following the Phase II impasse, Fokas informed the Ferderigos Brothers that the thirty (30) plus year custom of the Ferderigos and Fokas families eating at Old Towne Restaurant for free was to cease immediately even though the custom had been in place since the 1970's when Fokas' and the Ferderigos Brothers' parents opened the restaurant. (R. p. 74, ¶ 105; R. p. 182). Fokas then took things even a step further and informed Phillip of his plans to spread malicious rumors around the community about Phillip and the Proposed Project. (R. p. 74, ¶ 107; R. p. 183). Additionally, following the impasse, Fokas stated he would reverse as much as he could of the Proposed Project and "just right [sic] it off as a stupid transaction dealing with the Ferderigos Family." (R. p. 75, ¶ 109; R. pp. 186-192). As of April 2015, the final construction costs for the Proposed Project remained unknown. (R. p. 75, ¶ 111; R. p. 195).

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). "[S]ummary 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." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Id. "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." Id. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Id.

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Id. at 220, 616 S.E.2d at 730. "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." Blumenthal Mills, 365 S.C. at 220, 616 S.E.2d at 730. "Rather the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. "[I]n 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-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "A scintilla of evidence is *any material* evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." Taylor v. Railway Co., 78 S.C. 552, 556, 59 S.E. 641, 643 (1907). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Blumenthal Mills, 365 S.C. at 220, 616 S.E.2d at 730.

ARGUMENT

Because the lack of a writing bars any contract under the Statute of Frauds and because the evidence unequivocally demonstrates that there was no meeting of the minds between the parties on all material terms of the Proposed Project, the trial court properly granted summary judgment on Fokas' claims. Fokas alleges that the parties orally agreed to build the new building above the existing rental suites with the sole contingency being securing financing for the Proposed Project. As part of the alleged oral agreement, Fokas alleges that the Ferderigos Brothers verbally agreed to mortgage their individual interests in the Property to secure Fokas' and Jacob's share of the constructions costs for the Proposed Project, as well as for the Ferderigos Brothers to enter into numerous other contractual obligations and agreements. (R. pp. 884, 923). Fokas further alleges that he spent approximately Forty-Five Thousand Dollars ($45,000.00) 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 contrast, the Ferderigos Brothers deny that there was ever even an oral agreement between the parties on the essential elements and material terms, as numerous material terms were either unknown or disputed and still being negotiated between the parties when they reached an impasse.

The trial court properly found there was no evidence to show a meeting of the minds on all the Proposed Project's material terms, including, among others, the final cost which was not even known at the time negotiations reached an impasse, loan term and interest rate, and the parties to the promissory note. Further, the trial court properly found the Statute of Frauds required Fokas' alleged agreement regarding the mortgage on the Property to be in writing and the absence of such a writing barred his claims. Additionally, the trial court properly found the

partial performance exception to the Statute of Frauds did not apply because the expenditures made by the parties on the Proposed Project did not clearly and unequivocally show an oral agreement to mortgage the Property. Rather, these expenditures were necessitated by the parties' exploration into the feasibility of the Proposed Project. In other words, the expenditures were not exclusive of any other relation between parties touching such agreement, since the expenditures were equally consistent with the parties exploring the feasibility and desirability of the Proposed Project as with their having reached agreement on all of its material terms. For these reasons, and as more fully argued below, the trial court properly granted summary judgment on Fokas' claims.

I. THE TRIAL COURT PROPERLY FOUND THERE WAS NO ENFORCEABLE AGREEMENT BECAUSE THERE WAS NO EVIDENCE TO SUPPORT A MEETING OF THE MINDS BETWEEN THE PARTIES AS TO ALL THE MATERIAL AND ESSENTIAL TERMS OF THE ALLEGED AGREEMENT FOR THE PROPOSED PROJECT.

The trial court properly granted summary judgment on Fokas' breach of contract claims because there was no evidence that the parties discussed all the material terms, let alone reached an agreement on them, for the Proposed Project. Rather, the undisputed facts showed there was never an agreement between Fokas and the Ferderigos Brothers on numerous material terms related to the Proposed Project, and, as a result, the trial court properly found there was no contract as a matter of law. To recover for a breach of contract, a 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 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). Before a plaintiff can recover for a breach of contract, he must first demonstrate a contract existed. See also Tidewater Supply Co. v. Industrial Elec. Co., 253 S.C.

483, 485, 171 S.E.2d 607, 608 (1969) (action for damages for breach of contract is predicated on existence of contract). 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, 578, 762 S.E.2d 696, 701 (2014) (citing Capital City Garage & Tire Co. v. Elec. Storage Battery Co., 113 S.C. 352, 362, 101 S.E. 838, 841 (1920)).

To constitute a valid and binding contract, it is essential all parties assent to the same thing in the same sense. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894-95 (1989). "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". Id. "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." Stevens and Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578-79, 762 S.E.2d 696, 701 (2014) (citing Aperm of S.C. v. Roof, 290 S.C. 442, 351 S.E.2d 171 (Ct. App. 1986)); see also id. at 579, 762 S.E.2d at 701 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. citing 1 Corbin on Contracts § 2.8 ("Even if an intention to be bound is manifested by both parties, too much indefiniteness may invalidate the agreement, because of the difficulty of administering the agreement."); id. at 582, 762 S.E.2d at 703 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. Player, 299 S.C. at 105, 382 S.E.2d at 894 (citing McClintock v. Skelly Oil Co., 114 S.W.2d 181 (Mo. App. 1938)).

The only evidence put forth in this case demonstrates that the parties never knew or agreed upon material terms required to create an enforceable, binding contract for the Proposed Project. These material terms included the final cost for the Proposed Project and loan terms required by the bank, including the loan's interest rate and term, the inclusion of the LLC as a borrower, and other material terms. For the reasons more fully set forth below, the trial court correctly found no genuine issue of material fact exists as to the establishment of a contract 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 alleged by Fokas.

A. The parties did not know the final cost of the Proposed Project, and even to this date, the full cost for the Proposed Project is not yet known.

First and foremost, the parties never had a final cost for the Proposed Project, and with this material term being unknown, it was impossible for the parties to have an agreement on the Proposed Project. "Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty." McPeters v. Yeargin Const. Co., Inc., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986); see also Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 434, 322 S.E.2d 474, 477 (Ct. App. 1984) (noting price is an essential term in a

construction contract). Even if the parties intend to be bound by an agreement, the absence of material terms renders the agreement unenforceable. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 579, 762 S.E.2d 696, 701 (2014). Because the parties never determined the final cost for construction and furnishing the Proposed Project, there could be no enforceable contract between Fokas and the Ferderigos Brothers.

The SouthCoast loan commitment letter and the standard agreement between owner and contractor prove there was no meeting of the minds and no agreement as to the final cost of the Proposed Project. The SouthCoast loan commitment letter dated September 24, 2014, set forth that total cost for the Proposed Project, including the furnishings for the units, which Fokas testified was approximately Two Hundred Twenty-Five Thousand Dollars ($225,000.00), would be One Million Eight Hundred Thousand Dollars ($1,800,000.00). (Answer & Counterclaim of Spiros, Exh. G; Athan Depo., pgs. 124-126). However, the standard contractor agreement dated October 15, 2014, set forth a construction price of One Million Seven Hundred Twenty-Eight Thousand Nine Hundred Dollars ($1,728,900.00). (R. pp. 196-201). Based on this construction cost and this loan amount, there would only be approximately Seventy Thousand Dollars ($70,000.00) remaining for furnishings, even though Fokas testified the furnishings would cost Two Hundred Twenty-Five Thousand Dollars ($225,000.00). There is no evidence to suggest there was any agreement between Fokas and the Ferderigos Brothers related to this One Hundred Fifty-Five Thousand Dollar ($155,000.00) shortfall for furnishings.

While Fokas argues in his Brief the SouthCoast commitment letter terms reflected the parties' agreement, he then contradicts himself and argues the cost of furnishings had nothing to do with the Proposed Project and were not part of the alleged agreement. Unfortunately for Fokas, he ignores the fact the SouthCoast commitment letter required the amount to be spent on

furnishings be paid from the loan. If the furnishings cost Two Hundred Twenty-Five Thousand Dollars ($225,000.00), as Fokas testified, then the construction cost for the Proposed Project could not exceed One Million Five Hundred Sixty Thousand Dollars ($1,560,000.00). When questioned in his deposition, Fokas admitted he could not explain these discrepancies. (R. p. 906). Therefore, Fokas disproves his own argument, and he continues to be unable to even tell the court what the alleged agreement was as far as final cost.

Additionally, Fokas conceded that, up to the time of his deposition, the sprinkler system price had not yet been determined and could cost anywhere between Ten Thousand Dollars ($10,000.00) and One Hundred Thousand Dollars ($100,000.00). (R. pp. 895, 905-906, 952). Fokas testified the City required the rental suites include a sprinkler system. He further testified SouthCoast loan commitment letter required the sprinkler system to be paid from the total loan. The construction cost of One Million Seven Hundred Twenty-Eight Thousand Nine Hundred Dollars ($1,728,900.00) set forth in the contractor agreement did not include the sprinkler system. Under the contractor agreement signed by Fokas, if the sprinkler system cost an additional One Hundred Thousand Dollars ($100,000.00) and furnishings cost an additional Two Hundred Twenty-Five Thousand Dollars ($225,000.00), each Ferderigos Brother could be responsible for an additional Forty Thousand to Fifty Thousand Dollars ($40,000.00 to $50,000.00). This is a significant potential increase, especially considering the Proposed Project's cost had already doubled from approximately Nine Hundred Thousand Dollars ($900,000.00) to One Million Eight Hundred Thousand Dollars ($1,800,000.00).

Finally, on January 9, 2014, Phillip informed Fokas there were additional requirements to insure the construction of the Proposed Project such as the builder having at least a One Million Dollar ($1,000,000.00) commercial general liability or "builder's risk" insurance policy, a

performance bond, a payment bond to protect against unpaid subcontractor liens, and an architect to have "contract and administration/supervisory responsibilities". (R. pp. 1062-1063; R. p. 902). In his Brief, Fokas conceded the additional construction requirements, which in and of themselves can cost hundreds of thousands of dollars, were also material terms to the alleged agreement. (App. Brief, pg. 8). Phillip stated, "These items were necessary to protect our investment and, if we can't get them, we need to talk about it." (R. pp. 1062-1063). However, as to these material terms -- the cost of these items, the specific terms of any of these future agreements -- none of these items were even negotiated, much less agreed upon. These were material terms that were still in the early stages of being negotiated when the parties reached an impasse in negotiations. Fokas testified he did not know or was not sure whether or not these terms were satisfied much less ever agreed to by the Ferderigos Brothers. (R. p. 902). In fact, these material terms were not addressed or "taken care of" or "answered satisfactorily" to the Ferderigos Brothers' satisfaction. Indeed, the contract Fokas signed unilaterally with the contractor and the SouthCoast commitment letter do not even address all of these five material terms which had yet to be negotiated. There is no evidence these additional material items required by Phillip for the Proposed Project were ever even priced out or contracted for. These items also would have needed to be paid from the loan. Just as with the furnishings and the sprinkler system, there was no evidence these necessary items were counted in the final construction cost, and as a result, the final construction cost remains unknown even to this date.[13] Accordingly, because there was no meeting of the minds between Fokas and the Ferderigos

[13] On page 14 of his Brief, Fokas mentions "the essential elements of a contract for construction are typically described as: the price, the method and schedule of payment and the scope of work to be done." Here, the contract for construction is merely one part of the numerous alleged contracts Fokas alleges the Ferderigos Brothers orally agreed to, and as shown above, the contractor agreement is not consistent with the terms of the SouthCoast loan commitment letter and Fokas' testimony in terms of total construction cost.

Brothers concerning the Proposed Project's final cost, a material term to the agreement alleged by Fokas, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers at any time during negotiations and granted summary judgment as to Fokas' breach of contract claims.

B. Fokas misunderstood and misrepresented the loan's interest rate and term.

When the Proposed Project's cost doubled around September 2014, during the Phase I negotiations, the evidence showed Fokas misunderstood and misrepresented the terms on which his and Jacob's share of the Proposed Project would be financed. On September 19, 2014, long after Fokas received the first SouthCoast commitment letter, and again on September 24, 2014, after receiving the revised SouthCoast commitment letter, he enthusiastically informed the Ferderigos Brothers he had a twenty (20) year loan at a fixed five percent (5%) interest rate. (R. pp. 106-108). Fokas told the Ferderigos Brothers he was sure the loan was for five percent (5%) fixed for twenty years and later told the Ferderigos Brothers he even "sweet talk[ed]" the bank into getting rid of the balloon payments. (R. pp. 106-108).

Fokas misrepresented the terms of the proposed loan, as demonstrated by the SouthCoast loan commitment letter itself[14], as well as the testimony of Fokas' banker. (R. pp. 106-108; R. pp. 1379-1383). As late as February 9, 2017, at Fokas' deposition, Fokas repeatedly testified the Ferderigos Brothers had orally agreed to, and Fokas had received from his bank, a twenty (20) year term loan with a fixed five percent (5%) interest rate for loan term.[15] (R. pp. 884, 885, 887, 897-898, 905, 907, 908-909, 918, 938, 943, 954, 956). In fact, Fokas testified the Ferderigos

[14]Although Fokas asserts Phillip and Spiros knew or should have known the SouthCoast loan commitment letter terms, the written correspondence between the parties reflects they did not even receive a copy of the SouthCoast loan commitment letter *until* late September 2014. Further, Phillip and Spiros were not to be parties to the SouthCoast loan, and they were not expected to, nor did they, sign the SouthCoast loan commitment letter.

[15] Fokas testified Phillip and Spiros agreed to these loan terms as far back as 2012. (R. pp. 1361-1378). Again, Fokas never received such a loan offer.

Brothers orally agreed to mortgage their interests in the Property if Fokas received a fixed five percent (5%) loan for twenty (20) years. (R. pp. 1338-1340; R. pp. 1361-1378). Fokas never actually received such a loan offer, however. Fokas actually had only been offered a six (6) year loan amortized over twenty (20) years with a balloon payment at the end and the hope of being able to refinance prior to the balloon payment. (R. pp. 1361-1378; R. pp. 1379-1383; R. pp. 100-103).

Essentially, Fokas argues that his misunderstanding of the loan terms does not matter because Phillip and Spiros had a copy of the loan commitment letter from February 2013 and never objected to its terms. Fokas offers no evidence to support his assertion. As discussed above, there was no evidence Fokas, SouthCoast, or anyone else provided the initial SouthCoast loan commitment to Phillip or Spiros prior to September 2014. Fokas testified he had no evidence to support this assertion and even testified he personally "may not have provided it" but that Jacob may have. (R. p. 904). The bankers at SouthCoast also testified they did not provide a copy of the commitment letter to Phillip or Spiros. (R. pp. 1012-1013; R. pp. 1020-1022). Fokas offered no evidence to the trial court to support his assertion Phillip and Spiros had the loan commitment letter prior to September 2014. Because there was no evidence to support the assertion Phillip or Spiros received the loan commitment prior to September 2014, Fokas' misunderstanding and subsequent misrepresentation of the loan terms to Phillip and Spiros demonstrated the lack of any meeting of the minds with regard to the parties' terms upon which the Proposed Project would move forward.

There could be no meeting of the minds between Fokas and the Ferderigos Brothers when Fokas himself misunderstood the terms of his and Jacob's personal loan. Fokas compounded this issue when he misrepresented the loan offer and terms he believed he received from SouthCoast

bank to the Ferderigos Brothers, who proceeded forward with their investigation into the Proposed Project during the Phase I negotiations under this misrepresentation. Because Fokas did not have the loan offer on the terms he claimed to have, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers during the Phase I negotiations.

C. The closing documents for Fokas' and Jacob's personal loan required the LLC be a borrower on the loan, something Phillip and Spiros never agreed to.

Fokas put forth no evidence the parties agreed to list Old Towne Suites, LLC, as a borrower on the SouthCoast loan, which would make the LLC a liable party in the event of default on the loan. It is undisputed the LLC did not own the Property. Rather, Fokas and the Ferderigos Brothers owned the Property as tenants in common. Fokas also testified he and the Ferderigos Brothers investigated the Proposed Project in their capacity as owners of the Property as tenants in common. (R. p. 917). They were not investigating the Proposed Project as members of the LLC or through the LLC. In fact, Fokas admitted the LLC took no formal action or vote concerning the Proposed Project or the SouthCoast loan commitment letter. (R. p. 917). Fokas also testified he did not remember any conversation wherein Phillip and Spiros agreed to sign to any documents related to the LLC's proposed involvement in the SouthCoast loan. (R. pp. 1331-1334).

Until mid-October 2014, Phillip and Spiros believed Fokas was seeking a loan wherein Fokas and Jacob were to mortgage only their own portion of the Property as well as encumber only their own interests in the LLC. This is permissible under South Carolina tenants in common law. Phillip and Spiros did not know SouthCoast identified the LLC as a borrower and certainly never agreed to the LLC being a borrower on the loan. At the hearing on the motion for summary judgment, Fokas' counsel argued the LLC was always supposed to be on the note even though

Fokas testified he and the Ferderigos Brothers investigated the Proposed Project as owners of the Property, not as LLC members.

Additionally, Fokas again argues that Phillip and Spiros had a copy of the loan commitment letter from February 2013 and never objected to its terms, including the inclusion of the LLC as a borrower. Despite his bald assertion Phillip and Spiros received a copy of the loan commitment letter early during negotiations, Fokas offers no evidence to support his assertion. As discussed above, there was no evidence Fokas, SouthCoast, or anyone else provided the initial SouthCoast loan commitment to Phillip or Spiros prior to September 2014. (R. p. 904; R. pp. 1012-1013; R. pp. 1020-1022). Fokas offered no evidence to the trial court to support his assertion Phillip and Spiros had the loan commitment letter prior to September 2014. Because there was no evidence Phillip and Spiros, as members of the LLC, agreed or authorized the LLC to serve as a borrower for the SouthCoast loan, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers during the Phase I negotiations.

D. Because the closing documents required the LLC be identified as a borrower on the loan, any default on the loan exposed Phillip and Spiros to possible personal liability, a term they expressly rejected from the beginning of negotiations.

Fokas conceded Phillip and Spiros Ferderigos never agreed to personally guarantee "anything" for the Proposed Project. (R. p. 67, ¶ 77; R. p. 97; R. pp. 882, 936, 1331-1334). Fokas also testified he did not remember any conversation wherein Phillip and Spiros agreed to sign to any documents related to the LLC's proposed involvement in the SouthCoast loan. (R. pp. 1331-1334). Fokas testified the issue of personal guarantees was important to Phillip and Spiros and further the issue of risk was an important consideration for all parties. (R. p. 936).

While the loan's incorrect closing documents did not require Phillip and Spiros to be personal guarantors, they exposed Phillip and Spiros to personal liability. The closing attorney

wrote in an e-mail that "[n]othing in the documents I have makes you personally liable for the debt ... assuming the LLC corporate veil could not be pierced for some reason."[16] (R. pp. 172-173). By requiring the LLC to be a borrower on the loan, the LLC became a liable party for the loan balance in the event of default by Fokas and/or Jacob. If the corporate veil for the LLC, which simply distributed the profits from the rental suites to the tenants in common, could be pierced, then Phillip and Spiros faced personal exposure in the event of default by Fokas and/or Jacob. Therefore, the requirement to have the LLC as a borrower on the note or signing the HUD statement personally potentially exposed Phillip and Spiros to personal liability on that note, which Fokas conceded was never part of the alleged oral agreement. Because there was no meeting of the minds on this material term regarding the exposure to personal liability on the loan due to the LLC's identification as a borrower, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers at any time during negotiations.

E. Phillip and Spiros never agreed to execute a hypothecation agreement or an assignment of rents.

Fokas conceded he and the Ferderigos Brothers did not receive the hypothecation agreement or assignment of rents until the day of or the day before closing, and, as a result, it was impossible for the parties to have an agreement on the terms for the Proposed Project prior to this date. On November 21, 2014, even SouthCoast's closing counsel did not know if Fokas and the Ferderigos Brothers were required to sign a hypothecation agreement. (R. p. 1310). In fact, Fokas was not even aware the closing documents would require the parties to sign a hypothecation agreement until the parties received the closing documents and Phillip informed

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

him the closing documents required Phillip and Spiros to sign such an agreement. (R. p. 947). In this case, the hypothecation agreement required Phillip and Spiros to pledge the Property as collateral but did not require any payment by them. (R. pp. 118-171). However, contrary to Fokas' assertions, the hypothecation agreement did more than just pledge the Property by way of mortgage to secure the loan. The hypothecation agreement further authorized proceeds earned from the Property be delivered to SouthCoast as determined in its discretion from time to time. (R. pp. 118-171).

Similarly, SouthCoast required Fokas and the Ferderigos Brothers to assign any and all rents from the Property to secure the payment of Fokas' and Jacob's loan. (R. pp. 118-171). The assignment of rents and hypothecation agreement prepared by SouthCoast applied to all rents earned from the Property, including the rents from the first floor which Old Towne Restaurant paid to Fokas and the Ferderigos Brothers and the second and third floors which were already luxury rental units. (R. p. 118-171). Nothing in the assignment of rents limited the assignment of rents to the new rental units, but, instead, the assignment of rents applied to all rent earned from the Property.

The written correspondence between the parties sets forth that Phillip and Spiros never agreed to and specifically rejected executing any such agreements. (R. p. 1316). Further, Fokas testified he and the Ferderigos Brothers agreed the first floor rent was not part of any assignment of rents for the Proposed Project. (R. pp. 1318-1319). Pursuant to Fokas' own testimony, no party ever agreed to such material terms. In other words, Fokas testified neither he nor Jacob, Phillip, and Spiros ever agreed for the rent from Old Towne Restaurant (the first floor of the Property) to be assigned to SouthCoast in order to secure Fokas' and Jacob's loan. He unequivocally testified that there was never any such agreement between the parties. However,

SouthCoast's assignment of rents and hypothecation agreement are contrary to this testimony. They clearly set forth that the assignment of rents and the proceeds from the Property would be for the entire Property, including the first floor rents.[17] Because there was no meeting of the minds on this material term regarding the assignment of rents and hypothecation pledge of proceeds from the Property, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers at any time during negotiations.

F. Fokas admitted there was no agreement or even negotiation as to numerous other material terms.

Further, in his deposition testimony, Fokas conceded he never told Phillip or Spiros, much less negotiated or reached an agreement, about the numerous agreements his bank would require Phillip or Spiros to execute. From the closing, these documents included 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. (R. p. 948). Additionally, there were requirements for the Proposed Project such as the builder having at least a One Million Dollar ($1,000,000.00) commercial general liability or "builder's risk" insurance policy, a performance bond, a payment bond to protect against unpaid subcontractor liens, and an architect to have "contract and administration/supervisory responsibilities," all of which needed to be negotiated and were never agreed to.[18]

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[17] As such, here is another example where Fokas believed the SouthCoast loan commitment offered one thing but, in reality, offered something entirely different. Previously, Fokas believed the SouthCoast loan commitment offered a twenty (20) year loan at five percent (5%) interest fixed. In this instance, Fokas believed the pledge of assets and assignment of rents did not apply to the first floor rent paid by Old Towne Restaurant, but in reality, both the hypothecation agreement and assignment of rents applied to the entire Property, including the first floor.

[18] Fokas referred to these items as "stupid details" during Phase II negotiations with the Ferderigos Brothers. (R. p. 1322). In fact, Fokas told the Ferderigos Brothers to worry about the big picture and "forget about stupid details"

With regard to the closing documents, Fokas attempts to sidestep such a fatal flaw by incorrectly asserting he gave Phillip and Spiros the SouthCoast loan commitment letter in 2013 and they "should have known" about the loan requirements. Fokas further argues the Ferderigos Brothers agreed to all of its terms because they did not "object" to them at that time. However, as shown in the written record and as more fully discussed above, such assertions are erroneous. No evidence exists that Fokas provided the commitment letter to Phillip or Spiros in 2013, and Fokas even testified he may not have provided the loan commitment letter to them at that time. Rather, the written evidence in the record reveals Fokas sent Spiros the revised loan commitment letter on September 24, 2014, the same time Phillip received the loan commitment letter for the first time.

Additionally, the loan commitment letter did not mention each of these documents, let alone include drafts of these proposed documents for Phillip and Spiros to review and approve. Therefore, even if Fokas provided the loan commitment letter to Phillip and Spiros in 2013, any silence by Phillip and Spiros as to the loan commitment letter would not constitute approval or agreement to the terms. The record disproves Fokas' false narrative that Phillip and Spiros somehow tacitly agreed to these additional closing documents that they did not even receive until late November 2014, the day before the second closing Fokas scheduled.

In his Brief, Fokas conceded that the additional requirements, which in and of themselves can cost hundreds of thousands of dollars, were also material terms to the alleged agreement. (App. Brief, pg. 8). Pursuant to Phillip's email dated January 9, 2014, "These items were necessary to protect our investment and, if we can't get them, we need to talk about it." (R. pp. 1062-1063; R. p. 902). However, as to these material terms -- the cost of these items, the specific

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that carry no weight. However, as demonstrated above, these documents and requirements are material to the terms for the Proposed Project and were still being negotiated when the parties reached an impasse. These material terms carried with them possible personal liability exposure and increased costs to the Proposed Project.

terms of any of these future agreements -- none were even negotiated, much less agreed upon. These were material terms that were still in the early stages of being negotiated when the parties reached an impasse in negotiations. Fokas testified he did not know or was not sure whether or not these terms were satisfied much less ever agreed to by the Ferderigos Brothers. (R. p. 902). In fact, these material terms were not addressed or "taken care of" or "answered satisfactorily" to the Ferderigos Brothers' satisfaction. Indeed, the contract Fokas signed unilaterally with the contractor and the SouthCoast commitment letter did not even address all of these five material terms. Further, the record was devoid of the Ferderigos Brothers ever speaking with or communicating with the contractor or the bank or the architect on these issues. The parties had simply not gotten that far in negotiations when the parties reached an impasse. Because there was no meeting of the minds on numerous material terms contained in the closing documents which were first raised in the days leading up to the second closing, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers at any time during negotiations.

G. Fokas did not provide a copy of the agreement with the contractor to Phillip or Spiros and signed the agreement solely on his own behalf.

Because the Ferderigos Brothers never received a copy of the agreement with the contractor to build the Proposed Project and never executed it, there was no evidence to show they agreed to the terms for the construction of the Proposed Project. Fokas conceded he did not know if he ever even showed the agreement with the contractor for the Proposed Contract to the Ferderigos Brothers before he unilaterally signed it. (R. p. 1320). Also, no evidence in the record shows Fokas ever provided the agreement to any of the Ferderigos Brothers at any time.[19] In fact,

[19] There is no evidence in the record Fokas ever provided the contractor agreement he unilaterally signed to any of the Ferderigos Brothers. Fokas misstates the record by alleging Jacob responded by saying "Awesome" to Fokas executing an agreement with the contractor. Appellant's Brief, pg. 8. However, Jacob responded to a text message

the Ferderigos Brothers first received a copy of the agreement with the contractor through discovery, at which time they discovered Fokas signed the agreement without their authorization.

Further, Fokas did not even purport to sign the agreement for the Proposed Project on behalf of the LLC let alone on behalf of Phillip or Spiros. (R. pp. 196-201). Contrary to the assertions in Fokas' Brief, Fokas testified he did not receive authorization from Spiros to execute the contractor agreement. (R. p. 892). In fact, none of the Ferderigos Brothers signed the agreement. (R. pp. 196-201). Rather, Fokas signed the agreement himself. The record demonstrated the Ferderigos Brothers did not know about, let alone ever agree to be bound by, any such contract to build the Proposed Project as was evidenced by the fact they never signed any such contract. Because there was no meeting of the minds on the agreement with the contractor for the Proposed Project, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers at any time during negotiations.

H. Fokas never agreed to and never executed the proposed ancillary/side agreement required by Phillip and Spiros in order to mortgage their interests in the Property.

Just as the trial court found there was no evidence to support an agreement between the parties during Phase I negotiations, there was no evidence to show an agreement during Phase II negotiations. Phase I negotiations concluded when Fokas demanded Phillip and Spiros mortgage their interests in the Property in order to secure the SouthCoast loan to Fokas and Jacob. Even though Phillip and Spiros initially rejected this demand, after a lengthy discussion among the Ferderigos Brothers, Phillip and Spiros decided they would agree to mortgage their interests in

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from Fokas with a picture of the permit approval that said, "We got our permit. Can start building immediately." Jacob's response related to the approval of the permit for the Proposed Project, not any contract which Fokas never provided to him. Likewise, Fokas admitted that he did not recall if he ever provided the contractor agreement to Phillip or Spiros. (R. p. 1320).

the Property to secure Fokas' and Jacob's loan on several conditions.[20] To memorialize these conditions, Phillip and Spiros drafted an ancillary/side agreement and provided a copy to Fokas for consideration.

Initially, Fokas alleged in his Complaint that he agreed to sign the Ferderigos Brothers' proposed ancillary/side agreement. (R. p. 52, ¶ 20). However, during his deposition, Fokas testified in all manners, at one time testifying he agreed to the side agreement, at another time testifying he never agreed to any side agreement, and at yet another time testifying he did not know if he agreed to the side agreement. (R. pp. 1324-1326).

At the hearing and on appeal, contrary to Fokas' pleadings and his sworn testimony, Fokas' counsel argues that he had not agreed to the ancillary/side agreement. Accordingly, based on Fokas' inconsistent pleadings, testimony and arguments, Fokas apparently had no idea whether or not he ever agreed to such material term during the Phase II negotiations. However, no executed copy of the side agreement was ever produced, and the written record demonstrated Fokas rejected the side agreement. (R. pp. 71-72, ¶ 98; R. pp. 112-117). Therefore, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers during Phase II negotiations.

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[20] In Appellant's Brief, Fokas repeatedly conflates Phase I negotiations and Phase II negotiations when he offers evidence from Phase II to support his allegations there was an agreement during Phase I. For example, Fokas partially cited an e-mail from Spiros dated November 21, 2014, which stated, "Again, I was always told that only you and Jacob would have to sign the note and Phillip and I only having to mortgage our physical property interests in 229 King Street." Appellant's Brief, pg. 10. Fokas improperly argues this e-mail definitively proved Phillip and Spiros agreed in Phase I to provide a mortgage to secure Fokas' and Jacob's loan. Fokas fails to include portions of Spiros' e-mail where he stated "Two days before our original closing date (for which I had something like 3 days notice), I found out for the first time that I would need to put up my physical property interest in 229 King Street as collateral for the loan." (R. pp. 1089-1090). Spiros further stated he would consider mortgaging his interests in the Property "as long as [he] was satisfied with assurances to protect my property interests." (R. pp. 1089-1090). When read in its entirety, the e-mail offers no evidence to support Fokas' allegation that Phillip and Spiros ever agreed to mortgage their interests in the Property prior to Phase II negotiations and without Fokas' agreement to a side agreement.

I. Fokas admitted there was never a binding agreement.

Finally, also demonstrating the absence of a meeting of the minds or intent to form a binding contract, Fokas' 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. Fokas repeatedly purported to release the Ferderigos Brothers from any alleged binding oral agreement he claimed the parties reached regarding the Proposed Project. (R. pp. 186-192). In these e-mails and text messages from October 21, 2014, through November 24, 2014, Fokas told the Ferderigos Brothers to keep him in the loop "if and when" they were ready to complete the Proposed Project, asked if the parties were moving forward or simply forgetting about the Proposed Project, informed the Ferderigos Brothers he could not "care less" if the Proposed Project moved forward, and offered to reverse as much as he could and write off the rest as a "stupid transaction dealing with the Ferderigos Family." On December 15, 2014, Fokas even wrote to the Ferderigos Brothers they could "discuss all options when we meet and hopefully come to a mutual agreement." Implicit in these text messages and e-mails from Fokas was the fact there were material terms that needed to be discussed, negotiated, and agreed upon. These text messages and e-mails show there was never a binding agreement between the parties as negotiations remained ongoing and Fokas or the Ferderigos Brothers could "walk away" from the negotiations at any time. Because Fokas' own written communications throughout the negotiations showed there was no meeting of the minds on numerous material terms, the trial court properly found there was no enforceable contract between Fokas and the Ferderigos Brothers at any time during negotiations.

II. THE TRIAL COURT PROPERLY HELD THE STATUTE OF FRAUDS BARRED FOKAS' CLAIMS GIVEN THERE WAS NO WRITING BETWEEN THE PARTIES WHEREIN THEY AGREED TO MORTGAGE THEIR INTERESTS IN THE PROPERTY.

The trial court properly held the Statute of Frauds applied to the alleged oral agreement between the parties to mortgage their respective interests in the Property and the lack of a writing barred Fokas' breach of contract claims when the parties' part performance was not clearly and unequivocally exclusive of the parties' other relationships and did not clearly and unequivocally relate to the alleged oral agreement to mortgage the Property. Pursuant to the Statute of Frauds, "[u]nless the agreement upon which an 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", no action shall be brought whereby:

> (4) To charge any person upon any contract or sale of land, tenements or hereditaments or any interest in or concerning them; or
>
> (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof.

See S.C. Code Ann. § 32-3-10 (1976). 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.; Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 895 (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, 847-49 (1940). Failure to put such a contract in writing renders it void. Player, 299 S.C. at 105, 382 S.E.2d at 895; S.C. Code Ann. § 27-35-20 (1976)[21]. Thus, by

[21] 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."

virtue of the Statute of Frauds, certain contracts must be in writing to be enforceable. 30 S.C. Juris Contracts § 16; Player, 299 S.C. at 105, 382 S.E.2d at 895.

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, 484, 220 S.E.2d 121, 122 (1975) (emphasis added). 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, 299 S.C. at 1016, 382 S.E.2d at 895 (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, 265 S.C. at 484, 220 S.E.2d at 122. 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, 265 S.C. at 484, 220 S.E.2d at 122. 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, 382 S.E.2d at 895 (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).

A. The Statute of Frauds applies to the alleged agreement between Fokas and the Ferderigos Brothers, and there was no written agreement wherein Phillip and Spiros agreed to mortgage their interests in the Property.

Fokas conceded the alleged agreements with the Ferderigos Brothers related to the Proposed Project were oral, not in writing. (R. pp. 1338-1340). As the trial court properly held, in South Carolina, the Statute of Frauds applies to Fokas' claims of an alleged oral agreement because the alleged oral agreement requiring Phillip and Spiros to mortgage their interests in the Property to secure Fokas' and Jacob's loan contemplated the transfer of title, ownership, or possession of land and certainly concerned them. See S.C. Code Ann. § 32-3-10 (1976). Additionally, the Statute of Frauds applies to Fokas' claims of an alleged oral agreement because the terms of the alleged oral agreement could not be completed in one year. See S.C. Code Ann. § 32-3-10 (1976). Contrary to Fokas's arguments, the Statute of Frauds applies to a five (5) year or six (6) year or twenty (20) year loan obligation secured by a mortgage and any contract to build a new building on real property where the contract itself, pursuant to its own terms, exceeded a one (1) year time period to complete.

Here, where Fokas alleges Phillip and Spiros agreed to mortgage their interests in the Property to secure Fokas' and Jacob's loan for the Proposed Project, that agreement certainly contemplated the possible transfer of title, ownership, or possession or an interest in land. Black's defines a mortgage as a "conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms" or as a "lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms." Mortgage, Black's Law Dictionary (10th Ed. 2014). In other words, a mortgage is an encumbrance or a lien on property which provides a legal right or

interest to a creditor in the property until the debt secured by it is satisfied. See Encumbrance, Black's Law Dictionary (10th Ed. 2014); see also Lien, Black's Law Dictionary (10th Ed. 2014). "[A]ccording to the common law, a mortgage was a 'conveyance of an estate by way of pledge for the security of a debt, and to become void upon the payment of it.'" Johnson v. Johnson, 27 S.C. 309, 315, 3 S.E. 606, 609 (1887). In the event payments are not timely made on the loan or any other event of default under the terms of the loan, the bank, by reason of the mortgage on the Property, would have a right to foreclose on the Property. Even Fokas admitted the same in his deposition. (Athan Depo., pgs. 179-80). Absent a mortgage, the bank would have no right to foreclose on the Property in the event of default on the loan. It is the mortgage that grants the bank this right to foreclosure on the Property. In Charleston County, mortgages on real property are filed with the Register of Deeds and available for others to search in order for potential purchasers or lenders to determine who has an interest in or lien on real property. While Fokas does not dispute that a mortgage is subject to the Statute of Frauds, he argues an agreement to provide a mortgage is not subject to the Statute of Frauds. This is a difference without a distinction because the purported agreement contemplated the transfer of Phillip's and Spiros' interest in the Property and provided a right to foreclosure on the Property, including on Phillip's and Spiros' interests, that the bank would not have absent the mortgage.

In addition, the alleged agreement was one that was not to be performed in the space of one year from the making thereof because it was a loan for a set term beyond one year. The SouthCoast loan was a six (6) year loan with a balloon payment at the end. Further, the Standard Agreement Between Owner and Contractor unilaterally signed by Fokas sets forth a commencement date of January 3, 2014, and substantial completion date of December 31, 2015. The construction agreement demonstrated the proposed construction could not be completed

within one (1) year. For these reasons, the trial court properly held the Statute of Frauds applied to the alleged oral agreement between Fokas and the Ferderigos Brothers, and, absent an exception, the lack of a writing barred Fokas' breach of contract claims.

B. The part performance exception to the Statue of Frauds does not apply to this case because the alleged part performance did not clearly and unequivocally relate to the alleged oral agreement to mortgage the Property.

Further, the trial court correctly held the part performance exception to the Statute of Frauds, as argued by Fokas, did not apply in this case because the expenditures for the Proposed Project did not relate clearly and unequivocally to the oral agreement alleged by Fokas, exclusive of any other relation between the parties touching the agreement. See, e.g., Aust v. Beard, 230 S.C. 515, 96 S.E.2d 558 (1957). "Where a party seeks to rescue a parol agreement from the statute by showing possession and improvements put upon the land, he must show 'acts of performance or part performance by him which relate clearly and unequivocally to such agreement, exclusive of any other relation between the parties touching the said premises.'" Id. at 523, 96 S.E.2d at 562-63 (quoting Crawford v. Crawford, 77 S.C. 205, 57 S.E. 837, 839 (1907)). This principle can also be set forth as follows:

> Not every act of part performance will move a court of equity, though legal remedies are inadequate, to enforce an oral agreement affecting rights in land. There must be performance 'unequivocally referable' to the agreement, performance which alone and without the aid of words of promise is unintelligible or at least extraordinary unless as an incident of ownership, assured, if not existing.

Id. at 523, 96 S.E.2d at 563 (quoting Burns v. McCormick, 135 N.E. 273 (N.Y. 1922)). Further, when there is no writing, but part performance is alleged to remove an oral 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, 311, 683 S.E.2d 803, 812 (Ct. App. 2009).

By admission of Fokas in his Complaint, all expenditures and expenses for the proposed project went to exploring/investigating the possibility of the Proposed Project. (R. p. 53, ¶ 28; R. pp. 1341-1356). As evidenced by the numerous rejections by the City to the Proposed Project's plans, there were significant questions about the feasibility of the Proposed Project. At this time, Fokas and the Ferderigos Brothers did not know if the City would approve the Proposed Project's plans, and if the City did approve them, what the cost related to the Proposed Project would ultimately be. As the City repeatedly rejected the Proposed Project's plans, the cost for the Proposed Project increased from Nine Hundred Thousand Dollars ($900,000.00) to almost One Million Eight Hundred Thousand Dollars ($1,800,000.00). This represented a significant increase in Fokas' and the Ferderigos Brothers' share of the construction costs.[22]

While Fokas argued these expenditures represented part performance, the expenditures were not clearly and unequivocally related to Fokas' allegations that Phillip and Spiros orally agreed to mortgage their interests in the Property to Fokas to secure a loan for Fokas and Jacob, exclusive of any other relations of the parties touching the agreement. Fokas and the Ferderigos Brothers owned the Property, and when Fokas and the Ferderigos Brothers converted the second and third floors of the Property to rental units, they did not mortgage or encumber any assets to do so. They already received rental proceeds from the original rental units located on the Property and from Old Towne Restaurant for the first floor. Fokas and the Ferderigos Brothers were already in business to convert and rent property they owned. Their investigation into the feasibility of the Proposed Project was equally consistent with the parties' prior business

[22] Fokas seemingly argues the Ferderigos Brothers agreed to build the Proposed Project no matter the cost. Similar to his other claims, Fokas offered no evidence to support this contention.

relationship. Therefore, the part performance exception did not take the alleged oral agreement to mortgage their individual interests in the Property or to build the Proposed Project out of the Statute of Frauds.

The alleged oral agreement Fokas sought to enforce was one *both* to build the Proposed Project *and* for all parties to mortgage their interests in the Property to secure financing for Fokas' and Jacob's share of the Proposed Project's cost. The expenditures alleged by Fokas as part performance did not evidence any intent or agreement by Phillip and Spiros to mortgage their interests in the Property. Rather, the expenditures related to exploring the feasibility of the Proposed Project. (R. pp. 1341-1356). Indeed, these expenditures began before the negotiations over financing even began and long before the original 2013 SouthCoast commitment letter.[23] Fokas also admitted the expenses were for obtaining approvals to build the new building, not an alleged agreement for Phillip or Spiros to mortgage their interests in the Property to secure Fokas' and Jacob's loan or for any other alleged oral agreement. (R. pp. 1341-1356; R. pp. 1357-1360). For these reasons, the trial court properly found the expenditures argued by Fokas related to the Proposed Project did not constitute acts related clearly and unequivocally to the agreement, exclusive of any other relation between parties touching such agreement. Therefore, the part performance exception to the Statute of Frauds did not apply, and the Statute of Frauds barred Fokas' breach of contract claims.

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[23] On page 6 of his Brief, Fokas alleges that, after the issuance of the commitment letter, the parties began spending "substantial" sums to pay for detailed engineering, design and permitting work. However, the evidence in the record showed the parties started spending funds on the Proposed Project more than six (6) months before Fokas even received the SouthCoast commitment letter from his bank in February 2013. (R. pp. 92-93; R. p. 94). Moreover, each of the Ferderigos Brothers' portion of these total costs was less than Fifteen Thousand Dollars ($15,000.00). This represented a reasonable amount for exploring the possibility of doing a multi-million dollar proposed construction project. All such expenditures were for the investigation of the Proposed Project as Fokas alleged in his complaint and admitted in his testimony.

C. The part performance exception to the Statue of Frauds, which is based in equity, is not applicable because Fokas did not appeal the trial court's grant of summary judgment as to Fokas' specific performance cause of action.

Initially, the Ferderigos Brothers note Fokas did not argue against the trial court's finding that it would be inequitable to force the Ferderigos Brothers to complete the Proposed Project with Fokas. Fokas seemingly abandoned his claim for "specific performance" and argued only that the trial court incorrectly denied Fokas' right to have a jury determine the issue of damages. Appellant Brief, pg. 23. Fokas did not argue for specific performance or even mention the additional factors, set forth above, when a party seeks specific performance but there is no writing and part performance is alleged to remove an oral contract from the Statute of Frauds. See Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009) (holding 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).

By not arguing or briefing against the specific equitable finding of the trial court, Fokas abandoned his appeal as to specific performance and other statutory cause of actions. "An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."[24] Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993); see also Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). Further, a review of South Carolina case law applying the part performance exception reveals that it is an equitable exception to the Statute of Frauds and is only applicable to the equitable claim of specific performance, not a breach of contract/money damages claim. See Player v. Chandler, 299 S.C. 101, 105-06, 382 S.E.2d 891, 894 (1989); Aust v. Beard, 230 S.C. 515, 96

[24] Fokas also did not allege any arguments against the trial court's grant of summary judgment as to Fokas' claim for breach of fiduciary duty or violation of the LLC statute. As a result, Fokas abandoned his appeal with regard the trial court's ruling on this cause of action, as well.

S.E.2d 558 (1957); Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009). Accordingly, as a matter of law, because Fokas abandoned his equitable claims against the Ferderigos Brothers, the equitable exception to the Statute of Frauds is equally unavailable to Fokas in his action at law for money damages.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO JACOB FERDERIGOS BECAUSE THERE WAS NO EVIDENCE HE BREACHED ANY ALLEGED AGREEMENT WITH FOKAS.

The trial court correctly granted Jacob's Motion for Summary Judgment for all the same reasons set forth above related to the lack of existence of a contract and also because there is no evidence Jacob breached the contract, if one existed. First and foremost, the trial court properly granted summary judgment to Jacob because he could not breach a contract that did not exist, as more fully set forth above. Second, there was no evidence Jacob breached any contract, if one existed. In fact, in written communications, Fokas admitted Jacob did not breach any contract. On November 26, 2014, just two days after Fokas terminated negotiations regarding the Proposed Project, Fokas sent an e-mail that stated "[Jacob] is the only innocent one in this." (R. pp. 193-194). On April 24, 205, Fokas sent another e-mail to Jacob that stated "We figured out a way to keep you out of the lawsuit." (R. pp. 193-194). Fokas admitted Jacob did not breach any agreement, but he sued Jacob anyway. Fokas testified Jacob refused to enter into a new agreement with him to agree to honor the prior alleged agreement in the future in the event Phillip and Spiros either voluntarily or by court order moved forward with the Proposed Project. (R. p. 956). However, this represented a new demand placed upon Jacob by Fokas and went against Fokas' own written words during the negotiations of the prior alleged oral agreement. During those discussions, on November 24, 2014, Fokas admitted "I am interested in doing this deal now and will not do it later." (R. pp. 184-185). As such, Fokas sued Jacob for a breach of

contract claim based on grounds that Fokas himself refused/rejected and based on Jacob's refusal to enter into a new agreement that even Fokas refused to agree to. Accordingly, as there was no evidence that Jacob breached any agreement with Fokas, the trial court properly found no viable breach of contract claim exists against Jacob and granted summary judgment.

CONCLUSION

Based on the evidence and testimony in the Record, the trial court correctly found no genuine issue of material fact exists because there was no meeting of the minds between Fokas and the Ferderigos Brothers with regard to all material terms for the Proposed Project, and, therefore, no binding agreement existed between the parties. The trial court correctly found each one of the terms discussed above, in and of itself, was a material term to the alleged agreement between the parties and lack of evidence to show a meeting of the minds on any one term would defeat Fokas' claims for breach of contract or specific performance. This case illustrates why the Statute of Frauds requires such contracts be reduced to writing. Every material term was critical, and the complexities afforded too much opportunity for misunderstanding if all the material terms were not written out and finalized into a final agreement signed by all parties. The trial court correctly found numerous material terms were not even discussed, let alone agreed upon by Fokas and the Ferderigos Brothers. Additionally, other material terms, such as the total price for the Proposed Project, remained unknown at the conclusion of negotiations even after significant changes to the expected cost. Further still, Fokas misunderstood the terms for the loan for his and Jacob's shares of the Proposed Project's cost, and a meeting of the minds between Fokas and the Ferderigos Brothers on the loan terms would be impossible when Fokas himself did not understand the loan terms. Because these material terms were either unknown, misunderstood, or never agreed upon, Fokas' claims for breach of contract failed as a matter of law.

Further, the trial court correctly found Fokas' claims failed as a matter of law because the Statute of Frauds applies to the parties' alleged oral agreement and there was no writing clearly evidencing the parties' alleged agreement. The trial court properly found the Statute of Frauds applies to the oral agreement alleged by Fokas to build the Proposed Project and for all parties to

mortgage their interests in the Property to secure Fokas' and Jacob's financing for their share of the construction costs. The alleged oral agreement to mortgage their interests in the Property concerned the transfer of title, ownership, or interest in land because a mortgage encumbered the Property and provided the lender with the right to foreclose on the Property in the event of default. A lender would not have such rights without the mortgage. Also, the alleged oral agreement could not be completed within one year where the loan term was six (6) years and construction required almost two full years to complete.

The trial court also properly found the part performance exception to the Statute of Frauds did not save Fokas' claims. The evidence in the record showed only that the expenditures and expenses for the Proposed Project went to exploring/investigating the feasibility and possibility of the Proposed Project. Fokas and the Ferderigos Brothers did not know if the City would approve the Proposed Project's plans, and if the City did approve them, what the cost related to the Proposed Project would ultimately be, which impacted if the Proposed Project would move forward. The trial court properly found the expenditures did not clearly and unequivocally relate to the purported agreement to build the Proposed Project and secure any loan for Fokas and Jacob with mortgages from all parties on the Property exclusive of the other relationship between the parties. Fokas and the Ferderigos Brothers owned the Property, converted part of the Property to rental units, and already received rental proceeds from the original rental units located on the Property and from Old Towne Restaurant for the first floor all without providing a mortgage on the Property or for one another. Their investigation into the feasibility of the Proposed Project was equally consistent with the parties' prior business relationship. Therefore, the trial court properly found the part performance exception did not take

the alleged oral agreement to mortgage their individual interests in the Property or to build the Proposed Project out of the Statute of Frauds, which ultimately barred Fokas' claims.

With regard to Fokas' claim for specific performance, the trial court correctly found it would be inequitable to require the Ferderigos Brothers to specifically perform an alleged oral agreement upon material terms they never agreed to. Fokas abandoned his claim for "specific performance" and argued only that the trial court incorrectly denied Fokas' right to have a jury determine the issue of damages. Fokas also argued the part performance exception to the Statute of Fraud applied, which is an equitable exception. Because Fokas failed to argue this issue related to his claim for specific performance in his Brief, the trial court's grant of summary judgment on Fokas' specific performance claims against the Ferderigos Brothers is an unappealed ruling which is the "law of the case."

As for Fokas' claims for breach of fiduciary duty/violation of the LLC statute, the trial court correctly found no genuine issue of material fact existed as to such cause of action. Fokas presented no evidence to the trial court to create a genuine issue of material fact concerning such claim. Moreover, as set forth previously, in key portions of his sworn testimony, Fokas testified the LLC was not involved in the Proposed Project and did not take any formal action, vote, or even discuss the Proposed Project. To the contrary, Fokas testified the parties allegedly agreed "as owners of the building" to build the Proposed Project and mortgage their individual interests in the Property, not as members of an LLC. Further, because Fokas failed to argue this issue in his Brief, the trial court's grant of summary judgment on Fokas' claims against the Ferderigos Brothers for breach of fiduciary duty is an unappealed ruling which is the "law of the case."

Finally, because Fokas offered no evidence to support any breach of contract, if one existed, by Jacob, the trial court properly found no genuine issues of material fact on Fokas'

breach of contract claims against Jacob and correctly granted Jacob summary judgment on Fokas' breach of contract claims.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-3919

Appellate Case No. 2017-002032

Athan Fokas..... Respondent/Appellant,

v.

Philip Ferderigos, Spiros Ferderigos,
and Jacob Ferderigos..... Defendants,

of Whom

Spiros Ferderigos and Philip Ferderigos are ..... Appellants/Respondents,

And

Jacob Ferderigos is .....Respondent.

CERTIFICATION OF COMPLIANCE WITH RULE 211(b), SCACR

We hereby certify that the following final briefs served and filed in this matter comply with Rule 211(b), SCACR:

(1) Final Brief of Appellant Spiros Ferderigos

(2) Final Brief of Appellant Phillip Ferderigos

(3) Final Joint Brief of Respondents Spiros Ferderigos, Phillip Ferderigos, and Jacob Ferderigos

(4) Final Joint Reply Brief of Appellants Spiros Ferderigos and Phillip Ferderigos

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