THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.
Circuit Court Judge

Case No. 2015-CP-10-3919
Appellate Case No. 2017-2032

Athan Fokas,

Respondent/
Appellant,

v.

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

Of whom Spiros Ferderigos and Philip Ferderigos are the

Appellants/
Respondents,

And

Jacob Ferderigos is the Respondent.

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RESPONDENT/APPELLANT ATHAN FOKAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Other Authorities

STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN GRANTING DEFENDANTS' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

On July 15, 2015, Respondent/Appellant Athan Fokas ("Fokas") filed a complaint against the Appellants/Respondents Philip Ferderigos and Spiros Ferderigos and against Respondent Jacob Ferderigos[1] alleging causes of action for breach of contract, specific performance and breach of fiduciary duty. *Record on Appeal ("R.")* at pp. 49-56. Effective service on the three Defendants was accomplished shortly thereafter.

On October 1, 2015, Philip Ferderigos responded to the complaint by generally denying the material allegations, asserting various affirmative defenses essentially denying that there ever was any contractual agreement, and by asserting counterclaims sounding in breach of fiduciary duty, negligent misrepresentation, fraud, abuse of process, promissory estoppel, and initiation of frivolous proceedings. *R.* pp. 205-240. Also on October 1, 2015, Spiros Ferderigos filed an answer and counterclaims very similar to that of Philip Ferderigos. *R.* pp. 57-91. On December 29, 2015, Jacob Ferderigos filed an answer and counterclaims virtually identical to the other Defendants' answers. *R.* pp. 353-383.

On March 31, 2016, Fokas filed replies to the counterclaims of Philip Ferderigos and Spiros Ferderigos denying the material allegations thereof and on March 31, 2016, did the same with respect to the crossclaims of Jacob Ferderigos. *R.* pp. 497-502; 503-508; and 509-513. Following a period of discovery, the Defendants moved for summary judgment on the theory that the evidence in the record did not establish a contractual relationship between the parties under South Carolina law and, as such, there could be no breach of contract. They also asserted arguments as to Fokas' other causes of action. *R.* pp. 718-726; 727-736; and 710-717.

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1 Collectively referred to herein as "Defendants" for simplicity.

A hearing was held on Defendants' motions for summary judgment on June 8, 2017, and on September 28, 2017, the Trial Court entered an Order granting the Defendants' motions for Summary Judgment as to all causes of action asserted by Fokas. *R.* pp. 10-32. Fokas timely moved to alter or amend the Trial Court's ruling and the Trial Court issued an Order denying that motion. *R.* p. 33. From those orders, which served to eviscerate the claims against the Defendants, Fokas appeals.

STATEMENT OF FACTS

Fokas and the Defendants are all first cousins. The parties own 229 King Street as tenants in common, with Fokas holding one half interest and the Defendants holding one sixth interest each. The parties' fathers took title to 229 King in the 1970s and operated a restaurant on the first floor of it that is still there today, the Old Towne Restaurant "Restaurant"). The Restaurant is operated by a corporation, S&S Old Town, Inc., in which Defendants Philip and Spiros Ferderigos have no interest.

In 2009, a fire occurred on the second floor of 229 King Street, resulting in extensive damage that was compensated for by insurance proceeds. Prior to the fire, the second floor of 229 King Street had been used for "overflow dining space" in conjunction with the Restaurant. However, rather than repair the second floor and restore it for its prior use, the parties decided to convert the second floor into two (2) rental suites. As such, the insurance proceeds were used to upfit and/or convert the second floor into the rental suites.

Old Towne Suites, LLC (the "LLC") was the entity created to operate the rental suites. The LLC was owned by the parties in the same proportion to their ownership of the building[2] and was very successful. Due to that success, in 2012 the parties began discussing the possibility of creating more profitable rental units within the building. *R.* pp. 878-879; 958-995. Out of those discussions, an agreement was formed, the basis of which follows:

- The parties agreed to expansion of the existing building at 229 King Street by the addition of two (2) more floors of rental suites to add to the existing rental suites business which they owned jointly, Old Towne Suites, LLC. That plan changed and

---

[2] Fokas ½ and the Defendants ⅙ each.

the parties subsequently agreed to add three (3) floors so that six (6) more rental suites would be constructed;

- The parties would share the costs of design, engineering and permitting in proportion to their ownership interests in the building and the LLC (the percentages being the same);
- The parties would mortgage the property at 229 King Street, which they owned jointly as tenants in common, to secure the bank loan;
- The loan amount as per the commitment from South Coast Bank was to be $1,800,000;
- The LLC would be a borrower on the loan as provided in the bank commitment letter and the profit stream of the LLC's existing rental suites business would fund payments on the loan;
- Only Jacob Ferderigos and Athan Fokas would personally guarantee the loan from South Coast; and
- Construction would commence under a contract with Kevin Carroll, the same contractor who constructed the original rental suites, once the loan was closed.

By July 2012 and continuing through the summer of 2012, the parties were receiving estimates on the costs for design and permitting from an architect, Joe Tucker, and the contractor who constructed the original suites, Kevin Carroll. *R.* pp. 958-995. In December of 2012, the parties began to pay for some initial design work by both Tucker and Campbell. At this point in time, the agreement between the parties was essentially that of "due diligence," investigating the possibility of adding the suites and looking for acceptable funding through a loan. *R.* p. 879. Later, there was clearly an agreement to secure a loan in

which all the parties would borrow the funds and then proceed with the process of design, engineering and permitting of the new structure. *R.* pp. 879-880.

After canvassing a number of banks, Fokas received a commitment letter from South Coast Bank dated February 5, 2013. The commitment letter detailed the plan for South Coast Bank to loan the total amount of $1,000,000 to fund the original plan of adding two more floors of rental suites. *R.* pp. 996-999. The commitment letter also 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. Philip and Spiros Ferderigos had made clear that they did not want to be personal guarantors for the loan and the bank had agreed. Consequently, Jacob Ferderigos and Fokas signed the commitment letter and copies were provided to the other two defendants. *R.* pp. 880-887; 896-897; and 899-904.

The commitment letter is very specific in laying out the details of the loan. Fokas and Jacob Ferderigos were to sign personal guarantees for the loan. The third listed borrower is "Old Towne Suites, LLC." The loan was to be secured by (a) "a mortgage on 229 King Street and the assignment of rents and leases;" and (b) "all accounts receivables, inventory, and furniture fixtures and equipment now owned or hereinafter acquired." The letter spelled out other requirements as well, none out of the ordinary for a loan of this type. *R.* pp. 1007-1035.

Subsequent to the issuing of the commitment letter, the parties began spending substantial sums to pay for detailed engineering, design and permitting work. *R.* pp. 940; 1007-1001. These costs were shared by the parties in proportion to their ownership in the building and the Old Towne Suites, LLC. *R.* pp. 1002-1003. From 2013 through 2014, the

parties spent a total of $89,916, with Fokas picking up half of that total and the Defendants splitting the rest, proportionally. The costs were paid out of the profits from the LLC and throughout the process, Jacob Ferderigos was involved in every aspect of the design, permitting and funding, including the loan approval, acting on behalf of his brothers. *R.* p. 892. The email chains from June and July 2013 corroborate Fokas' testimony on Jacob Ferderigos' involvement. *R.* pp. 958-995; 1004-1006.

Spiros Ferderigos was also directly involved in discussions with South Coast Bank. In mid-April 2013, two and one-half (2½) months after the first commitment letter, Spiros corresponded with Jeff Odom at South Coast by email and gave him specific advice on how to describe the ownership of the LLC. *R.* pp. 1004-1006. Throughout this period, Spiros asked several times if he was correct in understanding that only Fokas and Jacob Ferderigos were personally guaranteeing the loan. On April 9, 2013, he asked Fokas to again send out the details of the loan. *R.* pp. 1036-1051. It is important to note that at no time before the first scheduled closing for the South Coast loan, ***none of the Defendants objected to or questioned any requirement set forth in the commitment letter, including the mortgage and the fact that the LLC would be listed as a borrower.***

During the Board of Architectural Review ("BAR") review and approval process, the parties learned that it would be possible to get approval to add an additional story to the project. Consequently, they agreed to revise the plans and the loan to do so. By mid-June of 2014, the parties had secured approval from the City for the additional story and set about paying for the redesign and re-engineering needed for the increased size of the project. *R.* p. 1052. Fokas and Jacob Ferderigos went back to South Coast Bank at that time to seek approval of the additional money needed for the larger building. *R.* pp. 901-903. On

September 24, 2014, the bank increased the loan amount to $1,800,000 by hand-modifying the original commitment letter. Plaintiff forwarded the new commitment letter to the Defendants the same day. *R.* pp. 1053-1057. By text messages on the same day, Spiros Ferderigos told Fokas, "Sweet . . . good job," "That is great news!" and again asking for confirmation of the loan details. Six days later, Spiros again joined in a group text with the other parties, exclaiming, "Wow" and "When we starting?" *R.* pp. 1065-1066.

Upon receipt of the revised commitment letter, Philip Ferderigos responded by telling Plaintiff he would try to find a better loan deal, specifically with Crescom, the bank in the same building as his law firm. *R.* pp. 1058-1061. Nothing came of this effort, however, and the commitment from South Coast continued to be the loan solution the parties pursued. At no time did Philip express any objection to any of the terms set forth in the South Coast Bank commitment letter. In fact, months earlier he had also engaged in detailed correspondence with Fokas concerning some requirements that he thought, as a lawyer, the parties should ask from the contractor. *R.* pp. 1062-1063. Fokas testified that he believed those questions were answered satisfactorily by the contractor, Kevin Carroll. *R.* p. 902.

At that point in time, all the parties needed was the final building permit from the City which was received on October 10, 2014. *R.* p. 1067. Five days later, on October 15, 2014, Fokas executed a contract with Kevin Carroll on behalf of the LLC, himself and Jacob Ferderigos for the construction of the building at a fixed price of $1,728,900. *R.* pp. 1081-1088. Jacob's response by text was "Awesome." *R.* pp. 1064-1080. Spiros, however, responded that he had to delay his execution of any bank documents because he was under consideration for a Family Court judgeship.

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

R. pp. 1067. Fokas objected to the request for the delay and Spiros responded with the same insistence that he could not sign until after the judgeship process was over.

> You don't understand. Nothing to discuss. Putting kids to bed. I can't sign anything until hopefully mid-November. That is when I should know if I am selected to move forward. Can (sic) sign before that. If you don't need my signature then you can do it before then. Otherwise, you need to wait for my signature u tip (sic) I get through the process I am working on.
>
> . . .
>
> I am not fighting with you. Sorry if it upsets you, but ***my signature goes on once I am done with what I have to do. If it was done a month ago, it wouldn't be an issue***. Now that I am weeks away from being considered, I am not affecting my P&L. Move forward without my signature if you want. We have been waiting years for this and now I need you to wait a few more weeks. It is important or I wouldn't be saying I need to wait . . .

R. p. 1068 (***emphasis*** added)). Philip entered the conversation at this point, texting as follows:

> Athan this is Philip. I do not like your tone. ***Shut up or I will kill the deal***. . . . Do you understand.

Id. (***emphasis*** added)). Spiros followed with:

> ***I have no problem moving forward but need to get through this first.***

Id. (***emphasis*** added)). Philip then added:

> I am losing interest in being in business with you . . . Spiro says you need to wait a week, then you need to wait a week . . . it is not an unreasonable request on his part and we don't need back and forth drama . . .

R. p. 1069. The argument continued over the next day. For the first time, Philip asserted that the Defendants had never agreed to anything, an assertion inapposite to the fact that Jacob had signed the commitment letter from South Coast and that all of the parties had shared in the $89,000 of expenses to design and permit the building expansion. *R.* pp. 1069-1073.

Under the cloud of the new tension between the parties, a second loan closing was set for November 21, 2014, pursuant to the revised commitment letter. *R.* pp. 1074-1076. On the Wednesday before the scheduled closing, Philip unilaterally attempted to inject a new term into the parties' agreement ***that had never previously been mentioned.*** Philip not only planned to bring his own money to the deal, so as to reduce the loan amount, but he demanded an agreement from the other parties describing the consequences of their not making their portion of the payments to the bank and requiring that he be paid his portion of the loan proceeds from the LLC rental suites business. *Id.*

Fokas was not willing to agree to those terms and the closing set for November 21, 2014, was cancelled. Thereafter, voluminous electronic exchanges between the parties about the disagreement took place. *R.* pp. 1076-1080. On November 21, 2014, Spiros sent an email to Fokas claiming that he never realized until that day he was expected to mortgage his interest in 229 King Street or that the LLC was to be listed as a borrower. *R.* pp. 1089-1090. In the same message, he makes this completely contradictory admission, however, "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.***" *Id.* (***emphasis*** added). He goes on to claim incorrectly that he was now being asked to sign personally on

the note. He added, "Lastly, Philip has been crystal clear from the beginning that he had no interest in being part of any loan or loan requirement. He would come up with his own money completely separate. ***The only thing he was willing to do was allow his personal physical property interest in 229 King Street to be collateralize to help you get a loan."*** *Id.* (***emphasis*** added)).

The parties never agreed to the new terms demanded by Philip, and subsequently by Spiros. Since that point, the Defendants have made a number of claims that are at best inconsistent with the evidence and at worst simply fantastic. One of those inconsistent claims, contrary to the record set out above, is that they were surprised by the bank's loan terms, terms they had been in possession of since February 2013. Some of their latter day-objections to closing on the loan are that they were asked to sign a hypothecation agreement. This agreement is included in the bank's closing package and clearly does no more than parrot the language of the mortgage. It imposes no obligations on the parties different than those in the mortgage. *R.* pp. 1091-1142. As the case progressed, Spiros and Philip took the position that they were never to mortgage "their part of 229 King Street" and that the bank's commitment letter only required Jacob and Athan Fokas to commit "their part" of the LLC. R. A. Daniel, a banker with 45 years of experience testified to the obvious, that no mortgage is ever taken without the signatures of all owners. *R.* pp. 1007-1016. The bank commitment letter was clearly given to Spiros and Philip. Their education and experience should have left them with only one conclusion – the bank was expecting them to execute the mortgage and the LLC – all of the LLC – was to be a borrower on the loan. For two practicing attorneys to claim otherwise is incomprehensible.

Sadly, because the Defendants, particularly Philip and Spiro Ferderigos, were never able to either reconcile their selfish individual ambitions with the agreed upon plan for the project, the deal died and Fokas was left with little recourse but to commence litigation against the Defendants. Fokas now appeals the decision of the Trial Court that totally disregarded the evidence cited above and determined that there was never any agreement between Fokas and the Defendants.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT

I. STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, an appellate court must apply the same standard that governs the trial court under Rule 56(c), *SCRCP*, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Rule 56(c), *SCRCP*. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860; see Belton v. Cincinnati Ins. Co., 360 S.C. 575, 602 S.E.2d 389 (2004); Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001); Koester v. Carolina Rental Ctr. Inc., 313 S.C. 490, 443 S.E.2d 392 (1994); and Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988).

The standard for summary judgment under South Carolina law is high. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376-77, 597 S.E.2d 181, 184 (Ct. App. 2004) (quoting Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). If there is a "scintilla of evidence" in the record which gives rise to a genuine issue of material fact, summary judgment should not be granted. Howle v. Woods, 231 S.C. 75, 97 S.E.2d 205 (1957); Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) ("the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary

judgment."). The "scintilla of evidence rule" means that there must be some evidence arising out of testimony which elucidates the issues of fact and which enables the jury to form an intelligent conclusion, but does not authorize admission of speculative, theoretical and hypothetical views. *In re Crawford*, 205 S.C. 72, 30 S.E.2d 841 (S.C. 1944).

A trial court may grant a motion for summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), *SCRCP*; *See also, Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997) ("Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied."). Further, "[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 684 S.E.2d 756 (2009).

II. SUMMARY JUDGMENT STANDARD RELATING TO THE EXISTENCE OF A CONTRACT

The existence of a contract is ordinarily a question of fact for the jury. *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 101 S.E. 838 (1920). If the evidence, when viewed in the light most favorable to the non-moving party, supports the existence of a contract, the issue should be submitted to a jury. *See Columbia Hyundai v. Carll Hyundai, Inc.*, 326 S.C. 78, 484 S.E.2d 468 (1997) (holding matter of existence of a contract properly submitted to the jury). *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989). A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Patricia Grand Hotel, LLC v.*

MacGuire Enters, 372 S.C. 634, 643 S.E.2d 692 (Ct. App. 2007). When the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached. *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005).

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO FOKAS' BREACH OF CONTRACT CLAIMS

In granting summary judgment on behalf of the Defendants with respect to Fokas' breach of contract cause of action, the Trial Court concluded that no binding agreement between the parties existed because there was no meeting of the minds and because the statute of frauds applies. Under South Carolina law, the required elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161 (2003). A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); *Roberts v. Gaskins*, 327 S.C. 478 486 S.E.2d 771 (Ct. App.1997). Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. *Armstrong*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); and *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 503 S.E.2d 184 (Ct. App.1998). A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. *Shayne of Miami, Inc. v. Greybow, Inc.*, 232 S.C. 161, 101 S.E.2d 486 (1957).

A contract may arise from oral or written words or by conduct. *Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016); *Prescott v. Farmers Tel. Co-op., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999). "[F]or a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). 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. *Scott v. Mid Carolina Homes, Inc.*, 293 S.C. 191, 359 S.E. 2d 291 (Ct. App. 1987). The essential elements of a contract depend on the subject matter of the agreement.

When the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached. *Conner v. City of Forest Acres*,363 S.C. 460, 811 S.E.2d 905 (2005), *citing* *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996) (contract may be based on verbal understanding to which both parties have mutually assented and upon which both are acting); *Gaskins v. Blue Cross-Blue Shield of S.C.*, 271 S.C. 101, 245 S.E.2d 598 (1978) ("agreement" does not necessarily import any direct or express stipulation, nor is it necessary that it should be in writing; if there is verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement); *Baylor v. Bath*, 189 S.C. 269, 1 S.E.2d 139 (1938) (in lawsuit to enforce specific performance of an alleged oral agreement by elderly bachelor to make a will in consideration of care and nursing, it was proper to admit evidence that plaintiffs provided care and nursing for three years until bachelors death to prove existence of the contract and performance under its

terms). A contract may arise from actual agreement of the parties manifested by words, oral or written, or *by conduct.* Prescott v. Farmers Tel. Co-op., Inc., 335 S.C. 330, 516 S.E.2d 923 (1999) (*emphasis* added); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).

With certain exceptions, a contract need not be in writing to be enforceable. Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005), *citing* Gaskins v. Firemen's Ins. Co. of Newark, N.J., 206 S.C. 213, 33 S.E.2d 498 (1945) (noting that if there is a meeting of the minds with regard to the essential elements of a contract, it is immaterial whether the contract is written or oral). A contract may arise from oral or written words or by conduct. Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997). "[F]or a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement." Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). Evidence of conduct by the parties is relevant to prove the existence of consent of a party, either express or implied, sufficient to constitute an enforceable contract. Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc., 379 S.C. 31, 664 S.E.2d 83 (Ct. App. 2008); Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership, 331 S.C. 385, 503 S.E. 2d 184 (Ct. App. 1999); Scott v. Mid Carolina Homes, Inc., 293 S.C. 191, 359 S.E. 2d 291 (Ct. App. 1987); and Edwards v. Rouse, 290 S.C. 449, 371 S.E.2d 174 (Ct. App. 1986). It is well settled that, if the minds of the parties have met on the essential elements of a contract, the binding agreement thus formed is not invalidated by subsequent negotiations regarding the details of performance or requests for modification of terms agreed upon. Hoffstot v. Dickinson, 166 F.2d 36 (4th Cir. 1948), citing, Townsend v. Stick, 158 F.2d 142 (4th Cir. 1946). If the evidence as to the existence of a contract is conflicting or raises more than one reasonable inference,

the issue should be submitted to the jury. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003); and *Sherman v. W & B Enterprises, Inc.*, 357 S.C. 243, 592 S.E.2d 307 (Ct. App. 2003) (When the existence of a contract is questioned and the evidence either conflicts or gives rise to more than one inference, the issue of the contract's existence becomes a question for the finder of fact.).

A. Application of the Statute of Frauds and Part Performance

As stated above, South Carolina law recognizes that contracts may be formed in writing, by oral agreement of the parties, or by conduct as well. The record in this case gives rise to genuine issues of material fact that were more than sufficient to defeat the Defendants' motions for summary judgment on the issue of the existence of a contract between the parties to add floors to 229 King Street for the purpose of adding rental suites to the existing rental suites business already there. There was more than sufficient evidence of part performance of the agreement to both establish unequivocally that there was an agreement between the parties and also to satisfy the Statute of Frauds.

With respect to the Statute of Frauds, the Trial Court's determination that it was applicable to ***the agreement between Fokas and the Defendants*** is erroneous. The section of the Statute of Frauds relied upon by the Court only applies in cases where the contract cannot possibly be performed within one (1) year. *Florence Printing Co. v Parnell*, 178 SC 119, 182 SE 313 (1935); *Joseph v Sears Roebuck & Co.*, 224 SC 105, 77 SE2d 583 (1953); 40 A.L.R.2d 742. In *Thompson v Gordon*, 34 SCL 196 (1848), the court held that the Statute of Frauds, when it enacts that any agreement that is not to be performed within the space of one year, from the making thereof shall be in writing, means an agreement not to be performed in the space of a year, and expressly so stipulated. A contingency is not within

the statute - it must appear, **within the agreement** that it is not to be performed till after the year, to make a note in writing necessary. *Walker v Wilmington C. & A. R. Co.*, 26 SC 80, 1 SE 366 (1887) *Oswald v Lawton*, 187 SC 42, 196 SE 535 (1938); and *McGehee v South Carolina Power Co.*, 187 SC 79, 196 SE 538 (1938).

In arriving at the conclusion that the agreement alleged to exist by Fokas could not have been completed in one year and for this reason falls under S.C. Code 32-3-10 (5), the Trial Court resorted to a tortured interpretation of the contract between the parties: since the mortgage the parties were required to execute to collateralize the loan from South Coast Bank was to last 20 years, that agreement had to be in writing. That interpretation completely (and likely conveniently) ignores the ***actual agreement between the parties:***

> Take out a loan pursuant to the terms given them by South Coast Bank and use the proceeds of that loan to contract to build the additional floors of 229 King Street into spaces for additional rental suites. Once the loan was consummated and the construction contract executed, the contract between the parties would be complete.

There is nothing about that agreement that establishes that it could not be completed in one (1) year and the fact that the mortgage itself falls within the Statute of Frauds does not mean the agreement of the parties could not be performed within a year.

The contract at issue was to build additional floors to 229 King Street and to offer a mortgage on the building as collateral for the required, not a contract for the transfer of land or an interest therein. The term "interest in land," as used in the applicable section of the Statute of Frauds, means some portion of the title or right of possession, and does not include agreements which may affect land but which do not contemplate the transfer of any title, ownership or possession. *Carter v. McCall*, 193 S.C. 456, 8 S.E.2d 844 (1940); 151 A.L.R. 641.

The contract was to build additional floors to 229 King Street and to offer as collateral for the necessary loan a mortgage on the building, not to transfer title to 229 King Street.

If, however, the Trial Court is correct that the contract should be deemed subject to the Statute of Frauds, there was clearly part performance of a substantial nature such that an exception applies in this instance. An oral contract within the Statute of Frauds may be taken out by performance where one party does some act essential to performance of the agreement resulting in loss to himself and benefit to the other. Graham v. Prince, 293 S.C. 77, 358 S.E.2d 714 (Ct. App. 1987); *citing* Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957). A party seeking to show part performance by possession and improvements must show acts which relate clearly and unequivocally to an agreement, exclusive of any other relation between parties touching that agreement. Taking possession and paying rent, in conjunction with other facts and circumstances, may constitute sufficient part performance to take an agreement out of the statute of frauds. Gibson v. Hrysikos, 293 S.C. 8, 358 S.E.2d 173 (Ct App. 1987). Payment of nearly $100,000 to engineer, design and permit the building these parties agreed to build is the quintessential example of part performance, and Fokas paid half (½) of that amount by himself.

Fokas was deposed at length by two experienced attorneys. He did not waiver or contradict his clear description of the parties' agreement or the substantial steps taken in pursuit of that agreement, steps that cost over $89,000. Fokas' testimony clearly evinces part performance not only on his part, but on the part of ***all of the parties.*** Fokas testified that after a period of investigation and seeking an attractive loan, the parties were given a commitment letter by South Coast Bank for $1,000,000 for the purpose of building two additional floors at 229 King Street and they entered into an agreement to do just that.

Thereafter, in accordance with the clear and unequivocal agreement that existed between the parties, they began spending substantial sums to design and permit the new structure. The bank's commitment letter was signed by both Fokas and Jacob Ferderigos, whom Fokas testified was acting on behalf of his brothers, the other two Defendants. The record shows active involvement of Spiros with the bank and routine discussions by email with Fokas. The written record similarly shows direct involvement of Philip. Fokas' testimony is that the parties agreed in mid-2014 to increase the size of the addition to 229 King to three more floors and the written record confirms this. When the new loan amount was approved by South Coast on September 24, 2014, all the Defendants were copied and all expressed enthusiastic support. Conversely, none expressed any objection to any of the bank's terms, the same terms they had been aware of since February 2013 and in reliance on which they had spent between them nearly $100,000.

The text messages accompanying Spiro's objection to close before his judgeship process was over are unequivocal admissions that he was in agreement with the bank's terms, or could certainly be accepted as such by a jury. Indeed, unless Spiros was going to mortgage his interest in 229 King Street and agree that the LLC's income was to be applied to make the loan payments, his "P&L" would not have been affected at all. Similarly, Philip's messages at the time in support of Spiros' request only confirm all of their agreement to the bank's terms. The evidence in the record is more than sufficient to allow a jury to conclude that the parties entered into an oral agreement to borrow money from South Coast Bank pursuant to the terms set forth in its commitment letter and build the additional floors to 229 King Street. Their actions in spending nearly $100,000 to design and permit the structure constitute part performance of that agreement sufficient to establish

consideration. *Gaskins v. Blue Cross–Blue Shield of S.C.*, 271 S.C. 101, 245 S.E.2d 598 (1978) (If there is verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement). Where, as in this case, the parties disagree about the existence of a contract and the evidence is in conflict, the issue is one for the trier of fact and summary judgment is not proper. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003); and *Sherman v. W & B Enterprises, Inc.*, 357 S.C. 243, 592 S.E.2d 307 (Ct. App. 2003) ("When the existence of a contract is questioned and the evidence either conflicts or gives rise to more than one inference, the issue of the contract's existence becomes a question for the finder of fact").

If the recitation above was not enough to convince this Court that the record in this case is replete with evidence as to an agreement between the parties and part performance thereof, the Court should also consider Philip's subsequent demand for a side agreement, never previously discussed, to impose sanctions on the other parties if their part of the loan was not met. If there had not been an agreement in existence between the parties, why would Philip have been trying to impose penalties on the other parties, and on what basis did he believe those penalties would be enforceable? Philip's unilateral and 11th hour attempt to change the prior agreement does not serve to defeat the fact that there most certainly was a definitive agreement between the parties and that they had acted accordingly for a substantial amount of time. *See Hoffstot v. Dickinson*, 166 F.2d 36 (4th Cir. 1948) (Subsequent efforts to amend an agreement do not affect its validity and enforceability).

The Trial Court further erred in concluding that "the part performance exception to the Statute of Frauds does not apply in this case, as the expenditures for the proposed project do not relate clearly and unequivocally to the oral agreement Plaintiff alleges, exclusive of

any other relation between the parties touching such agreement." The expenses were incurred, says the Trial Court, in the process of determining the feasibility of adding on to the buildings. With due respect to the Trial Court, that determination is completely ridiculous and makes a mockery of the evidence in the record.[3]

In *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989), the Supreme Court held that only acts which relate clearly and unequivocally to the agreement exclusive of any other relation between the parties may serve as part performance so as to take an oral agreement out of the Statute of Frauds. In *Player*, the parties were a landlord and a tenant who entered into a lease of land which specifically allowed the tenant to construct improvements on the land. The tenant built a restaurant on the property and alleged the parties entered into an oral agreement to extend the lease and thereafter built a second restaurant on the property. The court held that as the lease allowed the tenant to make improvements, his construction of the second restaurant was not an act relating exclusively to the alleged oral agreement to extend the lease.

The acts in that case, however, are not like those in *Player*. In this case, the contract Fokas alleges Defendants agreed to was to expend money for the exact purposes for which they spent their $89,000 – design, engineering and permitting of their project. The expenditure of these funds, half by Fokas was, therefore, an act that related directly and exclusively to their contract and there is absolutely no evidence in the record to the contrary. The acts were taken in furtherance of the agreement Fokas alleges exists and constitute sufficient part performance to make the exception to the Statute of Frauds applicable. *Gibson*

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[3] It is difficult to comprehend the concept of spending nearly $100,000 on a project that the parties did not expect to complete.

v. Hyrsikos, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987). The concept of part performance of an oral contract as relief from the Statute of Frauds arises from the same principles as equitable estoppel – that is, where one party has done acts in pursuance of and in reliance on an oral contract, application of the Statute of Frauds writing requirement would be unconscionable. *Scurry v. Edwards*, 232 S.C. 53, 100 S.E.2d 812 (1957). Whether such acts by a party constitute part performance is typically not a question to resolve on summary judgment, but one to resolve only after a full trial on the merits of the case. *Leventis v. Acciardo*, 256 S.C. 437, 182 S.E.2d 726 (1971). Lastly, the Trial Court's reliance on *Aust v. Beard*, 230 S.C. 515, 96 S.E.2d 558 (1957), for support of its determination as to part performance is misplaced. In that case, the part performance amounted to very little and could easily have been related to other interests. In this case, by comparison, the expenditures were great and cannot (or have not) been related to any pursuit other than the expansion of 229 King Street.

The undisputed actions of the parties in this case after the South Coast commitment letter of February 2013 are completely consistent with the concept of part performance excusing the writing requirement of the Statute of Frauds, if the Statute of Frauds is even applicable in this instance. The Trial Court erred in its determination on this issue. As such, Fokas has been improperly denied the opportunity to have a jury consider the simple issue of whether the Defendants refused to honor their contractual obligations and are liable to Fokas for all the damages that flow naturally from that refusal.

B. Meeting of the Minds

The Trial Court also based its conclusion that summary judgment was proper on a determination that the evidence in the record did not support a finding of a "meeting of the minds" between the parties. The Trial Court then goes on to list eleven (11) items that allegedly support that premise. Fokas asserts that the Trial Court "cherry-picked" items to support its determination and ignored the reality of the fact that there was an equal (or greater) number of facts that supported Fokas' position that there was in fact a meeting of the minds. Summary judgment, therefore, was improvidently granted.

From the outset, the terms of the South Coast commitment letter (which substantial evidence indicates the parties all agreed to) serve to rebut the conclusion that there was no meeting of the minds. The Trial Court obviously ignored the clarity of the loan terms in the South Coast commitment letter when it states that parties were somehow confused over the length of the loan. A misdescription by one party of the loan as a 20-year loan instead of what is clearly set forth in the bank's letter – "12 monthly payments of interest only followed by 59 consecutive monthly payments of principal, interest, and escrow with one final payment of the remaining principal balance plus any accrued interest," and with a fixed interest rate of 5% over that period. *R.* pp. 996-999. The bank witnesses, Daniel and Odom, confirmed that they typically renew loans at the end of the originally prescribed period, but are not obligated to do so. *R.* pp. 1007-1035. In any event, the loan commitment letter was crystal clear on the loan terms and all parties had it early on in the project.

Similarly, the Trial Court's findings that the Defendants did not agree to: (a) the LLC being on the loan, (b) a hypothecation agreement, (c) assignment of rents, (d) provide insurance, (e) a commercial security agreement, (f) a UCC financing statement, a (g)

hazardous substance certificate, and (h) any other of the items listed in the Order – are all rebutted by the South Coast commitment letter. The LLC is clearly listed as a borrower on page 1 under "Borrowers." The hypothecation agreement is no more than a confirmation that 229 King is to be mortgaged, as required in the "Collateral" section on page 1. *R.* pp. 1091-1142. Assignment of rents is specifically required in the Collateral section also. Property insurance is required in the "Property Insurance" section on page 1, as is Title Insurance in the section so named. A construction loan is specifically provided for on page 2 in the section bearing that title. The hazardous substance certificate is clearly contemplated by the "Environmental" section on page 2. Finally, the Collateral section requires a security interest on "all accounts receivables, inventory, and furniture fixtures and equipment now owned or hereinafter acquired," exactly what a UCC Financing Agreement is designed to do. Every term the Defendants claim they never agreed to (and that the Trial Court found did not create a factual issue) is specifically laid out in the South Coast commitment letter. If, as Fokas has testified and as they themselves confirmed, they agreed to the South Coast terms, they agreed to every one of these requirements. *R.* pp. 874-957; 1064-1080. At worst, a factual issue exists as to those items.

The Trial Court also determined that there could not be a contract unless all the parties knew the exact total cost of constructing the additional floors. As support of that conclusion, the Trial Court points to a requirement imposed late in the process for a sprinkler system that had not been priced, and the cost of furnishings. On this point, the Trial Court is confusing the concept of a cardinal change in a contract – one out of its scope – with whether there was sufficient agreement to essential elements so as to constitute a binding agreement. If knowledge and agreement to the exact final price of a construction project was a

requirement for a binding contract, there would be few binding construction contracts. Changes in the form of new regulatory requirements and changed physical conditions or even weather, routinely increase the costs of a project, as do other routine or nonroutine change orders. When the parties secured the building permit for the project, issued to them on October 10, 2014 as owners of 229 King Street, they inherently were agreeing to abide by the requirements for the project, including items like a sprinkler system. Indeed, municipalities may impose such requirements even after a project is completed and in operation. At a minimum, the question of whether the sprinkler cost was so significant as to mean there was no contract is one for the jury.

The finding that the cost of furnishings not being known to the Defendants has absolutely nothing to do with the agreement at issue in this case. The contract was purely to design, permit, fund and construct the additional floors or rental suites. Furnishing them was simply an entirely separate matter and was not an essential element to the contract to build the additional floors.

Additionally, the finding that Philip's last-minute demand for a "side agreement" whereby he would provide his own portion of the funds and impose onerous requirements on the other parties was an essential element of the contract at issue makes no sense. The contract was formed when, after agreeing to the South Coast commitment letter terms in February 2013, the parties began funding the design, engineering and permitting of the project. The sole contingency was receipt of the permit. Once that was secured in October 2014, the contract was ready to be fulfilled by closing on the loan and contracting for

construction of the project. Philip's demand for a side agreement was an attempt to modify the existing contract[4] and did not serve to void the contract.

Finally, the Trial Court points to various statements from Fokas' deposition, in some instances equivocal responses to leading questions, as further support for the conclusion that no agreement between the parties existed. As has been expressed throughout this brief, that contention is patently erroneous and Fokas has supplied the Court with a plethora of evidence from the record that supports his position that summary judgment was inappropriate in this matter and the Trial Court's decision granting it should be reversed.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO JACOB FERDERIGOS

The Trial Court granted summary judgment to Jacob Ferderigos on the theory that Jacob could not have breached a contract that did not exist. For the plethora of reasons stated above, there most certainly was a contract and, as such, summary judgment was just as inappropriately granted with respect to Jacob Ferderigos as it was with the other Defendants. To conclude otherwise is to simply ignore the evidence in the record.

Jacob Ferderigos claims he was always ready to go forward with the agreement and that only the refusal of his brothers, Spiros and Philip, prevented consummation of it. As Fokas testified, Jacob was given the opportunity to simply agree that if his brothers, either voluntarily or pursuant to court order, went forward with the agreement, he need not be made a defendant in this case. He refused, informing Fokas that he had to side with his brothers. *R.* p. 956. That does not constitute a willingness to go forward with the agreement;

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[4] Fokas contends that Philip's unilateral attempt to change the agreement, in and of itself, is clear recognition that an agreement existed and should have precluded summary judgment.

rather, it constitutes siding with the other Defendants in their refusal to carry out their obligations under the agreement.

Had Fokas simply left Jacob out of the lawsuit and pursued breach of contract actions only against his brothers, he might have prevailed against the brothers, but lost the ability to require Jacob to go forward with the agreement because of the statute of limitations. The breach of contract cause of action arose at the latest in November 2014 when Defendants refused to close on the loan they had previously agreed to for the financing of the project. This case could easily proceed, particularly with this appeal now pending, beyond the expiration of the three-year statute of limitations for breach of contract actions.

Jacob Ferderigos' argument goes more to causation of damages. If he establishes that he only refused to go forward because of his brothers, the jury might conclude he did not inflict damages on Fokas. The jury might, however, conclude he is just as culpable for the breach of contract as he acted in concert with his brothers. For these reasons, summary judgment was not proper as to Jacob.

CONCLUSION

The Trial Court erred in granting the Defendants' respective motions for summary judgment as there was clearly a factual issue as to whether of not there was an agreement between the parties to add floors to the building at 229 King Street. The statute of frauds does not operate to negate that agreement and, even if it did, the part performance exception to the statute of frauds would apply. Lastly, the record in the case is replete with evidence as to a clear meeting of the minds. Consequently, this Court should reverse the order of the Trial Court and allow those issues to be submitted to a jury.

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November 20, 2018

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Final Brief of Respondent/Appellant* complies with Rule 211(b), *SCACR*.

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