In The

Supreme Court of Virginia

RECORD NO: 091410

STATION #2, LLC,

Appellant,

v.

MICHAEL AND LISA LYNCH, and MARATHON DEVELOPMENT GROUP, INC., and FRANK T. ("BUDDY") GADAMS,

Appellees.

BRIEF OF APPELLANT

Kevin E. Martingayle
(VSB No. 33865)
STALLINGS & BISCHOFF, P.C.
2101 Parks Avenue
Suite 801
Post Office Box 1687
Virginia Beach, VA 23451
(757) 422-4700 (office)
(757) 428-6982 (fax)
martingayle@sb-lawgroup.com

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

I. STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT 1

II. ASSIGNMENTS OF ERROR 3

III. STATEMENT OF MATERIAL FACTS 4

IV. QUESTIONS PRESENTED 15

V. LAW AND ARGUMENT 16

Standard of Review 16

A. The trial court erred in sustaining the special plea of the statute of frauds 17

B. The trial court erred in sustaining the demurrer to Count VI of the Second Amended Complaint ("Fraud by Marathon and Gadams"), as Station #2 properly pled a cause of action for fraud 24

C. The trial court erred in sustaining the demurrer to the statutory conspiracy portion of Count VII (captioned "Tortious Interference with Business and Violation of Code Sections 18.2-499 and 18.2-500; All Defendants"), as Station #2 properly pled a cause of action for statutory conspiracy 26

VI. CONCLUSION 28

CERTIFICATE 30

TABLE OF CITATIONS

Page

Rules of the Virginia Supreme Court:

1:4 25

5:27 1

Cases:

Advanced Marine Enterprises v. PRC, Inc.,
256 Va. 106, 501 S.E.2d 148 (1998) 27

Baker v. Jim Walter Homes, Inc.,
438 F. Sup. 2nd (sic) 649 (2006) 18

Beach v. Virginia National Bank,
235 Va. 376, 367 S.E.2d 516 (1988) 18, 20

Catercorp, Inc. v. Catering Concepts, Inc.,
246 Va. 22, 431 S.E.2d 277 (1993) 1, 28

Commercial Business Systems v. Bell South,
249 Va. 39, 453 S.E.2d 261 (1995) 28

Duggin v. Adams,
234 Va. 221, 360 S.E.2d 832 (1987) 17

Elliott v. Shore Stop, Inc.,
238 Va. 237, 384 S.E.2d 752 (1989) 4, 16, 24

Feddeman & Company v. Langan Associates,
260 Va. 35, 530 S.E.2d 668 (2000) 27

Fox v. Deese,
234 Va. 412, 362 S.E.2d 699 (1987) 17

Gibbens v. Hardin,
239 Va. 425, 389 S.E.2d 478 (1990) 18, 20

Kay v. Professional Realty Corp.,
222 Va. 348, 281 S.E.2d 820 (1981) 17

Kitchen v. City of Newport News,
275 Va. 378, 657 S.E.2d 132 (2008) 16

Lance J. Marchiafava, Inc. v. Haft,
777 F. 2nd (sic) 942 (1985) 18

Pardoe & Graham Real Estate v. Schulz Homes,
259 Va. 398, 525 S.E.2d 284 (2000) 21

Porter v. Shaffer,
147 Va. 921 (1926) 18

Prospect Development Co., Inc. v. Bershader,
258 Va. 75, 515 S.E.2d 291 (1999) 25

Runion v. Helvestine,
256 Va. 1, 501 S.E.2d 411 (1998) 16, 21, 22

Silverman v. Bernot,
218 Va. 650, 239 S.E.2d 118 (1977) 16

Stuart v. Pennis,
91 Va. 688 (1895) 18

Tomlin v. McKenzie,
251 Va. 478, 468 S.E.2d 882 (1996) 24

Wingate v. Coombs,
237 Va. 501, 379 S.E.2d 304 (1989) 16, 22

Code of Virginia:

Va. Code § 11-2 . . . . . 19, 21, 22, 24

Va. Code § 18.2-499 . . . . . passim

Va. Code § 18.2-500 . . . . . passim

IN THE SUPREME COURT OF VIRGINIA at Richmond

STATION #2, LLC,

Appellant,

v.

MICHAEL AND LISA LYNCH,
and MARATHON DEVELOPMENT GROUP, INC.,
and FRANK T. ("BUDDY") GADAMS,

Appellees.

OPENING BRIEF OF APPELLANT

NOW COMES your appellant, Station #2, LLC (hereinafter "Station #2"), by counsel, and submits this Petition for Appeal pursuant to Rule 5:27.

I. STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

This is an appeal of a case involving contracts and business torts where the trial judge "incorrectly short-circuited litigation pretrial"[1] by dismissing fraud and conspiracy claims on demurrer and disposing of a contract claim pursuant to a "special plea".

By way of background, the initial Complaint was filed in November, 2006 and was subsequently amended prior to service. In response to various defensive pleadings, and after considering legal memoranda and oral

[1] Catercorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993).

arguments, the trial court issued three separate letter opinions, all dated April 30, 2008, sustaining some portions of the demurrers and overruling others. Leave to amend was granted and the "Second Amended Complaint" was filed in June, 2008. (JA 1-41).[2]

Various defensive pleadings were filed in response to the Second Amended Complaint (JA 42, 128), and the parties subsequently filed briefs (JA 129-200; 253-96). The trial court entertained oral argument on October 7, 2008. (JA 201-42).

In an order entered December 1, 2008, the trial court dismissed Count VI of the Second Amended Complaint (captioned "Fraud by Marathon and Gadams") and the statutory conspiracy portion of Count VII (captioned "Tortious Interference with Business and Violation of Code Sections 18.2-499 and 18.2-500; All Defendants") on demurrer. (JA 297-302).

In another letter opinion dated February 26, 2009, the trial court sustained a "Special Plea to Count V of the Plaintiff's Second Amended Complaint" and dismissed the contract claims stated against Marathon and Gadams. (JA 303-04). The trial court's ruling in the February 26, 2009 letter opinion was memorialized in an order entered on April 14, 2009. (JA 305-06).

---

[2] "JA" refers to the Joint Appendix filed in this appeal.

The December 1, 2008 and April 14, 2009 orders both preserved Station #2's objections (JA 302, 306). This appeal followed. (JA 309-11).

II. ASSIGNMENTS OF ERROR

1. The trial court erred in sustaining the Special Plea of the Statute of Frauds to Count V of the Second Amended Complaint (captioned "Breach of Contract by Marathon and Buddy Gadams") because the statute of frauds has no application to the facts of this case, and even if it did, Station #2 had performed on the agreement.

2. The trial court erred in sustaining the Special Plea of the Statute of Frauds to Count V of the Second Amended Complaint ("Breach of Contract by Marathon and Buddy Gadams") because the trial court's opinion was premised upon factual errors; specifically, the facts did not the allege a situation "analogous to a party wall and easement agreement", nor is it correct to state that Station #2 proposed to build or construct anything "on Defendant's property" or "attached to" property owned by Marathon and/or Gadams.

3. The trial court erred in sustaining the Special Plea of the Statute of Frauds to Count V of the Second Amended Complaint ("Breach of Contract by Marathon and Buddy Gadams") because Marathon and Gadams failed to carry their burden of proving that the statute of frauds has any application and/or constitutes a legal bar to recovery by Station #2.

4. The trial court erred in sustaining the demurrer to Count VI of the Second Amended Complaint ("Fraud by Marathon and Gadams"), as Station #2 properly pled a cause of action for fraud.

5. The trial court erred in sustaining the demurrer to the statutory conspiracy portion of Count VII ("Tortious Interference with Business and Violation of Code Sections 18.2-499 and 18.2-500; All Defendants"), as Station #2 properly pled a cause of action for statutory conspiracy.

III. STATEMENT OF MATERIAL FACTS[3]

In the summer of 2004, representatives of Station #2 had discussions with Michael Lynch about the possibility of renting the first floor of space of property at 239 Granby Street in Norfolk for use as a restaurant that would offer music and live entertainment. The building was owned by Michael Lynch and his wife, Lisa. This space was vacant at that time. (JA 1). To further solidify the feasability of the restaurant and entertainment project, the representatives of Station #2 applied to the City of Norfolk for permission to open an entertainment establishment with alcoholic beverages on the premises. The city attorney and planning department signed off on the application and the city council passed an ordinance on October 26, 2004 allowing the restaurant to open and allowing for music to be played. Entertainment was approved, and it specifically included the following:

a. Live Band performances including dance performance accompaniment (6-12 piece band members and accompaniment)
b. Comedy (Stand up performer or performers)

---

[3] The facts are derived from the Second Amended Complaint (JA 1-41) pursuant to the standard of review on demurrer. Elliott v. Shore Stop, Inc., 238 Va. 237, 239-40, 384 S.E.2d 752, 753 (1989). Moreover, no evidentiary hearings were conducted with regard to the statute of frauds defense, so the Second Amended Complaint provides all of the factual information for purposes of this appeal.

c. Theatrical performance (6-12 performers within the performance both on and off the stage)
d. Film and Video (featuring fine arts independent film and documentary cinematography)
e. Dance performance (pre-recorded or live accompaniment music)
f. Visual Art installations (art showings)

(JA 2).

Frank T. "Buddy" Gadams is a real estate developer in Norfolk and was/is a principal in Marathon Development Group, Inc. Gadams, acting through a company he owned, had purchased the upper two floors of the building at 239 Granby Street from Michael and Lisa Lynch, and utilized Marathon to perform certain development activities on his property. Gadams acquired the space with the intention of renovating it and developing condominiums within the space. In the summer of 2004, the second and third floors were unfinished spaces that required certain demolition preparation work before construction of the condominiums could begin. (JA 2-3).

Several meetings were organized and held to discuss development issues associated with the two projects that would be occurring in the building. In the meetings, the representatives of Station #2 met with Gadams and some of his employees, and with Michael Lynch and his attorneys. The parties specifically discussed entertainment in the restaurant and noise

issues. These discussions covered how the restaurant group could install sound attenuating materials that would significantly reduce the transmission of sound from the first floor to the upper floors of the building. (JA 3).

Gadams stated that installing the sound attenuation materials would not be a problem and indicated that there was plenty of "void space" that could be used for the materials. Michael and Lisa Lynch also agreed to the installation of sound attenuation materials. (Id.).

The restaurant group hired an expert who specialized in installing sound attenuation materials, and he attended additional meetings with Gadams, Marathon representatives, a construction company which had been hired to do the demolition and construction work on the second floor, and Michael Lynch. (JA 3-4).

It was agreed during these meetings that sound attenuation materials could be installed by the restaurant group and that the construction company working for Marathon would contact the restaurant group and its sound expert to indicate when they could come into the upstairs space to install the sound attenuation package. (JA 4).

Based on these assurances and relying on them, the members of the restaurant group made financial investments and began preparing to implement the restaurant. (Id.).

Michael Lynch became a member and minority owner of Station #2 pursuant to agreements he made with the investors in the restaurant project. (Id.).

As a part of the overall agreements, Michael Lynch promised that he would provide all of the equipment necessary to launch the restaurant and that it would be open by mid-November 2004. It was to be a "turn-key" operation, meaning that everything necessary to run the restaurant business would be provided. Station #2 was to occupy the space without the need for further improvement, and all of the requisite equipment was to be provided by Michael and Lisa Lynch. (JA 5).

The premises were not ready for occupancy in November, and were still not ready in December, even though the restaurant group had been paying rent and received assurances that the space would be available for occupancy by mid-November 2004. (JA 6).

On December 27, 2004, the parties entered into a written lease to substitute for the oral lease under which the parties had been operating.[4] (Id.). The December 27, 2004 lease specifically addressed the issue of sound, and it provided on page 6 in ¶10(f),

> Tenant will insure that in conjunction with the construction of the condominiums located above the business that additional sound proofing material to be selected by the Tenant with professional sound engineering consultants will be installed between the ceiling of the Premises and the floor of the lower level of the condominium located above the business. Tenant will use reasonable efforts to work in conjunction with the builder of the condominiums with regard to sound proofing. The cost of the insulating material is to be paid for by the Tenant. The insulation is to be at sufficient sound abatement characteristic as to effectively minimize noise and vibration from the leased premises being transmitted to the condominiums and to meet Landlord's covenant of quiet enjoyment passing to the owner of the condominiums.

(JA 6-7; 33-34).

Station #2 continued to pay rent, even though the space was still not ready for occupancy until February 2005. At that point, the restaurant opened for business and served lunch and dinner. (JA 7).

---

[4] A copy of the lease is attached to the Second Amended Complaint as Exhibit A. (JA 28-41).

Prior to being issued a permanent or final certificate of occupancy by the City of Norfolk, Station #2 was able to occupy the premises pursuant to several temporary certificates of occupancy which were dated November 20, 2004, December 16, 2004, and January 11, 2005. These enabled the restaurant to prepare to open. (Id.).

At all times material, all parties were aware of the nature of the business operations contemplated and conducted by Station #2. (JA 8). Specifically, all of the defendants were aware that Station #2 was operating as a full service restaurant and bar featuring musical and other live entertainment, and that the business also scheduled certain private events, including weddings, parties, receptions and the like. (Id.). The parties had previously agreed that construction activity would cease during the lunch hour (11:00 a.m. to 1:30 p.m.) when the restaurant was open for business serving lunch. However, the construction workers routinely conducted demolition and construction activities that were very noisy and disruptive. (Id.). Many patrons of the restaurant complained of the noise and dust, and many got up and walked out. The restaurant began providing dissatisfied customers with vouchers for free meals. Many customers said they would not return. (Id.). The situation

continued unabated throughout the spring and the restaurant was forced to shut down its luncheon service, thereby depriving it of revenues. (JA 8-9).

In the same time frame, Station #2 and its sound expert awaited notification that they could enter the area upstairs to place the sound attenuation material. Station #2's sound expert had previously indicated that he could install the sound package in the existing space between the floor and ceiling, and did not need the floor raised on the second level. (JA 9).

Notification to the sound expert and Station #2 was not forthcoming. When the sound expert tried to make contact on several occasions, his efforts were met with evasiveness and non-responsiveness. (Id.).

Station #2 and its expert then learned that the Marathon contractors had closed up the space without allowing the sound attenuation materials to be installed. The contractors claimed that Gadams and Marathon had changed their minds because allowing the sound attenuation work was going to delay them and cost them money. (Id.).

Station #2 appealed to Michael Lynch to force Gadams and Marathon to comply with the sound attenuation agreement. They cited to Lynch the oral agreements and written provisions in the lease that allowed them to put in

sound attenuation materials. Lynch did nothing. He made no attempt to have Gadams comply with his promises and he did not offer any alternatives or provide assistance of any kind. Lisa Lynch was made aware of the situation. She likewise did nothing. (JA 9-10).

Michael Lynch filed a suit seeking injunctive relief in the Circuit Court of the City of Norfolk to prevent live music at Station #2. (JA 10). At a hearing held on July 29, 2005, agents and employees of Marathon Development were actively involved with Michael Lynch and his lawyer in the preparation and presentation of their evidence. (Id.). During the hearing, Michael Lynch testified that prior to entering into the lease with Station #2, he had already sold the upper floors to Gadams and Marathon. Despite Lynch's efforts against Station #2, the court ruled in favor of Station #2 and against Lynch. The court did not grant the injunction. (Id.).

Gadams and Marathon conspired with Michael and Lisa Lynch to prevent the installation of the sound attenuation materials and acted in concert with them to prevent the playing of live music in the establishment. Gadams told officials of the city of Norfolk that he wanted Station #2 out of the space. (Id.).

Beginning in the summer of 2005 and continuing thereafter, the City of Norfolk initiated enforcement actions against Station #2 and began to issue citations for noise violations. (JA 11). Despite the court's ruling declining to grant them an injunction against Station #2, Michael and Lisa Lynch continued to refuse to allow Station #2 to install sound attenuation materials, even as the City continued to press claims against the restaurant based on noise. (Id.).

Over a period spanning many months, an attorney for Station #2 was in active talks with Michael Lynch and his lawyer, seeking to have Lynch live up to the obligations to allow sound attenuation materials to be installed. (Id.). The restaurant owners indicated that they could even install a sound attenuation package below the ceiling of the first floor by adding a new ceiling six inches below the original ceiling and installing the sound attenuation materials above the new ceiling. (Id.). This plan would eliminate any need to go into the second level area.

The restaurant group met with the representatives of the Norfolk city attorney's office, the police and Michael Lynch and his attorney. Station #2 explained various options for installation of a sound attenuation package that would cure noise problems. Station #2's efforts were in vain. (JA 11-12).

On February 19, 2006, the City issued a directive that ordered the owners of the restaurant to cease all music. (JA 12). Based on the City's action, Station #2 had no choice but to stop all music, requiring silent dining. (Id.). This destroyed the business and led to closure of the restaurant. (Id.).

In Count V of the Second Amended Complaint (captioned "Breach of Contract by Marathon and Buddy Gadams"), Station #2 alleged that Gadams and Marathon Development agreed to allow sound attenuation materials to be installed between the first and second floors of the premises. (JA 20).

Marathon and Gadams failed to perform on their agreement and did so willfully and with knowledge. The failure to perform caused damage to the restaurant operation, which eventually caused the restaurant to close. (JA 21).

Count VI of the Second Amended Complaint alleged "Fraud by Marathon and Gadams", and was pled in the alternative to the contract theory asserted by Station #2. (Id.). Specifically, Station #2 alleged that Marathon and Gadams made false promises to induce Station #2 and its members to invest money, prepare a restaurant to open, and get the restaurant started, all in an effort to drive up the value of the property, which would directly benefit the Marathon and Gadams condominium project. (Id.). Specifically,

Marathon and Gadams stated that they understood the nature of the business to be conducted on the leased premises, that no construction operations would be performed while the restaurant was serving the public or hosting events, that all construction would be performed so as to minimize any detrimental impact to the restaurant, and that they would cooperate fully with regard to sound attenuation. Marathon and Gadams knew that Station #2 was relying on the promises and discussions described in the lawsuit, and intended that Station #2 would rely upon such discussions and promises. (JA 21-22). Station #2 reasonably relied upon such promises (especially regarding sound attenuation issues) and as a result of its reliance and the "bait and switch" pulled on it, sustained damages. (JA 22).

Station #2 asserted that Marathon and Gadams are liable for damages caused by their actual and/or constructive fraud, and further asserted that Marathon and Gadams are liable for all proved reckless and/or intentional misconduct. (Id.).

Count VII of the Second Amended Complaint included a claim of statutory conspiracy. Station #2 pled that the defendants conspired against

Station #2 in a coordinated effort to shut down the restaurant, and Station #2 pled specific facts in support of this claim. (JA 22-26).[5]

IV. QUESTIONS PRESENTED

1. Did the trial court err in sustaining the Special Plea of the Statute of Frauds to Count V of the Second Amended Complaint ("Breach of Contract by Marathon and Buddy Gadams") where the statute of frauds has no application to the facts of this case, and despite performance by Station #2? (Assignment of Error 1).

2. Did the trial court err in sustaining the Special Plea of the Statute of Frauds to Count V of the Second Amended Complaint ("Breach of Contract by Marathon and Buddy Gadams"), where the trial court's opinion was premised upon factual errors? (Assignment of Error 2).

3. Did the trial court err in sustaining the Special Plea of the Statute of Frauds to Count V of the Second Amended Complaint ("Breach of Contract by Marathon and Buddy Gadams") where Marathon and Gadams failed to carry their burden of proving that the statute of frauds has any application and/or constitutes a legal bar to recovery by Station #2? (Assignment of Error 3).

4. Did the trial court err in sustaining the demurrer to Count VI of the Second Amended Complaint ("Fraud by Marathon and Gadams"), considering that Station #2 properly pled a cause of action for fraud? (Assignment of Error 4).

5. Did the trial court err in sustaining the demurrer to the statutory conspiracy portion of Count VII ("Tortious Interference with Business and Violation of Code Sections 18.2-499 and 18.2-500; All Defendant"),

---

[5] Each specific count, including Count VII, incorporated all prior factual allegations, in addition to adding further specific information. (See e.g., JA 22).

considering that Station #2 properly pled a cause of action for statutory conspiracy? (Assignment of Error 5).

V. LAW AND ARGUMENT

Standard of Review

On the issues presented in this appeal, the Court is presented with several questions of law and a *de novo* standard of review is appropriate. The only facts before the trial court, and therefore the only facts to be considered by this Court, are the facts presented in the Second Amended Complaint.

Application of the statute of frauds is a question of law. Silverman v. Bernot, 218 Va. 650, 654, 239 S.E.2d 118, 121 (1977). Dismissal on demurrer also presents a question of law and is reviewed *de novo* on appeal. Kitchen v. City of Newport News, 275 Va. 378, 385, 657 S.E.2d 132, 136 (2008). Moreover, pursuant to the well-established demurrer standard of review, all facts and reasonable inferences are to be construed favorably to the plaintiff, i.e., Station #2. Runion v. Helvestine, 256 Va. 1, 501 S.E.2d 411 (1998) (grant of demurrer reversed in an oral contract case where the statute of frauds was asserted); Elliott v. Shore Stop, Inc., 238 Va. 237, 384 S.E.2d 752 (1989) (reversing dismissal on demurrer; contract and fraud claims); Wingate v. Coombs, 237 Va. 501, 379 S.E.2d 304 (1989) (order sustaining

demurrers reversed in a case involving oral agreements to develop real property; statute of frauds defense rejected); Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987) (reversed and remanded where the plaintiff pled the elements of multiple tort claims arising from a large public concert event, including statutory civil conspiracy claims); Duggin v. Adams, 234 Va. 221, 360 S.E.2d 832 (1987) (reversing dismissal on demurrer where plaintiff pled a claim of tortious interference with a contract); Kay v. Professional Realty Corp., 222 Va. 348, 281 S.E.2d 820 (1981) (dismissal on demurrer reversed where plaintiff alleged oral agreement relating to compensation associated with a real estate transaction; statute of frauds defense rejected).

A. The trial court erred in sustaining the special plea of the statute of frauds.[6]

The following is the complete legal analysis of the trial court regarding the statute of frauds claim:

> The Plaintiff's Count V essentially alleges an oral agreement whereby the Defendant (sic) was allowed access and right to construct a sound insulation wall on Defendant's (sic) property. The Plaintiff complains that notwithstanding this agreement, the Defendant (sic) closed the floor without allowing Plaintiff to access the property. Consequently, the Plaintiffs (sic)

[6] Because the Assignments of Error 1-3 all relate to the statute of frauds analysis and ruling, they will all be addressed in this section.

seek compensatory damages in the amount of $300,000 for the breach of this oral agreement. The Defendant (sic) argues that no such agreement exists, and even if it did, it would be unenforceable pursuant to the statute of frauds.

The statute of frauds precludes oral contracts involving realty. Beach v. Virginia National Bank, 235 Va. 376 (1988). Virginia courts have consistently held that the application of the statute of frauds applies to land or real estate and includes "everything belonging or attached to it,..." Baker v. Jim Walter Homes, Inc., 438 F. Sup. 2nd (sic) 649 (2006); citing Stuart v. Pennis, 91 Va. 688 (1895). In light of the weight of authority, the Court concludes that the agreement alleged by the Plaintiffs (sic) in this case is analogous to a party wall and easement agreement and is contemplated by the statute of frauds. The clear implication of the oral agreement alleged is that the Defendants conveyed the right to the Plaintiff to enter upon and construct property attached to their real property. Gibbens v. Hardin, 239 Va. 425 (1990) (property boundary agreements are subject to the statute of frauds); See also, Baker v. Jim Walter Homes, Inc., 438 F. Sup. 2nd (sic) 649 (2006)(transfer a structure on real estate is subject to statute of frauds.)

The Plaintiff further argues that an exception exists in regard to the application of the statute of frauds in this case because of the doctrine of partial performance. This too must fail because the weight of authority is that the doctrine of partial performance does not apply to actions of law for breach of an oral contract and is only available in actions seeking equitable relief. Lance J. Marchiafava, Inc. v. Haft, 777 F. 2nd (sic) 942 (1985); citing Porter v. Shaffer, 147 Va. 921 (1926). As noted above, the Plaintiff in this action is

> not seeking equitable relief. Consequently, the partial performance doctrine will not apply. Counsel for the Defendants will prepare an Order consistent with the foregoing.

Trial court letter opinion of February 26, 2009 (JA 303-04).

The pertinent language from the statute of frauds dealing with real estate is the following:

> Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases:
>
> * * *
>
> 6. Upon any contract for the sale of real estate, or for the lease thereof for more than a year;
>
> 7. Upon any agreement or contract for services to be performed in the sale of real estate by a party defined in § 54.1-2100 or 54.1-2101;
>
> * * *
>
> The consideration need not be set forth or expressed in writing, and it may be proved (where a consideration is necessary) by other evidence.

Code of Virginia § 11-2.

In a brief it filed with the trial court, Marathon and Gadams cited cases involving property boundary agreements, transfer of a structure on real estate, transfer of interest in real property, restrictive covenants and grant of an easement. Although not one of those claims was presented or made by

Station #2, the trial court was persuaded by this inapplicable authority and sustained the special plea.

The primary authorities from this Court upon which Marathon, Gadams and the trial court relied are Gibbens v. Hardin, 239 Va. 425, 389 S.E.2d 478 (1990) and Beach v. Virginia National Bank, 235 Va. 376, 367 S.E.2d 516 (1988). Neither case involves similar circumstances and neither precludes the contractual claim asserted by Station #2. In Gibbens, this Court found that property boundary agreements are subject to the statute of frauds. Station #2 has not alleged anything analogous to a "property boundary agreement".

In Beach, this Court affirmed a trial court ruling which sustained a demurrer to a claim for specific performance of an alleged oral promise to convey land for consideration. Here, Station #2 has made no claim that any of the adverse parties promised to convey any property. Quite simply, Station #2 asserted that there was an agreement that it would be allowed to install certain sound attenuation materials. That is far from being a claim of ownership, a claim of easement, or any other claim of continuing rights in or to real estate.

A review of this Court's other jurisprudence dealing with the statute of frauds indicates that § 11-2 is not construed broadly in an effort to prohibit various kinds of oral agreements. To the contrary, this Court has traditionally construed the statute of frauds quite narrowly.

In Pardoe & Graham Real Estate v. Schulz Homes, 259 Va. 398, 525 S.E.2d 284 (2000) (copy at JA 267-72), this Court reversed a trial court ruling concluding that the statute of frauds barred a real estate brokerage firm from recovering damages for breach of an oral contract for a commission on the sale of a custom home to be constructed on a lot already owned by the home buyers. The Court noted that contracts to perform construction on property are not within the statute of frauds, even though the finished product will be "real estate". Id., 259 Va. at 403, 525 S.E.2d at 286-87; (JA 271).

In Runion v. Helvestine, 256 Va. 1, 501 S.E.2d 411 (1998) (copy at JA 273-81), this Court reversed a trial court ruling sustaining a demurrer to an alleged oral agreement requiring an elderly lady to make a devise of property to the plaintiffs and to give them an option to purchase a second tract of land. One of the holdings in Runion is that "subsequent occurrences can make enforceable an otherwise unenforceable contract, provided the rights of innocent parties without notice have not intervened." Runion, 256 Va. at 8,

501 S.E.2d at 415, (JA 279). To the extent that § 11-2 has any application to Station #2's case at all (which Station #2 denies), its reliance upon the oral agreements and its preparations to perform on the oral agreement are the kinds of "subsequent occurrences" that the Runion opinion indicated may lead to an enforceable contract. The trial court never allowed Station #2 an opportunity to prove the agreement, and also erred by finding that the "partial performance doctrine" is "only available in actions seeking equitable relief."[7]

In Wingate v. Coombs, 237 Va. 501, 379 S.E.2d 304 (1989) (copy at JA 282-87), this Court reversed a trial court ruling sustaining the defendants' demurrers holding that an oral agreement to develop real property in a partnership was within the statute of frauds. The agreement alleged by Station #2 is actually much simpler. The parties agreed that Station #2 would be allowed access to the space between the first and second floors of the building to install sound attenuation materials. Station #2 does not allege any ongoing right, title, easement or other interest in real estate, the leased space, or anything of that nature. Accordingly, the statute of frauds does not apply.

---

[7] The authority cited by the trial court predates the merger of law and equity. Perhaps more critically, it would make no sense to hold that because Station #2 was destroyed and can no longer benefit from "equitable relief", it cannot prove breach of a contract and seek damages. Such a ruling would reward wrongful conduct and punish the victim.

Another problem with the trial court's analysis is that it is premised upon an apparent misunderstanding of the facts. The Second Amended Complaint does not allege any situation "analogous to a party wall and easement agreement", nor was it correct for the trial court to find that Station #2 proposed to build or construct anything "on Defendant's (sic) property" or "attached to" property owned by Marathon or Gadams. These facts simply do not appear anywhere within the Second Amended Complaint. Quite to the contrary, it was never established exactly who owned precisely what portions of the building space in question. According to the Second Amended Complaint, Gadams, "acting through a company he owned, had purchased the upper two floors of the building" and "utilized Marathon Development to perform certain development activities on this property." (JA 2). The Lynches continued to maintain ownership of the first floor, which was the space being leased by Station #2. The record in this case never established who owned the space between the ceiling of the Lynches' space leased by Station #2 on the ground floor level and the floor of the second story space acquired by an entity owned by Gadams. It was undisputed that neither Gadams nor Marathon personally owned the second story space purchased from the Lynches, but they did purport to control the second level space and they did

indicate the apparent authority to make a deal with Station #2. Perhaps more importantly, the agreement asserted by Station #2 was nothing more than an agreement to allow the installation of sound proofing materials in open or "void" space between a floor and ceiling. That is not an oral agreement barred by § 11-2.

It appears that the trial court assumed several key facts without evidence and without stipulations[8], misinterpreted and misapplied precedent from this Court, and improperly transformed a simple construction agreement into an agreement involving an ownership interest in real estate. Accordingly, the trial court committed error by sustaining the special plea of the statute of frauds.

B. The trial court erred in sustaining the demurrer to Count VI of the Second Amended Complaint ("Fraud by Marathon and Gadams"), as Station #2 properly pled a cause of action for fraud.

In Elliott v. Shore Stop, Inc., 238 Va. 237, 244, 384 S.E.2d 752, 756 (1989), this Court stated:

---

[8] A party asserting a "defensive plea" is required to carry the "burden of proof on that issue of fact." Tomlin v. McKenzie, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996). No evidentiary hearings were conducted, and in the April 14, 2009 order, Station #2 specifically objected to the trial court's erroneous and unsupported factual findings. (JA 306).

> The elements of actual fraud, to be proved by clear and convincing evidence, are: a false representation of material fact, made intentionally and knowingly, with intent to mislead, reliance by the party misled, and resulting damage to the misled party.

In Prospect Development Co., Inc. v. Bershader, 258 Va. 75, 86, 515 S.E.2d 291, 297 (1999), this Court set out the elements for a claim of constructive fraud, and stated that a plaintiff must allege that a false representation of a material fact was made innocently and negligently, and the injured party was damaged as a result of his reliance upon the misrepresentation.

As permitted by Rule 1:4 of the Rules of the Virginia Supreme Court, the fraud claims were pled by Station #2 in the alternative to the contract claims. Paragraphs 65-67 of the Second Amended Complaint (JA 21-22) clearly set out all of the requisite allegations to sustain Station #2's fraud claims. Specifically, Station #2 alleged that Marathon and Gadams

> made false promises to induce plaintiff and its members to invest money, prepare a restaurant to open, and get the restaurant started, all in an effort to drive up the value of the property, which would directly benefit Marathon and [Gadams]. Specifically, Marathon and [Gadams] stated that they understood the nature of the business that would be conducted on the leased premises, and that no construction operations would be performed while the restaurant was serving the public or hosting events, that all

> construction would be performed so as to minimize any detrimental impact to the restaurant, and that they would cooperate fully with regard to sound attenuation. Marathon and [Gadams] knew that Station 2 was relying on the promises and discussions described in this lawsuit, and intended that Station 2 would rely upon such discussions and promises.
>
> [Station #2] and its members reasonably relied upon such promises, especially regarding sound attenuation issues, and as a result of their reliance and the "bait and switch" pulled on them, sustained damages.
>
> Marathon and [Gadams] are liable to plaintiff for damages caused by their actual and/or constructive fraud.

Id.

The trial court erred in dismissing the fraud claims.

C. The trial court erred in sustaining the demurrer to the statutory conspiracy portion of Count VII (captioned "Tortious Interference with Business and Violation of Code Sections 18.2-499 and 18.2-500; All Defendants"), as Station #2 properly pled a cause of action for statutory conspiracy.

The pertinent portion of Code of Virginia § 18.2-499, which states the elements for a claim of statutory civil conspiracy, reads as follows:

> Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously

> compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

Paragraphs 18, 70-74 of the Second Amended Complaint assert all of the facts necessary for a claim of statutory civil conspiracy. In summary, these paragraphs allege that all of the defendants were aware of the nature of the business operations contemplated and to be conducted by Station #2, and through the use of improper methods and deceitful practices, the defendants combined, associated, agreed and mutually undertook actions together for the purpose of willfully and maliciously injuring Station #2 in its reputation, trade and business. Station #2 further alleged that the defendants conspired to undermine and interfere with business operations and economic expectancies of Station #2, and succeeded in ruining the business.

Pursuant to the plain language of § 18.2-499 and controlling interpretive authority from this Court, a proper claim of statutory civil conspiracy was made by Station #2, and it was error for the trial court to rule otherwise. See Feddeman & Company v. Langan Associates, 260 Va. 35, 530 S.E.2d 668 (2000) (reinstating a jury verdict on a civil conspiracy claim); Advanced Marine Enterprises v. PRC, Inc., 256 Va. 106, 501 S.E.2d 148 (1998) (stating the

elements of a civil conspiracy claim and upholding a verdict for the plaintiff); Commercial Business Systems v. Bell South, 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995) (reversing summary judgment for the defendant and finding that the "statutory conspiracy claim is a matter for determination by a jury."); Catercorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993) (reversing the grant of a demurrer to various business tort claims, including statutory civil conspiracy, and finding that the "trial court incorrectly short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits.").

VI. CONCLUSION

_____WHEREFORE, your appellant, Station #2, respectfully requests that this Honorable Court reverse the rulings of the trial court which are presented in this appeal, and remand this case for trial on the merits. Counsel for the appellants requests an opportunity to present oral argument to this Court.

STATION #2, INC.

By_____
Of Counsel

Kevin E. Martingayle, Esquire
VSB# 33865
STALLINGS & BISCHOFF, P.C.
2101 Parks Avenue, Suite 801
Post Office Box 1687
Virginia Beach, VA 23451

(757) 422-4700
(757) 428-6982 (facsimile)
E-mail: martingayle@sb-lawgroup.com

CERTIFICATE

I, hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, twelve (12) copies of this Opening Brief of Appellant and Joint Appendix were hand-delivered to the Clerk of the Supreme Court of Virginia and three copies of the Opening Brief of Appellant and Joint Appendix have been mailed to Daniel R. Warman, Esquire, *Counsel for Michael and Lisa Lynch*; and John C. Lynch, Esquire, Counsel for Marathon Development Group, Inc. and Frank T. ("Buddy") Gadams this 3rd day of December, 2009. On this date, the Opening Brief was also filed electronically with the Court, with a copy being sent electronically to Daniel R. Warman, Esquire and John C. Lynch, Esquire.

Kevin E. Martingayle