In the

Supreme Court of Virginia

At Richmond

Record No. 091410

STATION #2, LLC,

Appellant,

– v. –

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

Appellees.

BRIEF OF APPELLEES MARATHON DEVELOPMENT GROUP, INC. and FRANK T. ("BUDDY") GADAMS

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Appellees, Marathon Development Group, Inc. ("Marathon") and Frank T. ("Buddy") Gadams ("Gadams"), file this Brief of Appellees in response to the Brief of Appellant filed by Station #2, LLC ("Station #2").

COUNTERSTATEMENT OF THE CASE

Instead of properly assessing the facts and pleading only the causes of action actually supported by those facts, in this case Station #2 attempted to cast its net wide as possible to pressure the defendants into a quick settlement. The trial court properly dismissed those causes of action not supported by the facts, leaving for trial claims for breach of contract, fraud and tortious interference against Michael and Lisa Lynch ("Mike and Lisa Lynch"), breach of fiduciary duty against Michael Lynch ("Mike Lynch"), tortious interference against Marathon and Gadams, and civil trespass and tortious interference against Hourigan Construction Corporation ("Hourigan").[1] Rather than proceed to trial on the remaining claims, Station #2 non-suited the case and brought this appeal.

As Station #2 notes, it originally filed its Complaint against Mike and Lisa Lynch, Marathon, Gadams and Hourigan on December 6, 2006 and amended it prior to service in May 2007. The First Amended Complaint alleged causes of action for fraud, breach of contract, tortious interference

[1] Station #2 ultimately reached a settlement with Hourigan and Hourigan was dismissed from the case.

with business expectancy and civil conspiracy against Marathon and Gadams, as well as various causes of action against Hourigan and the Lynches. All defendants filed Demurrers to the First Amended Complaint.

On November 6, 2007, the Court heard oral argument on Marathon and Gadams' Demurrer to the First Amended Complaint. On April 30, 2008, the Court issued its opinion overruling Marathon and Gadams Demurrer to the Breach of Contract and Statutory Conspiracy counts and sustaining their Demurrer to Station #2's fraud claim. (J.A., at 62.) Station #2 filed its Second Amended Complaint ("Complaint") against the same four defendants on May 22, 2008. (J.A., at 1.) The Complaint alleges the same three counts against Marathon and Gadams premised upon the same facts: Breach of Contract (Count V), Fraud (Count VI), and Interference with Business Expectancy (Count VII).[2]

Marathon and Gadams again filed a Demurrer to the fraud claim, as well as a Special Plea of the Statute of Frauds to the breach of contract claim. (J.A., at 53.) The Court heard oral argument on October 7, 2008 and, in an order entered December 1, 2008, dismissed Count VI (Fraud) of the Complaint and Count VII (with respect to the Statutory Conspiracy

[2] Count VII encompasses claims both for tortious interference with business expectancy and for statutory conspiracy pursuant to Virginia Code §18.1-499 and 500.

claim) against Marathon and Gadams. (J.A., at 297.) In a letter opinion issued on February 26, 2009 and subsequent Order entered, the trial court sustained Marathon and Gadams' Special Plea of the Statute of Frauds with respect to Count V (Breach of Contract). (J.A., at 303-06.) On April 14, 2009, Station #2 non-suited the remaining causes of action. (J.A., at 307.) This appeal followed. (J.A., at 309.)

QUESTIONS PRESENTED[3]

1. Whether the trial court properly sustained the Special Plea of the Statute of Frauds to Count V of the Second Amended Complaint when the oral contract alleged by Station #2 clearly involved a contract relating to the transfer of an interest in real estate.

2. Whether the trial court properly sustained the Special Plea of the Statute of Frauds to Count V of the Second Amended Complaint where none of the actions alleged to support part performance were sufficient to show actual performance of the agreement and where Station #2 sought damages and not equitable relief.

3. Whether the trial Court properly sustained the Demurrer to Count VI of the Second Amended Complaint when the only allegations made in the Complaint were of future promises.

4. Whether the trial court properly sustained the Demurrer to Count VII of the Second Amended Complaint, with respect to the Statutory Conspiracy Claims, when Station #2 is unable to plead any criminal or unlawful acts on the part of Marathon and Gadams.

[3] Marathon and Gadams disagree with Station #2's questions presented. Pursuant to Rule 5:28(b), Marathon and Gadams restate the Questions Presented in this Appeal.

COUNTERSTATEMENT OF FACTS

Station #2's statement of facts contains numerous factual allegations concerning Station #2's dealings with Mike and Lisa Lynch and the activities of Hourigan, many of which are not relevant to the claims against Marathon and Gadams. In this Counterstatement, Marathon and Gadams set forth those facts pertinent to the causes of action alleged against them in the Complaint. Sometime before the summer of 2004, Mike and Lisa Lynch sold the upper two floors of the building located at 237 Granby Street ("Granby Building") to 237 Granby, LLC ("237 Granby"), a company managed by Gadams, for the construction of condominiums. Gadams and Marathon are the developers of these condominiums.[4] (J.A., at 2; Compl. ¶ 3). Mike and Lisa Lynch retained ownership of the first floor of the Granby Building.

Station #2 is a limited liability company formed for the purpose of operating a restaurant. (J.A., at 4; Compl. ¶ 8). Station #2 alleges that some time prior to December 2004, the individuals who later formed Station #2 met with Gadams and Mike Lynch to discuss the installation of sound attenuating materials that would reduce the transmission of sound from the first floor to the upper floors of the building. (J.A., at 3; Compl. ¶ 4.) During

[4] Marathon has no ownership interest in the real property located at 237 Granby Street.

these meetings, Gadams is alleged to have stated that installing sound attenuation materials "would not be a problem." (J.A. at 3; Compl. ¶ 5.) The Complaint alleges further that Gadams indicated that the floors on the second level would be raised six inches and that "sound attenuation material could be placed in the space." Mike and Lisa Lynch also agreed to the installation of the sound attenuation materials. *Id.* Station #2 hired a sound attenuation expert who subsequently attended meetings with Gadams, Marathon, Hourigan and Mike Lynch. (J.A., at 3-4; Compl. ¶ 6.) The Complaint asserts that "[i]t was agreed at these meetings that sound attenuation materials could be installed by the restaurant group." (J.A., at 4; Compl. ¶ 7.)

On December 27, 2004, Station #2 entered into a written lease ("Lease") with the Lynches to open a restaurant, called Station #2, on the first floor of the Granby Building. (J.A., at 6; Compl. ¶ 14). The Lease provided that Station #2 would install a sound proofing system "between the ceiling of the Premises and the floor of the lower level of the condominium located above the business" at its expense. (J.A., at 6-7; Compl. ¶ 15.) Gadams and Marathon were not parties to the Lease.

Station #2 opened for business in February 2005. (J.A., at 7; Compl. ¶ 16). Station #2 alleges that Marathon and Gadams refused to allow

Station #2 access to the floor under the second story of the Granby Building to install the sound attenuation package. (J.A., at 9-10; Compl. ¶ 19-22). The Complaint claims that Marathon and Gadams changed their minds about the agreement because construction of the sound attenuation system was going to cause delay and cost (Gadams and Marathon) money. (J.A., at 9; Compl. ¶ 21). Instead, Marathon and Gadams closed up the space and refused to allow Station #2 access. *Id.* The Complaint alleges further that Mike Lynch refused to permit the installation of a sound attenuation system in the first floor of the Granby Building (J.A., at 11-12; Compl. ¶¶ 27-30.) The actions of Marathon, Gadams, and Mike and Lisa Lynch are further alleged to constitute a statutory conspiracy to injure Station #2's business by preventing the installation of sound attenuation materials and preventing the playing of live music in the restaurant. (J.A., at 10; Compl. ¶ 24.)

Beginning in the summer of 2005, the City of Norfolk began enforcement actions against Station #2 for noise violations and issued citations to its manager. (J.A., at 11; Compl. ¶ 25). On February 19, 2006, the City issued a directive that Station #2 stop playing music. (J.A., at 12; Compl. ¶ 31). Plaintiff closed for business in February 2006 (within ten days of the city's directive). (J.A., at 13; Compl. ¶ 34). Notably, the City's

directive only pertained to the music/entertainment emitting from the restaurant. (J.A., at 12; Compl. ¶ 31). Station #2 could have continued to operate the restaurant without the music/entertainment. *Id.*

STANDARD OF REVIEW

Marathon and Gadams agree that the issues presented in this appeal are reviewed *de novo* because they present questions of law. Application of the statute of frauds is a question of law, as is a ruling on demurrer. A demurrer tests the sufficiency of factual allegations to determine whether the Complaint states a cause of action. *Fun v. Virginia Military Inst.*, 245 Va. 249, 252, 427 S.E.2d 181, 183 (1991). To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court find the existence of a legal basis for its judgment. *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122-23, 624 S.E.2d 1, 2 (2006). The Court considers as admitted the facts expressly alleged and those which "fairly can be viewed as impliedly alleged or reasonably inferred from the facts alleged." *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226, 541 S.E.2d 909, 914 (2001); *Riverview Farm Assocs. Va. Gen. P'ship v. Bd. of Supervisors*, 259 Va. 419, 427, 528 S.E.2d 99, 103 (2000). However, a demurrer does not admit the correctness of the pleader's conclusions of law. *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373, 374 (1988).

Station #2's entire claim is premised upon a lease agreement entered into with Mike and Lisa Lynch, not Marathon and Gadams. In an effort to circumvent this obvious problem, Station #2 claims it had an oral contract with Gadams and Marathon pursuant to which they agreed to allow Station #2 to install a sound attenuation system onto the floor of the second level of the building located at 237 Granby Street. The trial court properly ruled that this claim is barred by the statute of frauds because it attempts to enforce an oral contract involving real property. Contrary to Station #2's assertions, the fact that the Complaint does not explicitly allege that the contract involved a transfer of an interest in real property does not prevent a ruling that the alleged oral agreement violates the statute of frauds. Whether a particular contract is within the statute of frauds is a question of law for the Court. *Silverman v. Bernot*, 218 Va. 650, 654, 239 S.E.2d 118, 121 (1977).

Station #2 also claims that Marathon and Gadams defrauded Station #2 when they refused to allow Station #2 to install the sound attenuation system on Gadams' property. This claim fails because, even assuming the allegations in the Complaint are true, Station #2 alleges only unfulfilled promises as to future events, promises which cannot form the basis for a claim of fraud. The amendments made by Station #2 when it filed its

Second Amended Complaint did not cure the deficiencies in its fraud claim. Finally, because Station #2 is unable to make any supportable claim that Marathon and Gadams acted in a criminal or unlawful manner, the trial court properly dismissed the statutory conspiracy claims against them.

ARGUMENT

I. THE TRIAL COURT PROPERLY SUSTAINED MARATHON AND GADAMS' SPECIAL PLEA OF THE STATUTE OF FRAUDS

It is undisputed that no written agreement exists between Station #2 and Gadams or Marathon regarding installation of the sound attenuation system. Accordingly, Station #2 alleges the breach of an oral contract between the parties. The trial court properly held that this claim is barred by the statute of frauds. Specifically, the statute of frauds provides that:

> 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.[5]

[5] It is not entirely clear why Station #2 cites Virginia Code § 11-2(7), which addresses contracts for services to be performed in the sale of real estate. Marathon and Gadams do not claim that the alleged oral contract was one for services to be performed in the sale of real estate. Instead, the alleged contract involved the transfer of an interest in real property and is governed by §11-2(6).

This Court consistently has held that the Statute of Frauds precludes oral contracts involving realty. *Beach v. Virginia Nat'l Bank,* 235 Va. 376, 378, 367 S.E.2d 516, 517 (1988); *see also Gibbens v. Hardin,* 239 Va. 425, 430, 389 S.E.2d 478, 480 (1990) ("a written agreement insures that a court enforces the agreement made by the parties and reduces the likelihood that a court will create an agreement where none existed"). This rule is broad. The requirement *extends to everything belonging on the land or attached to it*. *Baker v. Jim Walter Homes, Inc.,* 438 F.Supp.2d 649 (W.D. Va. 2006); *citing Stuart v. Pennis,* 91 Va. 688, 22 S.E. 509 (1895) (emphasis added). In addition, it extends to the conveyance of any interest in land, including easements. *Buckles-Irvine Coal Co. v. Kennedy Coal Corp*., 134 Va. 1, 15-16 (Va. 1922) (grant of easement is subject to the statute of frauds); *e.g., Price v. Scully*, 46 Va. Cir. 463, 467-68 (1959) (restrictive covenants relating to real property are subject to the statute of frauds).

A. <u>The Second Amended Complaint Alleges a Contract for the Transfer of an Interest in Real Property</u>.

The main thrust of Station #2's argument is that the alleged oral agreement does not involve the transfer of a property interest, but rather an agreement in the nature of a construction agreement to install sound proofing materials in the space between the first and second floors of the

building. (Brief of Appellant, at 22, 24.) Station #2 contends that the Complaint did not allege "any ongoing right, title, easement or other interest in real estate" or any agreement to construct anything on property owned by Marathon or Gadams or attached to such property. (Brief of Appellee, at 22-24.) However, a review of the allegations in the Complaint demonstrates that the alleged agreement involved a promise to permit the installation of a sound attenuation structure either on the property owned by 237 Granby, a limited liability company controlled by Gadams, on the property owned by Mike and Lisa Lynch, or on the boundary between the property owned by 237 Granby and the property owned by Mike and Lisa Lynch.

Specifically, the Complaint alleges that a company owned by Gadams (237 Granby) purchased the upper two floors of the Granby Building from Mike and Lisa Lynch (J.A., at 2; Compl. ¶ 3). Mike and Lisa Lynch continued to own the first floor, which Station #2 was to occupy under a lease from Mike and Lisa Lynch. (J.A., at 2-3, 6; Compl. ¶¶ 3, 14.) During a meeting, Gadams stated that the floors of the second floor space were to be raised and would include six to ten inches of space for wiring and plumbing. (J.A., at 3; Compl. ¶ 5.) In this same meeting, Mike and Lisa Lynch allegedly agreed that sound attenuation materials could be

installed in the space. (J.A., at 3; Compl. ¶ 5.) The Complaint alleges that at later meetings, "it was agreed . . . that sound attenuation materials could be installed." (J.A., at 4; Compl. ¶7.) The Complaint asserts that Gadams and Marathon later breached this alleged agreement when they closed up the space without permitting Station #2 to install the sound attenuation package. (J.A., at 9; Compl. ¶ 21.)

Station #2's argument that this agreement does not involve the transfer of an interest in real estate because the Complaint does not specifically mention an easement or allege an ongoing right in the property is nonsensical. (Brief of Appellee, at 22-24.) Station #2 cannot avoid the nature of the rights that were to be transferred by the alleged agreement simply by side-stepping any mention of them in the Complaint. In order for Station #2 to install the sound wall or sound materials on 237 Granby's property (either entirely or partially), Gadams must have conveyed the right to Station #2 to access and occupy the real property via the installation of a sound wall.[6] Put another way, if the promise alleged was not an agreement to convey an interest in the property to Station #2 and Mike and Lisa Lynch, what possible right would Station #2 have to access the property, construct

[6] The alleged agreement would have been of little use to Station #2 if it did not grant an *ongoing* right to maintain the sound attenuation system attached to 237 Granby's real property.

and maintain its sound wall thereon and benefit from the permanent installation of the sound wall? The agreement clearly created an easement – a right for Station #2 to come onto the property owned by 237 Granby,[7] construct a sound attenuation structure, and continue to use the property for the purposes of sound attenuation. *See Bunn v. Offutt*, 216 Va. 681, 684, 222 S.E.2d 522, 525 (1976) (an easement is a privilege on the part of one person to use the land of another in a particular manner and for a particular purpose); *see Tillis v. Treadwell*, 22 So. 983, 1897 Ala. LEXIS 51 (Ala. 1897) (party wall agreement could not be performed without a grant by the defendant to the plaintiffs of an interest in the lands).

Contrary to Station #2's contentions, the Complaint does not allege that Marathon and Gadams contracted with Station #2 for Station #2 to construct a sound attenuation structure on 237 Granby's property for the

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[7] Station #2 contends that it is unclear who owned the space into which the sound attenuation materials were to be placed. (Brief of Appellee, at 23.) However, the Complaint alleges that a company owned by Gadams, and for whom Gadams could contract, owned the second floor. (J.A., at 2; Compl. ¶ 3.) Gadams and his company, 237 Granby, are hereinafter sometimes referred to collectively as "Gadams" for purposes of the argument contained in Section 1(A) of this Brief. The materials were to be placed under the second floor. Mike and Lisa Lynch owned the first floor. Accordingly, the sound wall was to be placed either on the property owned by Gadams or on the boundary between 237 Granby's property and that owned by Mike and Lisa Lynch. If Station #2 is alleging that the space belonged entirely to Mike and Lisa Lynch, then Gadams and Marathon cannot be liable for breach of any agreement to refuse to permit the installation of sound materials thereon.

benefit of Gadams and his companies (*i.e.,* a construction agreement). Instead, the Complaint describes an agreement to transfer certain property rights previously held solely by Gadams and/or a company controlled by Gadams to Station #2 and Mike and Lisa Lynch so that Station #2 could access Gadams' property to construct the sound attenuation structure and continue to benefit from the existence of the sound attenuation structure on Gadams' property (or at least partially on Gadams' property). *See Rudisill v. Cross*, 16 S.W. 575, 1891 Ark. LEXIS 106 (Ark. 1891) (obligation to build and maintain a division fence, in whole or in part, for the benefit of adjoining land is something more than an obligation to furnish the materials and labor necessary for the erection and reparation of the fence; it imposes a burden on the land itself and cannot be conveyed or reserved by parol).

Indeed, Station #2 alleges that Marathon and Gadams *breached the contract when they closed up the floor of Gadams' own property*. (J.A., at 9; Compl. ¶ 21.) This action cannot possibly be a breach of any agreement unless the agreement conveyed rights in the property to Station #2. Such an agreement is analogous (if not identical) to an agreement to install a party wall and is precisely the kind of agreement covered by the statute of frauds. *Gibbens v. Hardin*, 239 Va. 425, 429 (1990) (property boundary agreements are subject to the statute of frauds); *see Rice v. Roberts*, 26

Wis. 461, 1869 Wis. LEXIS 119 (Wis. 1869) (in a case involving a party wall, the right claimed was a right to control or dictate the use which should be made of the adjoining lot and was an interest in land which must be granted or created by a writing); *Kuhn v. Poole*, 112 P. 962, 963 (Okla. 1910) (an executory parol agreement for the erection of a party wall is void as being within the statute of frauds requiring all agreements relating to an interest in land to be in writing).

The cases cited by Station #2 are inapplicable to this case. For instance, *Pardoe & Graham Real Estate v. Schulz Homes Corp.,* 259 Va. 398, 525 S.E.2d 284 (2000), involved a listing agreement between a property owner and a broker. *Id.* at 398. Unlike the situation here, *Pardoe* did not involve an agreement transferring a property interest, but an agreement for the defendant to pay the plaintiff a real estate commission on the sale of a home to be constructed on the property of third parties. *Id.* at 401, 525 S.E.2d at 285. Although it may be the case that a contract to construct a building for a property owner is not within the statute of frauds, for the reasons set forth more fully above, that is not the contract involved in this case.

Station #2 also cites *Wingate v. Coombs,* 237 Va. 501, 379 S.E.2d 304 (1989) as authority for why the statute of frauds should not apply in this

case. (Brief of Appellee, at 22.). The contract involved in *Wingate*, however, was an agreement to form a partnership to acquire and develop land for profit. Although the intended purpose of the partnership was to purchase land, the agreement at issue involved the partnership agreement, not the land purchase itself. *Id.* at 503, 379 S.E.2d at 502 (noting that plaintiffs claimed an interest in the partnership, not in the land). As this Court held, "when land is acquired and held for partnership purposes, it is considered personalty as between the partners and creditors of the firm." *Id.* at 505, 379 S.E.2d at 306. Accordingly, *Wingate* did not involve the transfer of an interest in real property is not applicable to this case.

In contrast, the facts alleged in the Complaint involve a transfer of a property interest previously held only by Gadams to Station #2 and Mike and Lisa Lynch in order for Station #2 to construct a sound attenuation structure. The agreement described ***is not*** a sale of services or a contract with a third party to build a structure on 237 Granby's property for the benefit of Gadams and his companies. Instead, the alleged contract to build a sound attenuation wall on 237 Granby's property is an agreement, like an agreement to permit the construction of a party wall, necessarily involving the conveyance of an interest in real estate. The trial court

properly held that the alleged oral contract is akin to party wall agreement and therefore must be in writing to satisfy the statute of frauds.

B. <u>The Doctrine of Part Performance Does Not Apply to Remove the Agreement from the Application of the Statute of Frauds</u>.

Station #2 makes a half-hearted attempt to avoid its statute of frauds problem by arguing that the partial performance exception to the statute of frauds applies to its claim. (Brief of Appellee, at 21.) The trial court properly rejected this assertion for two reasons. First, it is undisputed that the partial performance doctrine is not available in Virginia in actions at law for breach of an oral contract. Second, the acts asserted by Station #2 to show part performance are insufficient to take the contract out of the statute of frauds.

1. The Partial Performance Doctrine is Not Available in Actions Seeking Damages for Breach of Contract.

As the trial court observed, the part performance exception to the statute of frauds is only available if the party asserting the doctrine is seeking specific performance. *Lance J. Marchiafava, Inc. v. Haft,* 777 F.2d 942 (4th Cir. 1985); *citing Porter v. Shaffer*, 147 Va. 921, 133 S.E. 614 (1926) and *Ricks v. Sumler,* 179 Va. 571, 19 S.E.2d 889 (1942); *see also Albanese v. WCI Cmtys., Inc.,* 530 F. Supp. 2d 752, 767 (E.D. Va. 2007) ("[t]he doctrine of part performance is not available, in Virginia in such

actions at law for damages for breach of contract to take an oral agreement out of the statute of frauds") (internal quotations omitted).

2. The Complaint Does Not Allege Facts Sufficient to Establish Partial Performance.

Moreover, even if the part performance doctrine were applicable in actions seeking damages, the alleged facts of this case do not warrant application of the partial performance exception. As this Court recently observed:

> "[O]ne of the most important objects of the statute of frauds [is] to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts. Therefore, in invoking the defense of part performance to overcome the statute of frauds, a party must show that: (1) the parol agreement relied on is "certain and definite in its terms," (2) the acts proved in part performance "refer to, result from, or [were] made in pursuance of the agreement," and (3) the agreement was "so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation."

Moorman v. Blackstock, Inc., 276 Va. 64, 78-79, 661 S.E.2d 404, 411-412 (2008) (internal quotations omitted). "The acts relied on as part performance must be consistent with *no theory other than the existence of the alleged oral contract.*" *Pair v. Rock,* 195 Va. 196, 207, 77 S.E.2d 395, 401 (1953) (emphasis added).

Station #2 cannot demonstrate that its actions were consistent only with the existence of an alleged oral contract, or that the agreement was so far executed that a refusal of its enforcement would perpetrate a fraud on it. The only actions allegedly taken by Station #2 were to invest money in, and make preparations to open and operate, the restaurant. Station #2 cannot possibly claim that these actions are consistent only with the existence of a contract. Most of the allegations in the Complaint have nothing to do with these defendants, and the facts asserted are more consistent with the theory that Station #2 was hopeful it could install a sound attenuation wall, not that there was a binding contract permitting it to do so.

Runion v. Helvestine, 256 Va. 1, 501 S.E.2d 411 (1998), cited by Station #2 in support of its partial performance theory, provides no help. That case involved an alleged oral contract whereby an elderly lady agreed to devise real property to the plaintiffs in exchange for their caretaking services. *Id.* at 3, 501 S.E.2d at 412. This Court held that, by moving in with her and providing care for seven years, the plaintiffs had performed to the extent that it would operate as a fraud upon them to refuse to enforce the contract. *Id.* at 6, 501 S.E.2d at 414. Thus, the type of acts necessary to take the agreement involved here out of the statute of frauds are actions to *perform the agreement*, *i.e.*, actual construction of the sound attenuation

structure. *See Kuhn*, 112 P. at 963 (where one of the parties has executed the contract by building the party wall, the contract is no longer within the statute of frauds). Station #2 does not, and cannot, allege the existence of any such actions. Accordingly, the part performance doctrine does apply to this case.

II. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER TO COUNT VI, ALLEGING FRAUD, BECAUSE THE COMPLAINT ALLEGES ONLY FUTURE PROMISES

Because Station #2 cannot point to any contract (written or oral) between itself and Marathon and Gadams, it makes a hopeless attempt to assert a fraud claim. In its Petition, Station #2 alleges only that it properly pled a cause of action for fraud, failing entirely to address the trial court's ruling the Complaint does not state a fraud claim because the only allegations are of future promises. (Brief of Appellee, at 25.) As Station #2 notes, a fraud claim can be predicated only on a false representation of material *fact*. It cannot be based on unfulfilled promises. *Blair Constr. v. Randy Weatherford, T/A W.S. Construction,* 253 Va. 343, 346, 485 S.E.2d 137 (1997) (citations omitted) (fraud must relate to a present or a pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events.)

As noted above, in response to Marathon and Gadams' Demurrer to the First Amended Complaint, on April 30, 2008, the Court issued its opinion sustaining their Demurrer to Station #2's fraud claim. (J.A., at 62.) Specifically, the Court held that:

> The common law does not require Gadams, Marathon, or 237 Granby, LLC, to allow sound attenuation material underneath the floor of their condominium project, and Plaintiff alleges only that Gadams and Marathon changed their minds with regard to the insertion of sound attenuation due to cost (First Am. Compl. ¶21), not that they had lied from the beginning about their plan to allow Station #2 to install sound attenuation. Therefore Station #2 has not alleged facts which, if proven, would amount to a claim of fraud against Marathon or Gadams.

(J.A., at 67; Letter Opinion issued April 30, 2008.) In response to the Court's ruling, Station #2 filed the Second Amended Complaint. With respect to the fraud claim, the Second Amended Complaint added only the following:

> Specifically, Marathon and Gaddams [sic] stated that they understood the nature of the business that would be conducted on the leased premises, that no construction operations would be performed while the restaurant was serving the public or hosting events, and 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.

(J.A., at 21-22; Compl. ¶ 65.) In addition, Station #2 changed the word "stated" to "claimed" in paragraph 21 of the Complaint so that the Complaint alleged that "Hourigan representatives claimed that Buddy Gaddams [sic] and Marathon had changed their minds." (J.A., at 9; Compl. ¶ 21.)

Thus, the amendments to the Complaint made by Station #2 did nothing to correct the deficiencies present in the First Amended Complaint. The additions did nothing more than allege additional unfulfilled promises and state that Marathon and Gadams knew that Station #2 was relying on those promises. Nowhere does Station #2 allege that the promises were anything other than just that – promises. A fraud claim cannot be based on unfulfilled promises. *Blair Constr.,* 253 Va. at 347, 485 S.E.2d at 139.

Accordingly, the Complaint alleges nothing more than unfulfilled representations as to future events and does not state a claim for fraud. As this Court has observed, "[w]ere the general rule otherwise every breach of contract could be made the basis of an action in tort for fraud." *Id.* in this case, Station #2's fraud claim is premised on an assertion that Marathon and Gadams made a promise to allow Plaintiff to install a sound attenuation

system sometime in the future and failed to follow through with that promise. Station #2 alleges the following against Marathon and Gadams:

> The Station 2 restaurant group . . . then found out that Marathon and Hourigan had closed up the space without allowing the sound attenuation materials to be installed. Hourigan representatives claimed that Buddy Gaddams (sic) and Marathon had *changed their minds* because doing the sound attenuation was going to delay them and cost them money.

(Compl. ¶ 21) (emphasis added).[8] Absent *a contractual duty* to follow through with a promise to perform a future event, Marathon and Gadams cannot be held legally liable for doing so.

Station #2's attempts to turn a claim that would be a breach of contract claim (if a contract actually existed) into a fraud claim must be rejected. *See Richmond Metro. Auth. v. McDevitt Street Bovis, Inc.,* 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998) ("In determining whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained. … If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from

[8] The fact that the Second Amended Complaint asserts that Hourigan "claimed" that Gadams and Marathon changed their minds, as opposed to "stated" that Gadams and Marathon changed their minds is of no consequence. Both give the explanation that Gadams and Marathon "changed their minds."

contract to do what is complained of exists) then the action is founded upon contract, and not upon tort."); *Filak v. George,* 267 Va. 612, 618, 594 S.E.2d 610 , 613 (2004) ("losses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts.")

As recently as 2007, this Court rejected the same theory Station #2 espouses as the basis for its fraud claim. In *Augusta Mut. Ins. Co. v. Mason,* 274 Va. 199*,* 645 S.E.2d 290 (2007), the plaintiff argued that its fraud claim was proper because it alleged that the third party defendant made false statements, never intending to fulfill its contractual obligations. *Id.* at 206. This Court rejected the plaintiff's argument because "the duties that [Defendant] allegedly violated by making fraudulent representations…arose solely by virtue of the [contract]." *Id.* at 206. As in *Augusta Mutual*, the duties Station #2 alleges were violated by Marathon and Gadams arose solely from the alleged oral contract. Marathon and Gadams were under no common law duty to facilitate the sound attenuation system. *See, id.* at 205 ("To avoid turning every breach of contract into a tort, however, we have enunciated the rule that, in order to recover in tort, 'the duty tortiously or negligently breached must be a common law duty, *not one existing between the parties solely by virtue of*

the contract.'"); *quoting Spence v. Norfolk & W. R. Co*., 92 Va. 102, 116, 22 S.E. 815, 818 (1895) (emphasis added).

Absent a contractual agreement otherwise, Marathon, Gadams (and 237 Granby) were under *no duty* to allow Plaintiff to install a sound attenuation system on its property. The fact that Plaintiff now regrets the terms (and parties) to the Lease it negotiated and signed does not support a lawsuit against Marathon and Gadams. Station #2's failure to obtain the proper contract does not give rise to a fraud claim. Accordingly, the trial court properly sustained Marathon and Gadams' demurrer to Count VI.

III. THE TRIAL COURT PROPERLY DISMISSED COUNT VII OF THE COMPLAINT WITH RESPECT TO THE STATUTORY CONSPIRACY CLAIMS

The trial court properly dismissed Count VII of the Complaint with respect to the statutory conspiracy claims because Station #2 has not alleged that Gadams or Marathon engaged in unlawful or criminal acts in furtherance of the alleged conspiracy, nor can Station #2 make any such allegation. To state a claim for statutory conspiracy under Virginia Code § 18.2-499, a plaintiff must allege "(1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business, and (2) resulting damage to plaintiff." *Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984). The statute requires an

allegation that the defendants acted with legal malice, *i.e.*, "intentionally, purposely and without lawful justification." *Commercial Bus. Sys. v. Bellsouth Servs., Inc.*, 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995).

As this Court has held, in order to be "without lawful justification," a civil conspiracy must necessarily include "some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985). To survive a demurrer, an allegation of conspiracy must allege an unlawful act or an unlawful purpose. *Id.*

In this case, Station #2 is unable to allege any criminal or unlawful actions taken by Marathon and Gadams to further the alleged conspiracy. Station #2 asserts that the conspiracy allegations are contained in paragraphs 18, and 70-74 of the Second Amended Complaint. (Brief of Appellee, at 27.) At best, these paragraphs allege that Marathon and Gadams selfishly decided not to allow the sound attenuation system after previously agreeing to the installation. The reason given in the Complaint is that installation of the system would cause delay and cost money. This is a perfectly appropriate reason for Defendants to decide not to allow the sound attenuation system. Marathon and Gadams were protecting their

own property interest, not contriving to accomplish criminal or unlawful acts against Station #2. *See Nationwide Mut. Fire Ins. Co. v. Jones*, 577 F. Supp. 968 (W.D. Va. 1984) (malicious conduct must be directly aimed toward damaging Plaintiff's business, not the result of an action taken for personal gain).

Moreover, as demonstrated above, Station #2's claims for fraud and breach of contract were properly dismissed by the trial court. Absent any breach of contract or fraud, Station #2 simply cannot allege any set of facts demonstrating that Marathon and Gadams acted unlawfully. Instead, Marathon and Gadams acted within their rights in closing up a floor of their property in order to save on construction costs. Nothing about their actions was criminal or unlawful and, accordingly, their actions cannot support a claim for statutory conspiracy.

In each of the cases, cited by Station #2 the defendants used unlawful or criminal means to carry out the conspiracies. For instance, in *Commercial Business Systems*, the defendant's agent committed violations of conflict of interest rules and took bribes in the form of kickbacks in the course of a conspiracy to terminate a contract with the plaintiff and instead award it to another party. *Commercial Bus. Sys.*, 249 Va. at 43, 453 S.E.2d at 265. Similarly, in *Feddeman & Co. v. Langan Assocs., P.C.*, 260

Va. 35, 530 S.E.2d 668 (2000), this Court held that the defendants' breach of fiduciary duty in soliciting employees of the plaintiff to leave and take positions with a rival business constituted unlawful means. *Id.* at 44, 530 S.E.2d at 674. *See also*, *Advanced Marine Enters. v. PRC, Inc.*, 256 Va. 106, 117, 501 S.E.2d 148, 155 (1998) (employees of plaintiff breached employment agreements by taking original client documents and confidential and proprietary information); *Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 431 S.E.2d 277 (1993) (plaintiff alleged that defendant breached a non-competition and employment agreements and committed fraud and unlawful conversion). As set forth above, Station #2 cannot allege that Marathon and Gadams have engaged in any unlawful conduct. Accordingly, the trial court correctly ruled that Count VII of the Complaint, alleging statutory conspiracy, must be dismissed.

CONCLUSION

For the reasons set forth above, Appellees Frank T. ("Buddy") Gadams and Marathon Development Corp. submit that the trial court did not commit any reversible error in sustaining the Demurrers filed by Gadams and Marathon to Count V (Breach of Contract), Count VI (Fraud), and Count VII (Statutory Conspiracy) to the Complaint. Gadams and Marathon respectfully request that the Court AFFIRM the ruling of the trial

court sustaining Appellees' Special Plea of the Statute of Frauds and granting their Demurrer to Count VI and to Count VII (with respect to the statutory conspiracy claims).

Respectfully submitted,

MARATHON DEVELOPMENT
GROUP, INC. and
FRANK T. ("BUDDY") GADAMS

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CERTIFICATE OF MAILING

Pursuant to Rule 5:28(g) of the Rules of the Supreme Court of Virginia, the undersigned counsel for Appellees certifies as follows:

(1) In compliance with Va. Sup. Ct. R. 5:26(d), fifteen copies of the foregoing were hand delivered to the Clerk of the Supreme Court of Virginia, and three copies were mailed or delivered to

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(2) In addition, an electronic copy has been filed with the Clerk of the Supreme Court of Virginia, via CD, contemporaneous with the filing of this Brief of Appellee.

This the 23rd day of December, 2009.

/s/ John C. Lynch