

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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

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

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SC Court of Appeals

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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**FINAL REPLY BRIEF OF  
RESPONDENT/APPELLANT ATHAN FOKAS**

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***ATTORNEYS FOR RESPONDENT/  
APPELLANT ATHAN FOKAS***

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## REPLY ARGUMENT

**1. RESPONDENTS MISINTERPRET THE STATUTE OF FRAUDS IN SUGGESTING THAT THE DATES ON THE CONSTRUCTION CONTRACT WERE DISPOSITIVE OF THE REQUIREMENT OF A SIGNED WRITING.**

Respondents argue in their brief that the construction contract with Kevin Carroll is evidence that the agreement could not be completed within one (1) year because the dates given in the contract start on November 3, 2014 and give a completion date “**no later than**” December 31, 2015. *Record on Appeal (“R.”)* at p. 1083 (**emphasis added**). Clearly, the Statute of Frauds requires an agreement **not to be performed within the space of one year** to be memorialized in a signed writing; however, considering the explicit language of the construction contract here, the construction at 229 King Street was to be completed no later than one (1) year and two (2) months after the signing of the contract. Nothing in that contract showed that the project would unequivocally take longer than one (1) year to complete; the project at 229 King Street could just have easily taken less than the space of one (1) year to complete. Respondents conflate contracts that **could** and those that **will** take the space of a year to complete. Therefore, considering the project could be completed within one (1) year and the aforementioned law demonstrating that the Statute of Frauds is applicable when the agreement cannot be completed within the space of one year, respondents’ argument that the oral agreement here was required to be memorialized in a signed writing is without merit.

**2. AN AGREEMENT TO MORTGAGE PROPERTY IS NOT A TRANSFER OF LAND AS CONTEMPLATED UNDER THE STATUTE OF FRAUDS REQUIRING A SIGNED WRITING.**

Respondents suggest in their brief that mortgaging their interest in the 229 King Street property would “contemplate[] transfer of title, ownership, or possession of land,”

triggering the Statute of Frauds because of the possibility of the property being taken via foreclosure proceedings in the event of default. (*Respondents' Brief*, pp. 39-40). This is erroneous because South Carolina is a lien-theory, not a title-theory, jurisdiction. See 21 S.C. Jur. *Use of receivers to obtain possession of rents and profits* § 26 (2018). While it is true in title-theory jurisdictions that a mortgage requires the transfer of property from the mortgagor to the mortgagee, lien-theory states do not require a transfer and a mortgage stands as an encumbrance on property that remains in the full possession of the mortgagor. Respondents' arguments, while colorful and lengthy, do not hold water; if South Carolina's jurists wanted mortgages to constitute a transfer of real property triggering the Statute of Frauds, they would have followed the title-theory states. Respondents' reliance on archaic common law is misplaced and ignores centuries of legal advancement. Therefore, based on South Carolina's solidified stance as a lien-theory state, any mortgage of the property here would not trigger the Statute of Frauds as a transfer of an interest in real property.

Moreover, respondents assert that an agreement to provide a mortgage is subject to the Statute of Frauds just the same as a mortgage itself, calling it a "difference without distinction" relying on the abovementioned erroneous conclusion that a mortgage is considered a transfer of land in South Carolina. (*Respondents' Brief*, pp. 40-1). Appellant concedes that a mortgage itself is subject to the Statute of Frauds if it cannot be completed within one year. However, considering the above discussion surrounding lien versus title theory states, South Carolina's stance as a lien-theory state, and respondents' misgivings about the law in this state, clearly there *is* a distinction between an agreement to provide a mortgage (can be provided in less than a year and is not a transfer of land) and a mortgage (unlikely to be performed within a year but still not a transfer of land in South Carolina).

Therefore, the oral agreement between Fokas and the Ferderigos Brothers would not be subject to the Statute of Frauds because a mortgage is not a transfer of land.

**3. THE \$89,000 EXPENDED BY THE PARTIES IS EVIDENCE OF PART PERFORMANCE AND WAS SPENT CLEARLY AND UNEQUIVOCALLY WITH RESPECT TO THE BUILDING EXPANSION EXCLUSIVE OF ANY OTHER ON-GOING BUSINESS.**

Respondents argue in their brief that the \$89,000 expended by the parties is not “clearly and unequivocally” related to the oral agreement enough to constitute part performance because they do not relate exclusively to the part of the agreement made by Phillip and Spiros to mortgage their interest in 229 King Street. (*Respondents’ Brief*, p. 43). Also, respondents allege that part performance was not exclusive of any other relations because of the pre-existing rental units shared between the parties located at 229 King Street. *Id.* Firstly, Respondents efforts to subdivide the oral agreement of the parties into two (2) parts (to expand the building and for the parties to mortgage their interests in 229 King Street) in an attempt to argue against partial performance is flawed. The oral agreement of the parties was to expand the building at 229 King Street and a part of that agreement involved securing funding through a mortgage. Nonetheless, both of those parts form the whole agreement; to assert that performance would have to relate to every individual part of the oral agreement to constitute part performance would be counterintuitive. Part performance shown by expending nearly \$100,000 on design, engineering, and permitting is evidence of the oral agreement here, to include the agreement to mortgage 229 King Street pursuant to South Coast’s terms.

Furthermore, respondents fail to show how any of the funds spent prior to the current action were related to any dealings between the parties exclusive of the expansion project.

Trying to find a link between that \$89,000 spent on engineering, design, and permitting of a newly designed building expansion and the existing rental business, sufficient to deny part performance, is difficult. Other than those rental units being on the same property and between common parties, the contract at issue here shares no other relation with the prior dealings of the parties. The \$89,000 was spent devoid of relation to any ongoing business. Instead, it is clear that money was spent in anticipation of the building expansion project unrelated to ongoing business in the existing rental units. If the parties here were not going to expand the building pursuant to their oral agreement, that \$89,000 would never have been spent; how then respondents can assert that these funds were spent based on “prior business” strains logic. Moreover, in the light most favorable to Fokas, this disagreement of fact presents more than the mere scintilla of evidence needed to create an issue of material fact for a jury to decide.

Lastly, in Hail Mary fashion, respondents’ argue that Fokas cannot raise the part performance exception in the instant case to remove the agreement of the parties from the Statute of Frauds due to Fokas supposedly abandoning that argument on appeal. To support that theory, respondents’ cite to several South Carolina cases of specific performance where the parties asserted the part performance exception. (*Respondents’ Brief*, pp. 44-5). However, contrary to respondents’ implication, there is no language in any of the cited cases that supports its position that the part performance exception to remove an oral agreement from the Statute of Frauds is solely limited to specific performance causes of action. Furthermore, as shown above, it was error by the Trial Court to find the contract at bar fell under the Statute of Frauds in the first place.

Therefore, the tens of thousands of dollars spent by the parties devoid of relation to past business for the purpose of design, engineering, and permitting of the expansion project is, at the very least, evidence sufficient to create an issue of material fact for the jury with respect to part performance.

**4. BOTH THE LACK OF OBJECTION AND SHOWING OF READINESS TO BEGIN THE BUILDING EXPANSION PROJECT BY THE RESPONDENTS IS SUFFICIENT EVIDENCE TO CREATE AN ISSUE OF MATERIAL FACT FOR THE JURY ON MEETING OF THE MINDS.**

Respondents point to a supposed lack of evidence showing Phillip and Spiros had a copy of the South Coast commitment letter from February 2013 and assert, therefore, any argument by Fokas that defendants knew the terms of the South Coast loan for months, without objection, is meretricious. (*Respondents' Brief*, p. 26). While Fokas still asserts that respondents were aware of the South Coast loan terms (as is consistent with the record) prior to September 2014, assuming *arguendo* that they were not, respondents fail to consider the various communications they had with Odom and South Coast, Jacob Ferderigos, and their excitement/eagerness to start the project after receiving the second \$1.8 million commitment (which was undeniably received by respondents) that all points to respondents having an understanding of the loan terms and a meeting of the minds between themselves and Fokas.

Therefore, considering the standard of review and the aforementioned evidence showing that respondents had a clear understanding of the terms of the loan, such that they were wondering "when we starting," there is at least sufficient evidence to create a genuine issue of material fact for a jury as to whether or not there was a meeting of the minds.

**5. THE LLC BEING ON THE LOAN IS NOT EVIDENCE THAT THERE WAS NEVER A MEETING OF THE MINDS.**

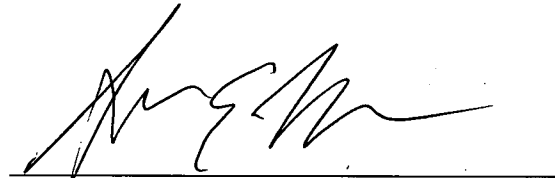
The Ferderigos Brothers, namely Phillip and Spiros, argue that the LLC being on the loan is evidence that there was no agreement between the parties because they did not want to personally guarantee the loan and there remained a possibility that they could be held personally liable in the event that the corporate veil was pierced upon default. Again, however, this ignores the fact that the brothers never objected to the LLC being named on the loan until it became convenient for them to do so after the agreement was made. Furthermore, there is a distinct difference between signing a personal guarantee on a loan and sharing potential liability for a loan on the off-chance that the corporate veil is pierced; any conflation of the two is inaccurate. If respondents were concerned about potential liability stemming from the LLC, it was never made a point throughout any of their communications with Fokas or South Coast. Thus, any assertion that the LLC's being on the loan is evidence of there not being a meeting of the minds is illogical.

**6. TO BE ENFORCEABLE IN SOUTH CAROLINA, PRICE IN AN AGREEMENT NEED ONLY BE REASONABLY CERTAIN.**

Respondents' argument that there was no meeting of the minds, due to the final cost of the project being unknown, is unsound. To be clear, certain terms, to include price, are indispensable and must be established with reasonable certainty. *See McPeters v. Yeargin Const. Co., Inc.*, 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986). The price of the project here needed to be reasonably certain; any claim that a more concrete/bottom-line price was needed is patently false. That reasonably certain cost was expressed in the terms from the September 2014 South Coast commitment letter: \$1,728,900.00. Also, as proof that

construction cost estimates are somewhat fluid, the construction contract here with Kevin Carroll, as is standard in many construction contracts, leaves an exception to total cost for certain "additions and deductions" in anticipation of unforeseen complications that inevitably reveal themselves throughout the building process, much like the sprinkler dilemma here. *R. p. 1084.*

Therefore, because the overall cost of the expansion project was priced at \$1,728,900 in the South Coast loan commitment of 2014 which was received by all parties, the common understanding that the cost of construction is very rarely going to remain consistent over the course of the entire project, and the fact that price need only be "reasonably certain" for courts to enforce agreements, there at least remains an issue of material fact for the jury with respect to cost being definite enough to constitute an enforceable agreement.



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November 20, 2018

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**CERTIFICATE OF COUNSEL**

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



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Andrew E. Haselden

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