marine commission and told Montgomery that he was not going to buy the charts and wanted his $750 back. Montgomery's actual damages are only $250. Is King entitled to any recovery? If so, how much? See UCC §2-718(2).[3]

III. EQUITABLE REMEDIES

The word *equity* is used by lawyers to mean different things, depending on the context. The most obvious use is as a synonym for *fairness* ("Your Honor, simple equity requires a judgment in favor of my client"). The other uses of the word have a historical background.

As it developed through the centuries, common law pleading in England became a game of technicalities. The law courts only recognized certain specific theories (causes of action) that could be pleaded, and if an injured party's complaint could not be adapted to an approved theory, the courts would not hear it. Moreover, the courts felt that remedial relief was available only in the form of money damages. If the plaintiff wanted other relief (for example, an order from the court telling the defendant to do or not do something), the courts were useless.

Enter the king. Litigants shut out of the law courts sought relief by appealing to the monarch, who, of course, could grant whatever relief was thought necessary. Phrased another way, the king could grant "equitable relief" unbounded by the rules hampering the courts of law. Litigants seeking this extraordinary intervention made their appeals to the monarch through the king's chancellor, and the chancery courts were called courts of "equity."

This end run around the existing legal system caused much friction between the courts of "law" and the courts of "equity" (and had the further result of causing the courts of law to loosen up and liberalize some of the constraints on common law pleading). Eventually rules were established to protect the jurisdiction of each. For our purposes, the most important of these is that the courts of equity limited the relief they would grant to cases in which money damages would not make the parties whole (the usual incantation is that "the remedy at law is inadequate"), as where the plaintiff requested something more than the payment of money from the defendant. Thus by a writ of *mandamus* a public official is ordered to perform his or her job, by a writ of *injunction* a party is forbidden to do something, and by a writ of *specific performance* a party is ordered to perform the contract. Defiance of the court's order would be contempt of court (an altogether nasty business involving an angry judge with almost unlimited powers, including the right to jail the offender).

Modern courts are not typically divided into courts of law and courts of equity (though vestiges of the practice do still exist here and there), but

3. The formula in §2-728(2) that aids a breaching buyer in the attempt to recover some of the purchase price has completely disappeared from the 2003 revision of Article 2.

the courts still keep close track of whether the plaintiff is seeking money damages (an action "at law") or extraordinary relief (an action "in equity"). In the materials that follow we will explore the constraints on a judge "sitting in equity."

As we have seen, in the usual contracts suit the prevailing plaintiff recovers money damages measured under the rules studied thus far. But considering that it is the primary remedial goal of contracts law to put injured persons in the position that performance would have done, why is it not more appropriate simply to order specific performance? In a contract in which the defendant is to pay an amount of money, such as in a loan contract, the award of money damages equals that which the plaintiff would have received by performance. But if the plaintiff had bargained for a house to be built, an award of money damages is not the same as the performance sought by the defendant. At first thought, specific performance appears more direct, easier to measure, and more fair to the plaintiff. Is it therefore the preferred solution?

POSNER, ECONOMIC ANALYSIS OF LAW
117-120 (4th ed. 1992)

§4.8 Fundamental Principles of Contract Damages

When a breach of contract is established, the issue becomes one of the proper remedy. There are a bewildering variety of possibilities, which in rough order of increasing severity can be arrayed as follows:

(1) the promisee's reliance loss (the costs he incurred in reasonable reliance on the promisor's performing the contract);
(2) the expectation loss (loss of the anticipated profit of the contract);
(3) liquidated damages (damages actually specified in the contract as the money remedy for a breach);
(4) consequential damages (ripple effects on the promisee's business from the breach);
(5) restitution (to the promisee of the promisor's profits from the breach);
(6) specific performance (ordering the promisor to perform on penalty of being found in contempt of court);
(7) a money penalty specified in the contract, or other punitive damages.

It makes a difference in deciding which remedy to grant whether the breach was opportunistic. If a promisor breaks his promise merely to take advantage of the vulnerability of the promisee in a setting (the normal contract setting) where performance is sequential rather than simultaneous, we might as well throw the book at the promisor. An example would be where A pays B in advance for goods and instead of delivering them B uses the money in another venture. Such conduct has no economic justification and ought simply to be deterred. An attractive remedy in such a

case is restitution. The promisor broke his promise in order to make money — there can be no other reason in the case of such a breach. We can deter this kind of behavior by making it worthless to the promisor, which we do by making him hand over all his profits from the breach to the promisee; no lighter sanction would deter.

Most breaches of contract, however, are not opportunistic. Many are involuntary; performance is impossible at a reasonable cost. Others are voluntary but (as we are about to see) efficient — which from an economic standpoint is the same case as that of an involuntary breach. These observations both explain the centrality of remedies to the law of contracts (can you see why?) and give point to Holmes's dictum that it is not the policy of the law to compel adherence to contracts but only to require each party to choose between performing in accordance with the contract and compensating the other party for any injury resulting from a failure to perform.[1] This dictum, though overbroad, contains an important economic insight. In many cases it is uneconomical to induce completion of performance of a contract after it has been broken. I agree to purchase 100,000 widgets custom-ground for use as components in a machine that I manufacture. After I have taken delivery of 10,000, the market for my machine collapses. I promptly notify my supplier that I am terminating the contract, and admit that my termination is a breach. When notified of the termination he has not yet begun the custom grinding of the other 90,000 widgets, but he informs me that he intends to complete his performance under the contract and bill me accordingly. The custom-ground widgets have no operating use other than in my machine, and a negligible scrap value. To give the supplier a remedy that induced him to complete the contract after the breach would waste resources. The law is alert to this danger and, under the doctrine of mitigation of damages, would not give the supplier damages for any costs he incurred in continuing production after notice of termination. . . .

duty to mitigate

Now suppose the contract is broken by the seller rather than the buyer. I really need those 100,000 custom-ground widgets for my machine but the supplier, after producing 50,000, is forced to suspend production because of a mechanical failure. Other suppliers are in a position to supply the remaining widgets that I need but I insist that the original supplier complete his performance of the contract. If the law compels completion (specific performance), the supplier will have to make arrangements with other producers to complete his contract with me. Probably it will be more costly for him to procure an alternative supplier than for me to do so directly (after all, I know my own needs best); otherwise he would have done it voluntarily, to minimize his liability for the breach. To compel completion of the contract (or costly negotiations to discharge the promisor) would again result in a waste of resources, and again the law does not compel completion but confines the victim to simple damages.

1. Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else"). [For the argument that Posner misunderstands what Holmes meant by this statement, see J. Perrillo, Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference, 68 Ford. L. Rev. 1085 (2000).]

But what are simple contract damages? Usually the objective of giving the promisor an incentive to fulfill his promise unless the result would be an inefficient use of resources (the production of the unwanted widgets in the first example, the roundabout procurement of a substitute supplier in the second) can be achieved by giving the promisee his expected profit on the transaction. If the supplier in the first example receives his expected profit from making 10,000 widgets, he will have no incentive to make the unwanted 90,000. We do not want him to make them; no one wants them. In the second example, if I receive my expected profit from dealing with the original supplier, I become indifferent to whether he completes his performance.

In these examples the breach was committed only to avert a larger loss, but in some cases a party is tempted to break his contract simply because his profit from breach would exceed his profit from completion of the contract. If it would also exceed the expected profit to the other party from completion of the contract, and if damages are limited to the loss of that profit, there will be an incentive to commit a breach. But there should be. Suppose I sign a contract to deliver 100,000 custom-ground widgets at 10¢ apiece to A for use in his boiler factory. After I have delivered 10,000, B comes to me, explains that he desperately needs 25,000 custom-ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers me 15¢ apiece for them. I sell him the widgets and as a result do not complete timely delivery to A, causing him to lose $1,000 in profits. Having obtained an additional profit of $1,250 on the sale to B, I am better off even after reimbursing A for his loss, and B is also better off. The breach is Pareto superior. True, if I had refused to sell to B, he could have gone to A and negotiated an assignment to him of part of A's contract with me. But this would have introduced an additional step, with additional transaction costs — and high ones, because it would be a bilateral-monopoly negotiation. On the other hand, litigation costs would be reduced.

Could not the danger of overdeterring breaches of contract by heavy penalties be avoided simply by redefining the legal concept of breach of contract so that only inefficient terminations counted as breaches? No. Remember that an important function of contracts is to assign risks to superior risk bearers. If the risk materializes, the party to whom it was assigned must pay. It is no more relevant that he could not have prevented the risk from occurring at a reasonable, perhaps at any, cost than that an insurance company could not have prevented the fire that destroyed the building it insured. The breach of contract corresponds to the occurrence of the event that is insured against. . . .

NOTES AND QUESTIONS

1. See also Birmingham, Breach of Contract, Damage Measures, and Economic Efficiency, 24 Rutgers L. Rev. 273, 284-292 (1970). Attorney's fees and out-of-pocket costs of litigation (except official court costs) are not normally awarded to a litigant in American courts. What effect do you

suppose this has on a plaintiff's willingness to file suit and proceed to trial? Is an award of damages that excludes these costs ever truly in substitution for performance? Others have disagreed that economic theory dictates that an award of damages should be the usual remedy for breach of contract. They have argued that specific performance is generally more economically efficient. See Linzer, On the Amorality of Contract Remedies: Efficiency, Equity, and the Second Restatement, 81 Colum. L. Rev. 111 (1981); Schwartz, The Case for Specific Performance, 89 Yale L.J. 271 (1979).

2. The United Nations Convention on Contracts for the International Sale of Goods (described in the Introduction) is divided into different sections called *articles*. The Convention has a presumption in favor of the ability of the parties to get specific performance. See Articles 46, 62. Note, however, that Article 28 does not permit specific performance if the court asked to grant it would not do so were its own law applied. For example, since in the United States specific performance is rarely appropriate if it would require undue court supervision, a United States court might use this ground to duck an order of specific performance.

3. What part does morality play in this discussion? Is breach of contract immoral, and, if so, does the moral obligation to fulfill one's promises tend to support money damages or specific performance?

4. Should such considerations as relative bargaining power affect the amount of an award if the court does opt for the generally accepted expectation measure of damages? See Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741 (1982).

CENTEX HOMES CORP. v. BOAG
Superior Court of New Jersey, 1974
128 N.J. Super. 385, 320 A.2d 194

GELMAN, J.S.C. Plaintiff Centex Homes Corporation (Centex) is engaged in the development and construction of a luxury high-rise condominium project in the Boroughs of Cliffside Park and Fort Lee. The project when completed will consist of six 31-story buildings containing in excess of 3,600 condominium apartment units, together with recreational buildings and facilities, parking garages and other common elements associated with this form of residential development. As sponsor of the project Centex offers the condominium apartment units for sale to the public and has filed an offering plan covering such sales with the appropriate regulatory agencies of the States of New Jersey and New York.

On September 13, 1972 defendants Mr. & Mrs. Eugene Boag executed a contract for the purchase of apartment unit No. 2019 in the building under construction and known as "Winston Towers 200." The contract purchase price was $73,700, and prior to signing the contract defendants had given Centex a deposit in the amount of $525. At or shortly after signing the contract defendants delivered to Centex a check in the amount of $6,870 which, together with the deposit, represented approximately 10 percent of the total purchase price of the apartment unit. Shortly there-

after Boag was notified by his employer that he was to be transferred to the Chicago, Illinois, area. Under date of September 27, 1972 he advised Centex that he "would be unable to complete the purchase" agreement and stopped payment on the $6,870 check. Centex deposited the check for collection approximately two weeks after receiving notice from defendant, but the check was not honored by defendants' bank. On August 8, 1973 Centex instituted this action in Chancery Division for specific performance of the purchase agreement or, in the alternative, for liquidated damages in the amount of $6,870. The matter is presently before this court on the motion of Centex for summary judgment.

Both parties acknowledge, and our research has confirmed, that no court in this State or in the United States has determined in any reported decision whether the equitable remedy of specific performance will lie for the enforcement of a contract for the sale of a condominium apartment. The closest decision on point is Silverman v. Alcoa Plaza Associates, 37 A.D.2d 166, 323 N.Y.S.2d 39 (App. Div. 1971), which involved a default by a contract-purchaser of shares of stock and a proprietary lease in a cooperative apartment building. The seller, who was also the sponsor of the project, retained the deposit and sold the stock and the lease to a third party for the same purchase price. The original purchaser thereafter brought suit to recover his deposit, and on appeal the court held that the sale of shares of stock in a cooperative apartment building, even though associated with a proprietary lease, was a sale of personalty and not of an interest in real estate. Hence, the seller was not entitled to retain the contract deposit as liquidated damages.

As distinguished from a cooperative plan of ownership such as involved in *Silverman,* under a condominium housing scheme each condominium apartment unit constitutes a separate parcel of real property which may be dealt with in the same manner as any real estate. Upon closing of title the apartment unit owner receives a recordable deed which confers upon him the same rights and subjects him to the same obligations as in the case of traditional forms of real estate ownership, the only difference being that the condominium owner receives in addition an undivided interest in the common elements associated with the building and assigned to each unit. . . .

Centex urges that since the subject matter of the contract is the transfer of a fee interest in real estate, the remedy of specific performance is available to enforce the agreement under principles of equity which are well-settled in this state. . . .

The principle underlying the specific performance remedy is equity's jurisdiction to grant relief where the damage remedy at law is inadequate. The text writers generally agree that at the time this branch of equity jurisdiction was evolving in England, the presumed uniqueness of land as well as its importance to the social order of that era led to the conclusion that damages at law could never be adequate to compensate for the breach of a contract to transfer an interest in land. Hence specific performance became a fixed remedy in this class of transactions. See 11 Williston on Contracts (3d ed. 1968) §1418A; 5A Corbin on Contracts §1143 (1964). The judicial attitude has remained substantially unchanged and is expressed in *Pomeroy* as follows:

> in applying this doctrine the courts of equity have established the further rule that in general the legal remedy of damages is inadequate in all agreements for the sale or letting of land, or of any estate therein; and therefore in such class of contracts the jurisdiction is always exercised, and a specific performance granted, unless prevented by other and independent equitable considerations which directly affect the remedial right of the complaining party. . . . [1 Pomeroy, Equity Jurisprudence (5th ed. 1941), §221(b).]

While the inadequacy of the damage remedy suffices to explain the origin of the vendee's right to obtain specific performance in equity, it does not provide a *rationale* for the availability of the remedy at the instance of the vendor of real estate. Except upon a showing of unusual circumstances or a change in the vendor's position, such as where the vendee has entered into possession, the vendor's damages are usually measurable, his remedy at law is adequate and there is no jurisdictional basis for equitable relief.

No need for specific performance remedy of money enough

[The] English precedents suggest that the reliability of the remedy in a suit by a vendor was an outgrowth of the equitable concept of mutuality, i.e., that equity would not specifically enforce an agreement unless the remedy was available to both parties. . . .

So far as can be determined from our decisional law, the mutuality of remedy concept has been the prop which has supported equitable jurisdiction to grant specific performance in actions by vendors of real estate. The earliest reported decision in this State granting specific performance in favor of a vendor is Rodman v. Zilley, 1 N.J. Eq. 320 (Ch. 1831), in which the vendee (who was also the judgment creditor) was the highest bidder at an execution sale. In his opinion Chancellor Vroom did not address himself to the question whether the vendor had an adequate remedy at law. The first reported discussion of the question occurs in Hopper v. Hopper, 16 N.J. Eq. 147 (Ch. 1863), which was an action by a vendor to compel specific performance of a contract for the sale of land. In answer to the contention that equity lacked jurisdiction because the vendor had an adequate legal remedy, Chancellor Green said (at p. 148):

> It constitutes no objection to the relief prayed for, that the application is made by the vendor to enforce the payment of the purchase money, and not by the vendee to compel a delivery of the title. The vendor has not a complete remedy at law. Pecuniary damages for the breach of the contract is not what the complainant asks, or is entitled to receive at the hands of a court of equity. He asks to receive the price stipulated to be paid in lieu of the land. The doctrine is well established that the remedy is mutual, and that the vendor may maintain his bill in all cases where the purchaser could sue for a specific performance of the agreement.

No other *rationale* has been offered by our decisions subsequent to *Hopper,* and specific performance has been routinely granted to vendors without further discussion of the underlying jurisdictional issue. . . .

Our present Supreme Court has squarely held, however, that mutuality of remedy is not an appropriate basis for granting or denying specific

performance. Fleischer v. James Drug Store, 1 N.J. 138, 62 A.2d 383 (1948); see also, Restatement, Contracts §372; 11 Williston, Contracts (3d ed. 1968), §1433. The test is whether the obligations of the contract are mutual and not whether each is entitled to precisely the same remedy in the event of a breach. In *Fleischer* plaintiff sought specific performance against a cooperative buying and selling association although his membership contract was terminable by him on 60 days' notice. Justice Heher said:

> And the requisite mutuality is not wanting. The contention contra rests upon the premise that, although the corporation "can terminate the contract only in certain restricted and unusual circumstances, any 'member' may withdraw at any time by merely giving notice."
>
> Clearly, there is mutuality of obligation, for until his withdrawal complainant is under a continuing obligation of performance in the event of performance by the corporation. It is not essential that the remedy of specific performance be mutual. . . . The modern view is that the rule of mutuality of remedy is satisfied if the decree of specific performance operates effectively against both parties and gives to each the benefit of a mutual obligation.
>
> The fact that the remedy of specific enforcement is available to one party to a contract is not in itself a sufficient reason for making the remedy available to the other; but it may be decisive when the adequacy of damages is difficult to determine and there is no other reason for refusing specific enforcement. Restatement, Contracts (1932), sections 372, 373. It is not necessary, to serve the ends of equal justice, that the parties shall have identical remedies in case of breach. [At 149, 62 A.2d at 388.]

The disappearance of the mutuality of remedy doctrine from our law dictates the conclusion that specific performance relief should no longer be automatically available to a vendor of real estate, but should be confined to those special instances where a vendor will otherwise suffer an economic injury for which his damage remedy at law will not be adequate, or where other equitable considerations require that the relief be granted. . . .

As Chancellor Vroom noted in King v. Morford, 1 N.J. Eq. 274, 281-282 (Ch. Div. 1831), whether a contract should be specifically enforced is always a matter resting in the sound discretion of the court and

> considerable caution should be used in decreeing the specific performance of agreements, and . . . the court is bound to see that it really does the complete justice which it aims at, and which is the ground of its jurisdiction.

Here the subject matter of the real estate transaction — a condominium apartment unit — has no unique quality but is one of hundreds of virtually identical units being offered by a developer for sale to the public. The units are sold by means of sample, in this case model apartments, in much the same manner as items of personal property are sold in the market place. The sales prices for the units are fixed in accordance with schedule filed by Centex as part of its offering plan, and the only variance as between apartments having the same floor plan (of which six plans are available) is the floor level or the building location within the project. In actuality, the condominium apartment units, regardless of their realty label, share the same characteristics as personal property.

From the foregoing one must conclude that the damages sustained by a condominium sponsor resulting from the breach of the sales agreement are readily measurable and the damage remedy at law is wholly adequate. No compelling reasons have been shown by Centex for the granting of specific performance relief and its complaint is therefore dismissed as to the first count.

Centex also seeks money damages pursuant to a liquidated damage clause in its contract with the defendants. It is sufficient to note only that under the language of that clause (which was authored by Centex) liquidated damages are limited to such moneys as were paid by defendant at the time the default occurred. Since the default here consisted of the defendant's stopping payment of his check for the balance of the down-payment, Centex's liquidated damages are limited to the retention of the "moneys paid" prior to that date, or the initial $525 deposit. Accordingly, the second count of the complaint for damage relief will also be dismissed.

CITY CENTRE ONE ASSOCIATES v. TEACHERS INSURANCE & ANNUITY ASSN. OF AMERICA

United States District Court, District of Utah, 1987
656 F. Supp. 658

ALDON J. ANDERSON, Senior District Judge.

INTRODUCTION

On March 27, 1984, defendant Teachers Insurance and Annuity Association of America, a New York non-profit association, entered into a loan commitment agreement with Price/Prowswood LTD., whereby defendant agreed to lend Price/Prowswood $14.5 million for the construction of an office building in Salt Lake City. The agreement was drafted by the defendant. Price/Prowswood subsequently assigned its interest in the agreement to City Centre One Associates, the plaintiff in the present action. Price/Prowswood appears in this action as a counterclaim defendant.

Each party claims that the other was unwilling to close the loan by the April 1, 1986 expiration date and thereby breached the agreement.[1] Plaintiff City Centre seeks a judgment declaring that the loan commitment agreement is voidable at its election. Defendant has filed its counterclaim

1. Defendant alleges that plaintiff was obliged, under the agreement, to meet certain leasing levels in the office complex as well as to deliver to defendant title reports, insurance policies, construction plans and other documents by April 1, 1986. Defendant further alleges that plaintiff deliberately failed to fulfill these obligations because of a substantial fall in interest rates between March 1984 and March 1986 which rendered the terms of the agreement less attractive to plaintiff.

Plaintiff, on the other hand, alleges that defendant failed to provide it with proposed drafts of the necessary closing documents by April 1, 1986. It claims that the first set of documents was not received until April 8, after defendant professed to extend the closing deadline unilaterally, in contravention of the agreement.

seeking specific performance of the commitment agreement and damages for breach of the agreement.

Claiming that defendant possesses an adequate remedy at law, plaintiff has filed a Rule 56(c) motion for partial summary judgment on defendant's specific performance claim. This motion is now before the court.

Discussion

The issue in this case is whether defendant, as a commercial lender, is entitled to a decree of specific performance requiring plaintiff to borrow the agreed amount. The inquiry focuses on whether defendant has an adequate remedy at law.[3] There are two circumstances in which the legal remedy might be inadequate. The first is where the benefit for which specific performance is sought is unique and the second is where relief in the form of damages is not capable of estimation. First National State Bank of New Jersey v. Commonwealth Federal Savings & Loan, 610 F.2d 164, 171 (3d Cir. 1979). Neither of these conditions is present when a prospective lender sues for specific performance of an agreement to borrow money.

Since the typical borrower agrees to pay the lender nothing more than a sum of money, there is nothing at all unique about the lender's interest in the agreement. While it could be argued that the lender expected to have a security interest in real property and should therefore have the benefit of the common law presumption that land is inherently unique, the lender's interest in the land is, in reality, negligible. His primary interest is in being paid a sum of money. He hopes that he will never have to rely on his security interest in the land. A breach by a prospective borrower, therefore, does not deprive the lender of any interest in the land. It merely requires him to find another borrower from whom he can exact the same rate of return. If he cannot find such a borrower, the only harm which he suffers is pecuniary and fully compensable in damages.

Moreover, a lender's damages can be estimated with reasonable precision. The amount borrowed and the interest rate under the agreement are known with absolute certainty and the current interest rate at which the lender is forced to loan the money to someone else is ascertainable within a narrow range.

It is not surprising, therefore, that there appear to be no reported cases granting a lender specific performance of an agreement to borrow money. There are a few exceptional cases in which specific performance of such agreements has been granted to borrowers, but the rationale of these cases does not justify extending equitable relief to lenders. In cases where courts have granted specific performance to borrowers, they have reasoned that since contracts to buy and sell land are presumed to be

3. The loan commitment agreement provides that it is to be governed by the law of the state of New York. Under New York law, specific performance is proper if (1) there is a valid contract, (2) the movant has substantially performed under the contract and is willing and able to perform its remaining obligations, (3) the opposing party is able to perform its obligations, and (4) movant has no adequate remedy at law. Niagra Mohawk Power Corp. v. Graver Tank & Mfr. Co., 470 F. Supp. 1308, 1325 (N.D.N.Y. 1979).

specifically enforceable, a lender may be required to lend money where his failure to do so will result in a borrower's inability to acquire property that he would otherwise be able to acquire. Clearly, however, a borrower's breach of an agreement to borrow money does not affect a real property interest of a lender.

Of the eight reported cases granting a borrower specific performance, the uniqueness of the particular lender's position appears to have been influential in five. In Jacobson v. First National Bank, 129 N.J.Eq. 440, 20 A.2d 19 (1941), aff'd 130 N.J.Eq. 604, 23 A.2d 409 (1942), the court was impressed by the fact that the borrowers were faced with an uncompleted residence on which it was ostensibly impossible to borrow additional money elsewhere for its completion because of an excessive existing mortgage. Id. at 20. In Camden v. South Jersey Port Commission, 4 N.J. 357, 73 A.2d 55 (1950), the court noted that if the City were not required to lend the agreed sums to the Port Commission, construction of the pier and warehouse would have to be halted, irreparably injuring the rights of citizens who had relied upon the project. Id. at 63.

And in Selective Builders, Inc. v. Hudson City Savings Bank, 137 N.J. Super. 500, 349 A.2d 564 (1975), a builder sued a mortgage lender for breach of a loan commitment agreement. The construction project was 95% completed and the builder had sought alternative financing for almost a year without success. The construction mortgage lender threatened to foreclose on the property in which case the builder would lose its equity in the project into which it had poured substantial time and effort. The court also noted that the rights of third parties would be prejudiced if only damages were awarded. Id. at 569. Two other cases in which the borrower had already executed a note and mortgage and the lender had already begun disbursing the funds, thus rendering alternative financing nearly impossible, were Cuna Mutual Insurance Society v. Dominguez, 9 Ariz. App. 172, 450 P.2d 413 (1969) and Southhampton Wholesale Food Terminal, Inc. v. Providence Produce Warehouse Co., 129 F. Supp 663. (D. Mass. 1955).

Damages were inadequate to all of the borrowers in these cases since what they really needed was financing to complete their projects. Since the defendant lenders already held security interests in the properties, the borrowers could not find other lenders and only specific performance would thus make them whole.

Difficulty in estimating damages was present in the remaining cases granting borrowers specific performance. In those cases, the borrowers had relied on the loan commitments to such an extent that no figure confidently could be placed on damages designed to compensate them.

In Columbus Club v. Simons, 110 Okla. 48, 236 P. 12 (1925), the borrowers seeking specific performance of a loan to finance a new clubhouse had already sold their old clubhouse, purchased new land, reincorporated, hired an architect and entered into a construction contract. The difficulty of estimating the damages resulting from the borrower's completion of 95% of the project and from the lender's subsequent failure to lend the funds as promised was also influential in the court's decision to grant specific performance to the borrowers in *Selective Builders,* supra, 349 A.2d at 569.

And in both Leben v. Nassau Savings & Loan Association, 40 A.D.2d 830, 337 N.Y.S.2d 310 (2d Dep't 1972), aff'd 34 N.Y.2d 671, 312 N.E.2d 180, 356 N.Y.S.2d 46 (1974), and Vandeventer v. Dale Construction Co., 271 Or. 691, 534 P.2d 183 (1975), rev'd on other grounds, 277 Or. 817, 562 P.2d 196 (1977), the borrowers had terminated their previous residential obligations, moved into a new house and spent substantial sums in connection with the purchase and repairs of the new house. The *Vandeventer* court emphasized that it would be extremely difficult, if not impossible, for a jury to estimate the damages that would be incurred if the borrowers were forced to move out of their new house for lack of adequate financing. These four cases illustrate that, unlike a lender's reliance on a loan commitment agreement, a borrower's non-monetary reliance can often be substantial.

Teachers insists that even if lenders should not be granted specific performance as a matter of course, equitable relief is appropriate in this case since the contingent interest provision in the present commitment agreement makes Teachers much more than just a lender.[4] Even in light of the contingent interest provision, however, Teachers' bargain is not unique and its damages are not incapable of estimation.

To support its claim that its profit-sharing position is unique, Teachers turns to the presumption that real estate is inherently unique and asserts that the City Centre property will generate revenues that are not reliably capable of replication. Teachers' position, however, is distinguishable from that of a buyer of property to whom specific performance is usually granted. First, Teachers was to hold no legal interest in the real property. Second, in deciding to loan money to City Centre, Teachers was not in the position of a purchaser of investment real estate who actively seeks out and even develops investment opportunities. There was nothing raised in the pleadings or at the hearing to indicate that Teachers did anything more than merely select the developers of the City Centre project from among a large field of loan applicants. The City Centre project may have appeared especially lucrative, but "lucrative" is not equivalent to "unique." By its own admission, Teachers is a conservative lender who inserted the contingent interest provision in the agreement in order to give itself additional security on a non-recourse loan. From Teachers' perspective, the City Centre property is not truly unique.

Teachers also argues that any damages designed to reflect the fruits of the contingent interest provision would be speculative. A jury is capable, however, of evaluating comparable transactions and determining the present value of a future stream of income.

As a policy matter, it should be noted that granting equitable relief on the basis of a contingent interest provision would encourage all lenders to include such clauses in their agreements and would result in a spate of

4. The loan agreement provided that plaintiff was to pay annually to defendant, in addition to principle and interest payments zbased on a 12% annual interest rate over a 35 year term, "contingent interest" equal to 40% of the amount by which the gross receipts for the year from the City Centre project would exceed the Base Amount for that year (defined in the agreement to be the lesser of (i) the annualized fixed minimum rent roll projected to 95% occupancy or (ii) $2,886,335).

specific enforcement decrees in contravention of the common law reluctance to order specific performance.

Under Rule 56(c), summary judgment is proper where there exists no genuine issue as to any material fact and the relevant rule of law entitles the movant to a judgment. Having determined that a lender is not entitled to specific performance on an agreement to lend money, the court considers that plaintiff's motion for partial summary judgment on defendant's specific performance claim should be granted.

NOTES AND QUESTIONS

1. Is the reason for the court's denial that (a) condominium units are alike and therefore not unique, (b) given the vendor's position in the principal case, it is easy to determine the amount of damages, or (c) specific performance does not lie in favor of the seller?

2. Section 2-506 of the Uniform Land Transactions Act provides that the seller of land is not entitled to specific performance unless the property cannot be resold by him at a reasonable price with reasonable effort.

3. Courts have been even quicker to give vendees of land the right to specific performance. Should it make a difference whether the vendee is buying the land for purposes of speculation rather than for a residence or for recreational use? That the buyer has already arranged a resale at the time of the principal contract? See, e.g., Watkins v. Paul, 95 Idaho 499, 511 P.2d 781 (1973).

4. Occasionally specific performance will be denied if the court finds that specific performance would be unjust because of fraud, undue influence, or the like even though the suspect activity does not give rise to an action at law for damages. See, e.g., Hilton v. Nelson, 283 N.W.2d 877 (Minn. 1979).

LACLEDE GAS CO. v. AMOCO OIL CO.
United States Court Of Appeals, Eighth Circuit, 1975
522 F.2d 33

Ross, Circuit Judge. The Laclede Gas Company (Laclede), a Missouri corporation, brought this diversity action alleging breach of contract against the Amoco Oil Company (Amoco), a Delaware corporation. It sought relief in the form of a mandatory injunction prohibiting the continuing breach or, in the alternative, damages. The district court held a bench trial on the issues of whether there was a valid, binding contract between the parties and whether, if there was such a contract, Amoco should be enjoined from breaching it. It then ruled that the "contract is invalid due to lack of mutuality" and denied the prayer for injunctive relief. The court made no decision regarding the requested damages. Laclede Gas Co. v. Amoco Oil Co., 385 F. Supp. 1332, 1336 (E.D. Mo. 1974). This appeal followed, and we reverse the district court's judgment.

On September 21, 1970, Midwest Missouri Gas Company (now Laclede), and American Oil Company (now Amoco), the predecessors of the parties to this litigation, entered into a written agreement which was designed to provide central propane gas distribution systems to various residential developments in Jefferson County, Missouri, until such time as natural gas mains were extended into these areas. The agreement contemplated that as individual developments were planned the owners or developers would apply to Laclede for central propane gas systems. If Laclede determined that such a system was appropriate in any given development, it could request Amoco to supply the propane to that specific development. . . .

. . . [O]n April 3, 1973, Amoco notified Laclede that its Wood River Area Posted Price of propane had been increased by three cents per gallon. Laclede objected to this increase also and demanded a full explanation. None was forthcoming. Instead Amoco merely sent a letter dated May 14, 1973, informing Laclede that it was "terminating" the September 21, 1970, agreement effective May 31, 1973. It claimed it had the right to do this because "the Agreement lacks 'mutuality.' "

The district court felt that the entire controversy turned on whether or not Laclede's right to "arbitrarily cancel the Agreement" without Amoco having a similar right rendered the contract void "for lack of mutuality" and it resolved this question in the affirmative. We disagree with this conclusion and hold that settled principles of contract law require a reversal.

I

A bilateral contract is not rendered invalid and unenforceable merely because one party has the right to cancellation while the other does not. There is no necessity "that for each stipulation in a contract binding the one party there must be a corresponding stipulation binding the other.". . .

We conclude that there is mutuality of consideration within the terms of the agreement and hold that there is a valid, binding contract between the parties as to each of the developments for which supplemental letter agreements have been signed.

II

Since he found that there was no binding contract, the district judge did not have to deal with the question of whether or not to grant the injunction prayed for by Laclede. He simply denied this relief because there was no contract. Laclede Gas Co. v. Amoco Oil Co., supra, 385 F. Supp. at 1336.

Generally the determination of whether or not to order specific performance of a contract lies within the sound discretion of the trial court. . . . However, this discretion is, in fact, quite limited; and it is said that when certain equitable rules have been met and the contract is fair and plain "specific performance goes as a matter of right.". . .

With this in mind we have carefully reviewed the very complete record on appeal and conclude that the trial court should grant the injunctive relief prayed. We are satisfied that this case falls within that category in which specific performance should be ordered as a matter of right. See Miller v. Coffeen, supra, 280 S.W.2d at 102.

Amoco contends that four of the requirements for specific performance have not been met. Its claims are: (1) there is no mutuality of remedy in the contract; (2) the remedy of specific performance would be difficult for the court to administer without constant and long-continued supervision; (3) the contract is indefinite and uncertain; and (4) the remedy at law available to Laclede is adequate. The first three contentions have little or no merit and do not detain us for long.

There is simply no requirement in the law that both parties be mutually entitled to the remedy of specific performance in order that one of them be given that remedy by the court. . . .

While a court may refuse to grant specific performance where such a decree would require constant and long-continued court supervision, this is merely a discretionary rule of decision which is frequently ignored when the public interest is involved. . . .

Here the public interest in providing propane to the retail customers is manifest, while any supervision required will be far from onerous.

Section 370 of the Restatement of Contracts (1932) provides:

> Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.

We believe these criteria have been satisfied here. As discussed in part I of this opinion, as to all developments for which a supplemental agreement has been signed, Amoco is to supply all the propane which is reasonably foreseeably required, while Laclede is to purchase the required propane from Amoco and pay the contract price therefor. The parties have disagreed over what is meant by "Wood River Area Posted Price" in the agreement, but the district court can and should determine with reasonable certainty what the parties intended by this term and should mold its decree, if necessary accordingly. Likewise, the fact that the agreement does not have a definite time of duration is not fatal since the evidence established that the last subdivision should be converted to natural gas in 10 to 15 years. This sets a reasonable time limit on performance and the district court can and should mold the final decree to reflect this testimony.

It is axiomatic that specific performance will not be ordered when the party claiming breach of contract has an adequate remedy at law. . . . This is especially true when the contract involves personal property as distinguished from real estate.

However, in Missouri, as elsewhere, specific performance may be ordered even though personalty is involved in the "proper circumstances." Mo. Rev. Stat. §400.2-716(1); Restatement of Contracts, supra, §361. And a remedy at law adequate to defeat the grant of specific performance "must

be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance.". . .

One of the leading Missouri cases allowing specific performance of a contract relating to personalty because the remedy at law was inadequate is Boeving v. Vandover, 240 Mo. App. 117, 218 S.W.2d 175, 178 (1949). In that case the plaintiff sought specific performance of a contract in which the defendant had promised to sell him an automobile. At that time (near the end of and shortly after World War II) new cars were hard to come by, and the court held that specific performance was a proper remedy since a new car "could not be obtained elsewhere except at considerable expense, trouble or loss, which cannot be estimated in advance."

We are satisfied that Laclede has brought itself within this practical approach taken by the Missouri courts. As Amoco points out, Laclede has propane immediately available to it under other contracts with other suppliers. And the evidence indicates that at the present time propane is readily available on the open market. However, this analysis ignores the fact that the contract involved in this lawsuit is for a long-term supply of propane to these subdivisions. The other two contracts under which Laclede obtains the gas will remain in force only until March 31, 1977, and April 1, 1981, respectively; and there is no assurance that Laclede will be able to receive any propane under them after that time. Also it is unclear as to whether or not Laclede can use the propane obtained under these contracts to supply the Jefferson County subdivisions, since they were originally entered into to provide Laclede with propane with which to "shave" its natural gas supply during peak demand periods. Additionally, there was uncontradicted expert testimony that Laclede probably could not find another supplier of propane willing to enter into a long-term contract such as the Amoco agreement, given the uncertain future of worldwide energy supplies. And, even if Laclede could obtain supplies of propane for the affected developments through its present contracts or newly negotiated ones, it would still face considerable expense and trouble which cannot be estimated in advance in making arrangements for its distribution to the subdivisions.

Specific performance is the proper remedy in this situation, and it should be granted by the district court.

Conclusion

For the foregoing reasons the judgment of the district court is reversed and the cause is remanded for the fashioning of appropriate injunctive relief in the form of a decree of specific performance as to those developments for which a supplemental agreement form has been signed by the parties.

NOTES AND QUESTIONS

1. In Sedmak v. Charlie's Chevrolet, Inc., 622 S.W.2d 694 (Mo. App. 1981), the court granted specific performance under UCC §2-716 for a

new limited production "Indy 500" Corvette that was in very short supply. In Scholl v. Hartzell, 20 Pa. D.&C. 3d 304, 33 UCC Rep. Serv. 951 (Pa. Ct. Common Pleas 1981), the court refused to allow specific performance for a 1962 Corvette. Is the lesson of these two cases (a) newer specialty cars are unique and older specialty cars are not, (b) the judge in Pennsylvania does not think Corvettes are so special, or (c) the judge in Missouri is a race fan?

2. The Uniform Commercial Code does not per se allow the *seller* specific performance in a sale of goods. However, §2-709 of the UCC allows the seller of goods to recover, as damages, the price of goods if the buyer has breached the contract after final acceptance of the goods, the goods have been destroyed after the risk of loss of the goods has passed to the buyer, or for "goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing."

LUMLEY v. WAGNER
Lord Chancellor's Court, 1852
1 De C.M.&G. 604, 42 Eng. Rep. 687

Lord T. LEONARDS, L.C. The question which I have to decide in the present case arises out of a very simple contract, the effect of which is, that the defendant Johanna Wagner should sing at Her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal they in effect come to this, namely, that a court of equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction, being to compel a party to forbear from committing an act (and not to perform an act), that in-junction will complete the whole of the agreement remaining unexecuted. . . .

The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference, but of an act to be done by Johanna Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant — the one being ancillary to, and concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract, and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that Johanna Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach

herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered. Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements, and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other, and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant Johanna Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect, too, of the injunction, in restraining Johanna Wagner from singing elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre. The injunction may also, as I have said, tend to the fulfilment of her engagement, though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly. . . .

Problem 89

Hammer & Son was a contractor. Hammer made plans to build a large shopping center. One of the stores was to be leased to Jane's Fashions. Jane's store was to be built according to general specifications applicable to all stores in the center. However, no two stores were to be identical and Jane and Hammer had never particularized the design for Jane's store. Hammer refused to build Jane's store and lease it to her as promised. Jane sued for breach and asked for specific performance — an order requiring Hammer & Son to build Jane's store and lease it to her. The court finds a contract and a breach. Should the court grant Jane's request for specific performance? See City Stores Co. v. Ammerman, 266 F. Supp. 766 (D.D.C.), aff'd per curiam, 394 F.2d 950 (D.C. Cir. 1967).

CHAPTER

4

THE STATUTE OF FRAUDS

I. HISTORY AND PURPOSE

In 1671, in Old Marston, Oxfordshire, England, defendant Egbert was sued by plaintiff John over an alleged oral promise by Egbert to sell to John a fighting cock named Fiste. John's friend, Harold, claimed he overheard the "deal" and by that dubious means John won, though in fact there apparently was no deal. In 1671 courts did not allow parties to a lawsuit to testify so Egbert could not testify to rebut Harold's story. Compounding the problem was the fact that courts then could not throw out jury verdicts manifestly contrary to the evidence. So, in response to the plight of the Egberts of the world and to the recurring mischief of the Johns, as well as to combat possible "Fraude and perjurie" by the Harolds, Parliament passed in 1677 a "Statute of Frauds" which required that certain contracts for the sale of goods be in writing to be enforceable.

Thomson Printing Machinery Co. v. B. F. Goodrich Co., 714 F.2d 744, 746 (7th Cir. 1983).

Given present rules concerning the competency of witnesses, the admissibility of testimony, and the greater confidence in courts and juries, is there still a reason for the statute of frauds?

Corbin at 380 and 381 states:

It can hardly be doubted that the statute renders some service by operating *in terrorem* to cause important contracts to be put into writing. Indeed, many laymen have the erroneous notion that an agreement is never binding until it is written and signed.

Reduction to writing undoubtedly tends to prevent not only fraud and perjury but also the disputes and litigation that arise by reason of treacherous memory and the absence of witnesses. . . .

Such good as the statute renders in preventing the making of perjured claims and in causing important agreements to be reduced to writing is attained at a very great cost of two different sorts: First, it denies enforcement to many honest plaintiffs; secondly, it has introduced an immense complexity into the law and has been in part the cause of an immense amount of litigation as to whether a promise is within the statute or can by any remote possibility be taken out of it.

The United Nations Convention on Contracts for the International Sale of Goods has no requirement that its contracts be in writing; Article 11.

II. TYPES OF CONTRACTS TYPICALLY COVERED UNDER STATUTES OF FRAUDS

The English statute of frauds — entitled "An Act for Prevention of Frauds and Perjuries" — had 25 sections and covered transactions other than contracts for the sale of goods. But for our purposes, the important segment of the act (§4) provided:

> And be it further enacted . . . that . . . no action shall be brought
>
> (1) whereby to charge any executor or administrator upon any special promise to answer for damages out of his own estate; or
>
> (2) whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or
>
> (3) to charge any person upon any agreement made upon consideration of marriage; or
>
> (4) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or
>
> (5) upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

In addition, §17 of the statute required a writing for the sale of any goods having a price of "ten pounds of sterling or upwards."

In 1954, the English Parliament removed the writing requirement for all contracts other than those listed in (2) and (4).

In the United States, nearly every state has adopted, and retained, a statute of frauds. (Louisiana, Maryland, and New Mexico have not, but the latter two have similar requirements as the result of judicial decisions.) Typically these laws require a writing for the same types of contracts as those listed in (1) through (5) above. See Restatement (Second) of Contracts §110.

The writing requirement for certain sales of goods is now found in a state's version of §2-201 of the Uniform Commercial Code. The official version, adopted by most states, is applicable only when the goods have a price of over $500.[1] Other provisions of the UCC, such as §9-203, which mandates that security agreements be in writing, also require signed writings in some other commercial transactions (e.g., §8-319, the sale of stocks and bonds). Also read UCC §1-206, which provides an overall statute of frauds for every contract involving the sale of personal property having a

1. The 2003 revision of UCC §2-201 changes the amount to $5,000.

value of $5,000 or more.[2] Article 2A of the UCC, dealing with the leasing of goods, has a statute of frauds requirement in §2A-201 for leases of $1,000 or more. This section is modeled on Article 2's §2-201, discussed in detail later in this chapter.

In any particular state, other statutes may require certain kinds of contracts to be in writing. Typical examples are agreements authorizing brokers to buy or sell real estate, contracts to make a bequest in a will, or warranties by physicians to effect a certain result. Less common writing requirements abound in the statute books. Florida demands that newspaper subscriptions be in writing (Fla. Stat. Ann. §725.03); South Dakota does the same for prearranged burial services and, curiously enough for a landlocked state, ships (S.D. Laws Ann. §§55-11-3 and 43-35-2); Indiana wants all contracts with teachers to be in writing (Ind. Code Ann. §20-6.1-4-3); North Carolina requires contracts with non-English-speaking Cherokee Indians to be in writing (N.C. Gen. Stat. §22-3); North Dakota mandates a writing for contracts involving seeds (N.D. Cent. Code §4-25-02); Arkansas does so for contracts concerning political campaigns (Ark. Stat. Ann. §3-1101); and Minnesota requires a writing for nonmarital cohabitation agreements between a man and a woman who are contemplating sexual relations (Minn. Stat. Ann. §513.175). Before practicing law in any given jurisdiction you should pore through your state statutes for variations like these.

A. *Executor/Administrator Contracts*

Contracts by an executor or administrator to answer for the debts of a decedent and payable out of the executor/administrator's own personal assets generally must be in writing. For example, assume D died leaving a debt of $5,000 to C. A, the administrator of D's estate, promises C that he will pay D's debt out of his own pocket. Unless A's promise is in writing, the promise is unenforceable. This writing requirement has generated little litigation. Note the similarity of this requirement with the writing requirement for suretyship contracts discussed below. In both types of contracts, one person is agreeing to answer for the debts of another.

B. *Suretyship Contracts*

YARBRO v. NEIL B. McGINNIS EQUIPMENT CO.
Arizona Supreme Court, 1966
101 Ariz. 378, 420 P.2d 163

BERNSTEIN, V.C.J. This case is before us on an appeal from a judgment of the Superior Court of Maricopa County. The appellee, McGinnis

2. The revised version of Article 1 drops this provision.

Equipment Co., brought suit to recover payments due it pursuant to a conditional sales contract for the sale of one used Allis-Chalmers Model HD-5G tractor. The contract was negotiated in August of 1957 and called for twenty-three monthly installments of $574.00 each. The buyer, Russell, failed to make the first monthly payment, and on his suggestion a McGinnis company representative met with the appellant, Yarbro, to ask if he would help with the payments. As a result of this meeting Yarbro agreed to, and did, pay the September installment.

In the months that followed there was a continued failure on the part of Russell to make any of the monthly installment payments. During the late months of 1957 and the early months of 1958, there were numerous discussions between McGinnis Co., Russell and Yarbro relative to these monthly payments and at various times during this period, the defendant orally agreed to make some of the payments for Russell. Late in December of 1957, Yarbro gave the McGinnis Co. a check to cover one of the delinquent payments but the check was returned due to insufficient funds. In March of 1958, Yarbro agreed to bring the account of Russell current and allocated $2,378.00 of a check for this purpose. This check, however, was also returned by the bank for lack of sufficient funds.

In May, 1958 when McGinnis Co. indicated that the tractor soon would have to be repossessed, Yarbro again assured the company that it would be paid as soon as two pending real estate escrows were closed. This promised payment was not made. A similar promise was made by Yarbro in July on the strength of proceeds that were to be forthcoming from an oat crop in New Mexico but again no payment was made. An ultimatum was issued by the McGinnis Co. at the end of July, 1958 and finally steps to repossess were taken in August of 1958.

Persons at the Yarbro ranch prevented the repossession, leading to further negotiations which also proved unfruitful. The tractor was finally repossessed in January of 1959. Subsequently, the McGinnis Co. brought an action to recover the payments due under the conditional sales contract, naming Russell and Yarbro as defendants. A default judgment was entered against Russell and the only question before this court now concerns the liability of the defendant, Yarbro. The trial court found Yarbro liable for the entire balance under the conditional sales contract ($8,751.95).

The errors assigned by the defendant on this appeal are threefold. First, he contends that his promises to pay the debts of Russell, being oral, are unenforceable by reason of the Statute of Frauds, §44-101, subsec. 2. Second, he contends that there was insufficient consideration to support the promise assuming it was otherwise enforceable. Third, he contends that if the Statute of Frauds were held to be inapplicable to this case, the judgment rendered by the trial court was excessive. The third assignment of error is based on defendant's arguments that he only promised to pay four, rather than all, of the unpaid monthly installments. We will consider these contentions separately.

A.R.S. §44-101, commonly known as the Statute of Frauds provides:

> No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memoran-

dum thereof, is in writing and signed by the party to be charged, or by some person by him thereunder lawfully authorized. . . .

2. To charge a person upon a promise to answer for the debt, default or miscarriage of another.

Although the promises made by Yarbro clearly were of the type covered in the above statute, the plaintiff contends that the leading object or primary purpose exception recognized by this court in the case of Steward v. Sirrine, 34 Ariz. 49, 267 P. 598, is applicable. Simply stated, this rule provides that where the leading object of a person promising to pay the debt of another is actually to protect his own interest, such promise if supported by sufficient consideration, is valid, even though it be oral. This rule has been adopted by a great number of states although the rationale has often been stated in varying terms. This exception to the Statute of Frauds no matter how stated, is based upon the underlying fact that the Statute does not apply to promises related to debts created at the instance, and for the benefit, of the promisor, (i.e. "original" promises) but only to those by which the debt of one party is sought to be charged upon and collected from another (i.e. "collateral" promises). Although a third party is the primary debtor, situations may arise where the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefitted by the performance of the promisee. In such cases the reason which underlies and which prompted the above statutory provision fails, and the courts will give effect to the promise. Schumm, by Whyner v. Berg, 37 Cal. 2d 174, 231 P.2d 39, 21 A.L.R.2d 1051; Restatement of Contracts, §184.

Recognizing the leading object rule as a well reasoned exception, the question remains whether the facts presently before this court make the exception applicable. There are no easy, mathematical guidelines to such a determination. To ascertain the character of the promise in question and the intention of the parties as to the nature of the liability created, regard must be had to the form of expression, the situation of the parties, and to all the circumstances of each particular case. Meinrath Brokerage Co. v. Collins-Dietz-Morris Co., 8 Cir., 298 F. 377; Amons v. Howard, 111 Okl. 195, 239 P. 217. The assumption behind the exception is that it is possible for a court to infer from the circumstances of any given case whether the "leading object" of the promisor was to become a surety for another or whether it was to secure a pecuniary advantage to himself and so, in effect, so answer for his own debt. The leading object may be inferred from that which he expected to get as the exchange for his promise. Thus, it is neither "consideration" alone (for there must be consideration to make any promise enforceable, including one of guaranty) nor "benefit" alone (for in most every guaranty situation at least some benefit will flow to the promisor-guarantor) that makes an oral promise to pay the debt of another enforceable. Rather, there must be consideration and benefit *and* that benefit must be the primary object of making the promise as distinguished from a benefit which is merely incidental, indirect, or remote. It is when the leading and main object of the promisor is *not* to become surety or guarantor of another, even though that may be the effect, but is to serve

some purpose or interest of his own, that the oral promise becomes enforceable. Schumm, by Whyner v. Berg, supra.

The facts in the present case show that before McGinnis Co. ever began its dealings with Russell, Yarbro had sought to purchase the tractor in question for himself, but that no sale had resulted because the financing institution with which the McGinnis Equipment Co. financed such deals would not accept Yarbro's credit. It was at this point that Yarbro said he thought he could get Russell to buy the tractor. Further evidence of Yarbro's interest in the tractor comes from the fact that after its purchase he had borrowed it on a series of occasions. When repairs were needed shortly after Yarbro had made the first installment payment, the McGinnis Co. repairman found the machine on Yarbro's land. He admits that a number of times he used the tractor for jobs around his ranch, and witnesses stated at the trial that Yarbro had asked on several occasions that the McGinnis Co. not repossess the tractor because he needed it. These requests were usually in onjunction with a promise to pay what was owing on the tractor. . . . We find that there was substantial evidence to support the trial court's conclusion that the main and leading object of Yarbro in making his promises to McGinnis Co. was not to become Russell's guarantor but rather was to serve interests of his own.

Yarbro further contends that if the oral character of the promise does not prevent its enforcement, then a failure of consideration does. We, of course, recognize that a promise must be supported by consideration or some substitute in order to be legally enforceable, but find this requirement to be fulfilled in the present instance. In Cavanagh v. Kelly, 80 Ariz. 361, 297 P.2d 1102, we held that a benefit to a promisor or a loss or detriment to the promisee is good consideration to legally support a promise. In the present case, the McGinnis Co. had a legal right to repossess the subject of its conditional sales contract, but the evidence shows that it forbore from doing so because Yarbro promised that he would pay the delinquent installment payments. This forbearance was not only a legal detriment to the McGinnis Co., but as previously noted, was a substantial benefit to Yarbro. Forbearance by a creditor to seize his debtor's property or enforce a lien against it, has often been held to be sufficient consideration to support an oral promise to guaranty when such forbearance enables the promisor to obtain an advantage or benefit. . . .

Thus, when the main purpose of the promisor is not to answer for the debt of another, but to obtain a substantial benefit to himself, which he actually secures as the consideration for his promise, then not only is the promise valid though oral, it is supported by good and sufficient consideration.

The defendant also contends that assuming his promise was not within the contemplation of the Statute of Frauds, the eventual judgment rendered against him was excessive. With this contention, we agree.

The trial court granted judgment in the amount of $8,751.95 which represents the entire unpaid balance of the contract purchase price reduced by the $5,000 received by the plaintiff at an auction sale of the repossessed machine. To hold Yarbro liable for the complete contract price, the evidence must indicate that his promises to pay went not only to

delinquent payments but also to the remainder of the payments under the contract. The evidence, however, does not show this.

It is clear from the testimony of the creditor's agents that each time they visited Yarbro and Russell, only past due payments were requested. It is also clear from their testimony that there were no promises by Yarbro to assume future installment payments. The only evidence regarding a promise to pay in the future appears in Yarbro's own testimony on direct examination, and is as follows:

Q. What was said by you concerning the . . . Russell obligation?
A. I told them that . . . if they would give me time I would pay for this tractor and take it over.

The creditors failed to make any such arrangements, and under such circumstances the above statement cannot be considered to rise to the dignity necessary to obligate the defendant to pay future installment payments. When one assumes a portion of the debt of another it does not necessarily follow that he has assumed his entire debt.

The record indicates that the last time Yarbro was contacted prior to repossession was shortly after the July, 1958 installment came due. At this time, claiming anticipated crop proceeds for assurance, he promised to make all past due payments on the equipment. No later promises were made. Accordingly, we find Yarbro liable for the monthly installments from October, 1957 through July, 1958 only. The trial court judgment is reduced correspondingly.

Judgment affirmed as modified.

Problem 90

Mame Dennis took her nephew Patrick to the grocery store near St. Boniface Academy and told the proprietor to let him charge anything he wanted and send the bill to her. The proprietor agreed, and over the course of the semester Patrick charged quite a large amount. On getting the bill, Mame was flabbergasted. She phoned the proprietor and bawled him out for letting the tab get so high, saying that she refused to pay anything. When the grocery store sued, she defended, using the suretyship portion of the statute of frauds. Will this defense succeed? What exactly was Patrick's obligation here?

Problem 91

When Henry Pulling needed a loan, he asked his Aunt Augusta if she would become his surety. When she demurred initially, he promised her that in return for her undertaking this obligation, he would give to her an urn once belonging to his now deceased mother. She agreed to cosign for him in an amount of $10,000. He delivered the urn to her, but she then changed her mind and decided not to cosign the promissory note that the

bank had Henry sign. He sued her. May she defend on the basis of the statute of frauds? No

C. *Made in Consideration of Marriage*

This part of the statute of frauds is almost never litigated. One case holding an oral promise unenforceable under this requirement involved a promise by A to support B's child if B would marry A. Byers v. Byers, 618 P.2d 930 (Okla. 1980). Another oral promise unenforceable because of this requirement was a promise by X to leave all property to Y upon X's death if Y would promise to marry X. Tatum v. Tatum, 606 S.W.2d 31 (Tex. Civ. App. 1980).

Problem 92

Over supper one evening Edwin proposed to Angelina and she accepted. He now refuses to get married, and Angelina sues him for breach of promise of marriage. Edwin defends by pointing to the lack of a writing. Who wins? Angelina wins bcc an ordinary oral engagement to marry is not within the statute — enforceable even no writing.

D. *Land Transactions*

There are two main issues here. What types of "transfers" are covered and what is "land"? Clearly, agreements to buy or sell are within the types of transfers contemplated. Generally, assumptions, extensions, or modifications of real estate mortgages are also covered. See, e.g., Marine Midland Bank v. Northeast Kawasaki, Inc., 92 A.D.2d 952, 460 N.Y.S.2d 666 (1983). An agreement affecting the boundary line of adjoining landowners has been held not to require a writing. Norberg v. Fitzgerald, 122 N.H. 1080, 453 A.2d 1301 (1982); but see Restatement (Second) of Contracts §128. A promise to devise land is within the statute. Illustration 5 to Restatement (Second) of Contracts §125. The original statute of frauds covered all leases, but today in most states leases of a short duration (one to three years, typically) are statutorily exempt from the writing requirement.

Problem 93

Mark Wilson orally agreed to sell Jeff Hartje all the corn growing on his back forty. Jeff was to harvest the corn. Assume there is no problem with compliance with UCC §2-201 because the confirmation exception has been met. (We will discuss §2-201 later.) On the other hand, assume that the state's statute of frauds provision for real estate transactions has not been met. Jeff contends that there is no enforceable contract for that reason. Is he right? Is this a sale of goods or real estate? See UCC §2-107.

What if Mark had agreed to sell rights in minerals believed to be on his land? UCC §2-107(1); Wilkins v. Hogan Drilling Co., 424 So. 2d 420 (La. App. 1982).

E. The One-Year Provision

SATTERFIELD v. MISSOURI DENTAL ASSN.
Missouri Court of Appeals, 1982
642 S.W.2d 110

CLARK, J. Appellant suffered dismissal of her petition for actual and exemplary damages on the ground the cause of action was barred by the statute of frauds, §432.010, RSMo 1978. On this appeal she contends, first, that the statute of frauds as an affirmative defense may not serve as a basis for sustaining a motion to dismiss on the pleadings and, second, the oral agreement between the parties was not within the operation of the statute of frauds. Affirmed.

The facts of the case are drawn from appellant's petition by which it is alleged that appellant was employed by the association as executive secretary from 1944 until November 11, 1979 when she was discharged. That event, she asserted, breached an oral agreement under which appellant was to have continued in her position until retirement on a date set by her. Appellant further alleged the date of retirement had been determined to be April 1981 and she had so advised the association. In addition to damages, appellant sought reinstatement to her former position. The motion to dismiss, sustained by the trial court, was based on the ground that any agreement to retain appellant in employment from November 1979 to April 1981 was not to be performed within one year and was thus required by the statute of frauds to be in writing.

In her first point, appellant contends the trial court erred in dismissing the petition because a plaintiff is under no obligation to show affirmatively by petition averments that a cause of action is not barred by the statute of frauds. The statute constitutes an affirmative defense to be pleaded by answer and, according to appellant, may not be successfully asserted on a motion to dismiss.

We first observe that plaintiff's petition here makes no particular allegation as to the form of the employment agreement, appellant having been content to plead "it was agreed and understood between plaintiff and defendant that plaintiff would serve as executive secretary of defendant until her retirement." The fact that the agreement was indeed oral was not, however, the subject of any dispute. In suggestions opposing the motion to dismiss, appellant conceded the agreement to have been oral arguing that the statute was inapplicable because the agreement could have been performed within one year. . . .

. . . [T]he statute of frauds may properly be raised in a motion to dismiss for failure to state a claim if it appears the contract in question is

Law

unwritten and the plaintiff fails to plead facts which would take the contract out of the operation of the statute. In other circumstances where the pleadings raise a dispute as to whether the agreement was memorialized by a writing or where the plaintiff has raised other fact issues relevant to the applicability of the statute, a motion to dismiss would be premature until the fact questions are settled. . . .

Appellant next contends the statute of frauds was not applicable to the agreement she made to work until she decided to retire because that agreement, embracing an indefinite time period, could have been performed within one year. While it is correct that an employment contract for an indefinite period may be performed within one year by exercise of the option to terminate and such an agreement has been held not to be within the statute of frauds, . . . the agreement here was not of that nature according to plaintiff's petition. She there alleged the exercise of her option to select a retirement date "which she had therefore determined to be April, 1981 and had so advised the Board of Governors of the defendant corporation." The contract on which appellant based her action was one for her continued employment until April 1981, a definite future date well beyond the limitation of one year. By setting her retirement date, which appellant was entitled to do, she established the agreement to be of definite duration obligating both parties to continue the employment and eliminating the termination option.

Appellant also argues, inexplicably, that the statute of frauds does not apply here under the exception recognized where one party to the agreement has fully performed. Apparently, she bases this contention on the fact that she rendered services from the date of the agreement until her termination, thus giving defendant the benefit of the agreement for that period of time. Of course, the cause of action here originates in a premature discharge which prevented appellant from performing the complete services her agreement contemplated. By her own allegations, the agreement would have been fully performed on her part only if she worked until retirement in April 1981. The fact that she was earlier terminated, with or without cause, does not convert partial performance into full performance such as will remove the case from the requirements of the statute of frauds. . . .

Finally, appellant contends her part performance was sufficient to enable the court to enforce the contract under the "doctrine of equitable fraud" despite the statute of frauds. She cites Pointer v. Ward, 429 S.W.2d 269 (Mo. 1968) as authority for this proposition.

In the last cited case, the court acknowledged the possibility, in very unusual circumstances, for a court of equity to enforce an oral contract despite the statute of frauds. Among the elements to be proved are partial performance done in reliance on the contract with a resulting change in the positions of the parties so that application of the statute of frauds would result in a grossly unjust and deep-seated wrong, constituting fraud or something akin thereto sometimes referred to as virtual fraud, constructive fraud, or equitable fraud. Suffice it to say that appellant here pleaded no change in the positions of the parties based on the alleged agreement,

no grossly unjust or deep-seated wrong and no act or consequence approaching fraud. The doctrine has no application to the facts as they appear in the petition. Moreover, the law is generally settled that partial performance will not remove a contract not to be performed within one year from the operation of the statute of frauds where the action is one for breach of the entire contract.

The judgment is affirmed.

As to this portion of the statute of frauds, the Restatement comments:

> The design was said to be not to trust to the memory of witnesses for a longer time than one year, but the statutory language was not appropriate to carry out that purpose. The result has been a tendency to construction narrowing the application of the statute. Under the prevailing interpretation, the enforceability of a contract under the one-year provision does not turn on the actual course of subsequent events, nor on the expectations of the parties as to the probabilities. Contracts of uncertain duration are simply excluded; the provision covers only those contracts whose performance cannot possibly be completed within a year. . . .
>
> The period of a year begins when agreement is complete, ordinarily when the offer is accepted. . . . But a subsequent restatement of the terms starts the period again if the manifestation of mutual assent is such that it would be sufficient in the absence of prior agreement. The one-year period ends at midnight of the anniversary of the day on which the contract is made, on the theory that fractions of a day are disregarded in the way most favorable to the enforceability of the contract.

Restatement (Second) of Contracts §130, Comments a and c.

General Rule: If K doesn't state a definite date that is more than 1 year is not within the statute so no writing required - even if it is highly likely that K will not be done in one year →

NOTE

The general rule is that a contract that does not specifically state a time that is more than one year is not within the statute even if the time for completion of the contract is very likely to be more than one year. For example, a contract to build a commercial building that does not state a time for completion greater than one year is not within the statute even if it is likely that the contract will not be completed within one year. See, e.g., Cron v. Hargro Fabrics, Inc., 670 N.Y.S.2d 793, 694 N.E.2d 56 (Ct. App. N.Y. 1998). There are some jurisdictions where the law is to the contrary; for example, Texas. See Hall v. Hall, 158 Tex. 95, 308 S.W.2d 12 (1957) (Court makes a determination as to what is a reasonable time to complete performance of the contract. The court does this by looking at circumstances surrounding the adoption of the agreement, the situation of the parties, and the subject matter of the contract (but not facts arising after formation of the contract)). If the reasonable time for completion is over one year, the contract must be in writing.

Exception Texas

Problem 94

Are the following contracts within the scope of the one-year portion of the statute of frauds?

(a) On November 30, Levy Pants offers Ignatius J. Reilly a one-year job as office manager. The job is to begin on December 1, the next day. If Ignatius accepts, can Levy Pants change its mind and avoid liability on the theory that the contract cannot be performed within one year?

(b) Levy Pants orally contracted with Ignatius J. Reilly for a one-year position as its office manager. The contract was entered into on November 30, 2001, and was to begin on the first day of 2002. On the first working day of the year, Ignatius showed up and began his duties. He proved so obnoxious that Levy Pants discharged him the next day. When he sued, the company defended only on the ground of the lack of a writing. Is this a good defense? Could they have refused to recognize the contract in January, when he first reported for duty?

(c) Levy Pants hired Ignatius J. Reilly for a five-year term as its office manager; the contract was oral. Can Ignatius avoid the necessity of a writing by pointing out that he might die within the first year? Would it matter if he were in bad health?

(d) Knowing of his bad health, Levy Pants orally offered to employ Ignatius J. Reilly as its office manager for a five-year period "if you live so long." Is this contract required to be in writing?

(e) Levy Pants contracts for Reilly to work for five years, but the contract provides that either party may terminate the contract at any time. Must this contract be in writing? The majority rule is that it does not. Can you see why? California adopts the minority approach. See White Lighting Co. v. Woldson, 66 Cal. Rptr. 697, 438 P.2d 345 (Cal. 1968).

(f) Levy contracts for Reilly to work "for life." As of this writing, the most recent major case on point is McInerney v. Charter Golf, Inc. 680 N.E.2d 1347 (Ill. 1997). The majority held that lifetime contracts anticipated a relationship of long duration and were, therefore, subject to the statute of frauds. A very strong dissent pointed out that this decision was in contradiction of the generally accepted law on the issue. The majority's opinion has also been criticized elsewhere. Note, *Mcinerney v. Charter Gold, Inc.*: The Court Swings and Misses, 29 Loyola U. Chi. L.J. 907 (1998).

F. Modification of Contracts

If the parties to an existing contract modify it, the new contract must comply with the writing requirement if the contract *as modified* now falls within the coverage of the statute of frauds. See, e.g., UCC §2-209(3).

Problem 95

When Dr. Maugham went into partnership with Drs. Doyle and Lewis, they signed an agreement providing that if one of the partners left the part-

nership, he would not practice medicine anywhere in the city for a five-year period thereafter. When Dr. Maugham decided to leave the partnership, he initially moved to another city. Two months later he phoned his former associates and proposed a modification of the contract whereby he would pay the partnership $40,000 and then be allowed to open up his practice in the old city. The parties all agreed to this, but then Dr. Maugham changed his mind once again and decided not to return. By this time his former partners were less concerned about the possible competition he might provide than the loss of the $40,000, so they sued for the money. Can he successfully defend on the basis that the oral modification needs a writing to be enforceable? See Modisett v. Jolly, 153 Ind. App. 173, 286 N.E.2d 675 (1972).

The doctrines of waiver and estoppel may serve to permit the enforcement of a modification otherwise unenforceable under the statute of frauds. We will discuss these doctrines and their effect on the statute at the end of this chapter.

G. *Sale of Goods*

The original statute of frauds required a writing for contracts for the sale of goods for ten pounds or more. It has been replaced in this country by §2-201 of the UCC, which you should read prior to the next case.

EASTERN DENTAL CORP. v. ISAAC MASEL CO.
United States District Court, Eastern District of Pennsylvania, 1980
502 F. Supp. 1354

LUONGO, District Judge. Plaintiff, Eastern Dental Corporation (EDC), is a distributor and manufacturer of products used exclusively in the practice of orthodontics. Defendant, Isaac Masel Co., Inc. (Masel), is a manufacturer and distributor of dental products and instruments. From the time of EDC's incorporation, Masel supplied it with certain of the products Masel manufactured. On August 10, 1978, Masel informed EDC that it would no longer supply its products to EDC. . . .

EDC asserts additional claims [EDC's first claim involved a violation of the antitrust laws]: (1) that the termination of the business relationship between the parties was in breach of a requirements contract and (2) that defendant had supplied defective merchandise in breach of a warranty of merchantability. On all three counts plaintiff claims damages to its business, including a claim for loss of goodwill. . . .

Before me is defendant's motion for partial summary judgment on the antitrust claims, the breach of contract claim and on the issue of whether or not damages for loss of goodwill are recoverable if plaintiff is successful on any one of the three counts of the complaint.

Masel sold to EDC products for dental purposes
EDC got complaints from customers re: Masel's products

I. Background

EDC was incorporated in December of 1973 for the purpose of distributing products used exclusively in the practice of orthodontics, in particular, disposable orthodontic products, "the braces and the wires and the auxiliary items that go around the fixed appliances." Masel is a manufacturer and distributor of dental products and instruments including those considered to be disposable orthodontic products and instruments. Masel markets its products wholesale through sales to distributors, and retail through direct sales to dentists and orthodontists. Around the time of EDC's incorporation, its President, Vincent Santulli, and its Vice-President and Secretary-Treasurer, H. Neil Miller, began a series of discussions with Jacob J. Masel, the President of defendant, Isaac Masel Co., Inc., concerning the sale of Masel's disposable orthodontic products and instruments to EDC for resale to retail purchasers. As a result of these discussions Masel began to sell a product known as facebows to EDC. Eventually, Masel added what are known as elastics, lingual buttons, cleats, and metal bases to the line of products that it sold to EDC. Pursuant to their negotiations, Masel manufactured and sold to EDC at a wholesale price (the price which Masel charged distributors) products which were resold under EDC's label. In addition, since EDC was a new company, Masel granted it advantageous credit terms. During the course of the four year relationship, the parties operated without a written agreement, doing business solely through invoices and statements.

Beginning in late 1976, EDC began to receive many customer complaints concerning breakage of the facebows manufactured by Masel. These complaints of defective facebows are the basis for EDC's breach of warranty count in which EDC seeks to be compensated for loss of customers and goodwill.

In July of 1977, EDC began to manufacture elastics, a product it had theretofore purchased from Masel. Later, in September of 1977, Miller informed Masel that a firm known as Star Dental Company had expressed an interest in acquiring EDC. A meeting took place between Jacob Masel, his son Robert, and Miller and Santulli, concerning the possibility of Masel acquiring EDC. Although Jacob Masel made a proposal to Miller and Santulli, no written offer was ever made. In any event, the possibility of a Masel takeover never left the preliminary negotiation stages as the EDC shareholders rejected the entire concept of the Masel proposal.

In March of 1978 EDC submitted a purchase order which was not filled. Eventually, on August 10, 1978, Masel sent a letter to EDC advising that Masel was too busy to handle accounts like EDC's profitably, and that it was therefore terminating their relationship.

When it was cut off, EDC attempted to find alternative sources of supply for Masel products. It was unable to find a source for either facebows or metal bases at wholesale prices. While it did find an alternative source of buttons and cleats, it made the business decision not to purchase those items because the price was prohibitive. As of the date of the filing of the complaint, EDC was no longer selling metal bases, cleats,

or buttons. It did, however, sell facebows, a product which it has been manufacturing itself since January, 1979.

II. The Antitrust Claims. . .

III. The Breach of Contract Claim

Masel contends that it is entitled to summary judgment on the breach of contract claim on the grounds . . . that the contract is not evidenced by a writing sufficient to satisfy the statute of frauds. . . . The statute of frauds' requirement of a writing is applicable to all contracts for the sale of goods for $500 or more, including requirements contracts. . . .

A writing satisfies the statute if it is (1) signed by the party to be charged, (2) evidences a contract for the sale of goods, and (3) specifies a quantity term. . . . In output and requirement contracts the quantity of goods to be delivered under the contract is determined by the good faith output or requirements of the parties. This does not mean, however, that the statute of frauds' requirement of a quantity term is obviated since the inclusion of a quantity term is a mandatory requirement under the Code. . . . While the quantity term in requirements contracts need not be numerically stated, there must be some writing which indicates that the quantity to be delivered under the contract is a party's requirements or output. . . .

EDC asserts that the termination letter dated August 10, 1978, the invoices of the individual transactions between the parties and a letter dated November 18, 1974, satisfy the requisite quantity term. While the above documents may indicate that the parties had an ongoing business relationship, they do not, expressly or by implication, reflect that the contract between the parties was for the supply of EDC's requirements of Masel's products.

First, the invoices of the individual sales transactions do not indicate that a requirements contract was entered into. They reflect only the quantity of goods shipped in each transaction. (Plaintiff's Exhibit III, 25(a).) Invoices which solely reflect the terms of individual transactions do not indicate that quantity is to be measured by requirements and, accordingly, do not satisfy the quantity term requirement of the statute of frauds. . . .

Similarly the letter signed by EDC on Masel's letterhead dated November 18, 1974, fails to satisfy the statute of frauds. It provides:

> Isaac Masel Company is importing a line of dental instruments which they will supply to Eastern Dental Corporation at a very small markup. Isaac Masel Company is advancing a large sum of money for these products, and would like assurance from Eastern Dental Corporation that
>
> A. Eastern Dental Corporation will not contact Masel's supplier or purchase from Masel's supplier for a period of five years.
>
> B. Eastern Dental Corporation will not purchase similar instruments from any other source unless Masel can not supply them or until Masel's stock is exhausted, so that Masel will not get stuck with this merchandise.
>
> I agree to the above terms.

almost an output contract

Eastern Dental Corporation
/s/*Vincent Santulli*
Vincent Santulli — Pres.
/s/*Neil Miller*
Neil Miller — Vice-Pres.
Date 11/18/74

Although this letter arguably indicates that EDC would purchase its requirements of a certain line of dental instruments from Masel, the record clearly establishes that it is a memorandum of an agreement unrelated to the contract which EDC is attempting to prove in this case. The subject matter of this letter was dental pliers, a product which neither party had dealt with previously. It is evident from Miller's deposition that the parties viewed their arrangement concerning these pliers as being distinct from any other arrangement they may have had. Miller pointed out that the letter was not a true memorandum of the intent of the parties. He stated that the parties, in fact, had entered into an exclusive dealing arrangement whereby Masel was obligated to market these pliers through EDC. At no point in the course of these proceedings has EDC asserted that the purported requirements contract was also an exclusive dealing contract. Indeed, the record would not support such an assertion.

It is clear that EDC was just one of Masel's many customers for the items which are the subject matter of the purported requirements contract. In fact, both EDC and Masel sold these products on the retail level in competition with each other. Thus, whatever may have been the contractual arrangement between the parties concerning facebows, elastics, lingual buttons and cleats, it is clear that Masel was not obligated to market these products solely through EDC. The November 18, 1974 agreement, therefore, is distinct from the contract which plaintiff is attempting to prove in the instant case. Accordingly, the presence of a quantity term, if it is such, in that agreement cannot serve to satisfy the statute of frauds for the purported contract which is before me.

Finally, plaintiff's contention that the quantity term is supplied by the termination letter is not supported by the record. The termination letter provides:

Gentlemen:

We are enclosing our check No. 7290 in the sum of $599.05. At the present time, we are too busy to handle your orders, and we make the least amount of profit manufacturing for other manufacturers. As something had to give, we decided to eliminate this type of account.

If we pick up enough additional, capable, new help making it possible for us to handle your account again, we will contact you.

Please understand our position.

Very truly yours,
ISAAC MASEL CO., INC.
J. J. Masel

All that this letter indicates is that the parties had an ongoing business relationship. There is nothing in it suggesting that the "type of account"

was a requirements account, or that Masel was to supply all that EDC needed. This letter, therefore, also fails to state a quantity term sufficient to satisfy the statute of frauds.

The remaining documents submitted by the parties also fail to state the requisite quantity term. There are documents concerning credit terms and future shipments of merchandise, but there is no document expressly or impliedly providing that Masel was to supply all of EDC's requirements. I must, therefore, grant defendant's motion for summary judgment on count III of the complaint because the contract fails to satisfy the statute of frauds.

Problem 96

Natasha agreed to sell Dan 4,000 cartons of cigarettes (she had just quit smoking). Dan felt the agreement should be in writing so Natasha typed on a blank piece of her letterhead: "I promise to sell Dan 4,000 cartons of cigarettes at $7.50 per carton." Natasha did not sign her name at the end. When Natasha backs out of the deal, Dan sues for breach of contract, and Natasha defends alleging there is no requisite writing because she has signed nothing. Is she correct? UCC §1-201(39); Restatement (Second) of Contracts §134. Yes

III. SATISFACTION OF THE STATUTE

RESTATEMENT (SECOND) OF CONTRACTS

§131. General Requisites of a Memorandum

Unless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which

(a) reasonably identifies the subject matter of the contract,
(b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
(c) states with reasonable certainty the essential terms of the unperformed promises.

Comment g to this section provides: "What is essential depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought."

CRABTREE v. ELIZABETH ARDEN SALES CORP.
New York Court of Appeals, 1953
305 N.Y. 48, 110 N.E.2d 551

FULD, J. In September of 1947, Nate Crabtree entered into preliminary negotiations with Elizabeth Arden Sales Corporation, manufacturers and sellers of cosmetics, looking toward his employment as sales manager. Interviewed on September 26th, by Robert P. Johns, executive vice-president and general manager of the corporation, who had apprised him of the possible opening, Crabtree requested a three-year contract at $25,000 a year. Explaining that he would be giving up a secure well-paying job to take a position in an entirely new field of endeavor—which he believed would take him some years to master—he insisted upon an agreement for a definite term. And he repeated his desire for a contract for three years to Miss Elizabeth Arden, the corporation's president. When Miss Arden finally indicated that she was prepared to offer a two-year contract, based on an annual salary of $20,000 for the first six months, $25,000 for the second six months and $30,000 for the second year, plus expenses of $5,000 a year for each of those years, Crabtree replied that that offer was "interesting." Miss Arden thereupon had her personal secretary make this memorandum on a telephone order blank that happened to be at hand:

EMPLOYMENT AGREEMENT WITH
NATE CRABTREE DATE SEPT. 26 1947
At 681 5th Ave. 6 P.M.

Begin	20000.
6 months	25000.
6 months	30000.

5000. — per year, Expense money
[2 years to make good]

Arrangement with Mr. Crabtree, By Miss Arden, Present Miss [A]rden, Mr. Johns, Mr. Crabtree, Miss O'Leary

A few days later, Crabtree phoned Mr. Johns and telegraphed Miss Arden; he accepted the "invitation to join the Arden organization," and Miss Arden wired back her "welcome." When he reported for work, a "payroll change" card was made up and init ialed by Mr. Johns, and then forwarded to the payroll department. Reciting that it was prepared on September 30, 1947, and was to be effective as of October 22d, it specified the names of the parties, Crabtree's "Job Classification" and, in addition, contained the notation that "This employee is to be paid as follows:

First six months of employment	$20,000 Per annum
Next six months of employment	25,000 " "
After one year of employment	30,000 " "

Approved by RPJ [initialed]

After six months of employment, Crabtree received the scheduled increase from $20,000 to $25,000, but the further specified increase at the end of the year was not paid. Both Mr. Johns and the comptroller of the corporation, Mr. Carstens, told Crabtree that they would attempt to straighten out the matter with Miss Arden, and, with that in mind, the comptroller prepared another "pay-roll change" card, to which his signature is appended, noting that there was to be a "Salary increase" from $25,000 to $30,000 a year, "per contractual arrangements with Miss Arden." The latter, however, refused to approve the increase and, after further fruitless discussion, plaintiff left defendant's employ and commenced this action for breach of contract.

At the ensuing trial, defendant denied the existence of any agreement to employ plaintiff for two years, and further contended that, even if one had been made, the statute of frauds barred its enforcement. The trial court found against defendant on both issues and awarded plaintiff damages of about $14,000, and the Appellate Division, two justices dissenting, affirmed. Since the contract relied upon was not to be performed within a year, the primary question for decision is whether there was a memorandum of its terms, subscribed by defendant, to satisfy the statute of frauds, Personal Property Law, §31.

Each of the two payroll cards — the one initialed by defendant's general manager, the other signed by its comptroller — unquestionably constitutes a memorandum under the statute. That they were not prepared or signed with the intention of evidencing the contract, or that they came into existence subsequent to its execution, is of no consequence, see Marks v. Cowdin, 226 N.Y. 138, 145, 123 N.E. 139, 141; Spiegel v. Lowenstein, 162 App. Div. 443, 448-449, 147 N.Y.S. 655, 658; see, also, Restatement, Contracts, §§209, 210, 214; it is enough, to meet the statute's demands, that they were signed with intent to authenticate the information contained therein and that such information does evidence the terms of the contract. See . . . 2 Corbin on Contracts [1951], pp. 732-733, 763-764; 2 Williston on Contracts [rev. ed., 1936], pp. 1682-1683. Those two writings contain all of the essential terms of the contract — the parties to it, the position that plaintiff was to assume, the salary that he was to receive — except that relating to the duration of plaintiff's employment. Accordingly, we must consider whether that item, the length of the contract, may be supplied by reference to the earlier unsigned office memorandum, and, if so, whether its notation, "2 years to make good," sufficiently designates a period of employment. The statute of frauds does not require the "memorandum . . . to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion." . . . Where each of the separate writings has been subscribed by the party to be charged, little if any difficulty is encountered. . . . Where, however, some writings have been signed, and others have not — as in the case before us — there is basic disagreement as to what constitutes a sufficient connection permitting the unsigned papers to be considered as part of the statutory memorandum. The courts of some jurisdictions insist that there be a reference, of varying degrees of specificity, in the signed writing

to that unsigned, and, if there is no such reference, they refuse to permit consideration of the latter in determining whether the memorandum satisfies the statute. . . . That conclusion is based upon a construction of the statute which requires that the connection between the writings and defendant's acknowledgment of the one not subscribed, appear from examination of the papers alone, without the aid of parol evidence. The other position — which has gained increasing support over the years — is that a sufficient connection between the papers is established simply by a reference in them to the same subject matter or transaction. . . . The statute is not pressed "to the extreme of a literal and rigid logic," Marks v. Cowdin, supra, 226 N.Y. 138, 144, 123 N.E. 139, 141, and oral testimony is admitted to show the connection between the documents and to establish the acquiescence, of the party to be charged, to the contents of the one unsigned. . . .

The view last expressed impresses us as the more sound, and, indeed — although several of our cases appear to have gone the other way, . . . — this court has on a number of occasions approved the rule, and we now definitively adopt it, permitting the signed and unsigned writings to be read together, provided that they clearly refer to the same subject matter or transaction. . . .

The language of the statute — "Every agreement . . . is void, unless . . . some note or memorandum thereof to be in writing, and subscribed by the party to be charged," Personal Property Law, §31 — does not impose the requirement that the signed acknowledgment of the contract must appear from the writings alone, unaided by oral testimony. The danger of fraud and perjury, generally attendant upon the admission of parol evidence, is at a minimum in a case such as this. None of the terms of the contract are supplied by parol. All of them must be set out in the various writings presented to the court, and at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction as that set forth in the one that was signed. Parol evidence — to portray the circumstances surrounding the making of the memorandum — serves only to connect the separate documents and to show that there was assent, by the party to be charged, to the contents of the one unsigned. If that testimony does not convincingly connect the papers, or does not show assent to the unsigned paper, it is within the province of the judge to conclude, as a matter of law, that the statute has not been satisfied. True, the possibility still remains that, by fraud or perjury, an agreement never in fact made may occasionally be enforced under the subject matter or transaction test. It is better to run that risk, though, than to deny enforcement to all agreements, merely because the signed document made no specific mention of the unsigned writing. . . .

Turning to the writings in the case before us — the unsigned office memo, the payroll change form initialed by the general manager Johns, and the paper signed by the comptroller Carstens — it is apparent, and most patently, that all three refer on their face to the same transaction. The parties, the position to be filled by plaintiff, the salary to be paid him, are all identically set forth; it is hardly possible that such detailed information

could refer to another or a different agreement. Even more, the card signed by Carstens notes that it was prepared for the purpose of a "Salary increase per contractual arrangements with Miss Arden." That certainly constitutes a reference of sorts to a more comprehensive "arrangement," and parol is permissible to furnish the explanation.

The corroborative evidence of defendant's assent to the contents of the unsigned office memorandum is also convincing. Prepared by defendant's agent, Miss Arden's personal secretary, there is little likelihood that that paper was fraudulently manufactured or that defendant had not assented to its contents. Furthermore, the evidence as to the conduct of the parties at the time it was prepared persuasively demonstrates defendant's assent to its terms. Under such circumstances, the courts below were fully justified in finding that the three papers constituted the "memorandum" of their agreement within the meaning of the statute.

Nor can there be any doubt that the memorandum contains all of the essential terms of the contract. . . . Only one term, the length of the employment, is in dispute. The September 26th office memorandum contains the notation, "2 years to make good." What purpose, other than to denote the length of the contract term, such a notation could have, is hard to imagine. Without it, the employment would be at will, see Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417, and its inclusion may not be treated as meaningless or purposeless. Quite obviously, as the courts below decided, the phrase signifies that the parties agreed to a term, a certain and definite term, of two years, after which, if plaintiff did not "make good," he would be subject to discharge. And examination of other parts of the memorandum supports that construction. Throughout the writings, a scale of wages, increasing plaintiff's salary periodically, is set out; that type of arrangement is hardly consistent with the hypothesis that the employment was meant to be at will. The most that may be argued from defendant's standpoint is that "2 years to make good," is a cryptic and ambiguous statement. But, in such a case, parol evidence is admissible to explain its meaning. . . . Having in mind the relations of the parties, the course of the negotiations and plaintiff's insistence upon security of employment, the purpose of the phrase—or so the trier of the facts was warranted in finding—was to grant plaintiff the tenure he desired.

The judgment should be affirmed, with costs.

NOTES AND QUESTIONS

1. The court held in Heinrichs v. Marshall & Stevens, Inc., 921 F.2d 418 (2d Cir. 1990), that provisions in an employee's manual concerning employment were insufficient to satisfy the statute of frauds where the manual contained no promise or undertaking that employment would be for any definite term.

2. In the last section of these materials, we learned that the general view is that UCC §2-201 requires a quantity to be stated in the writing. In a distributorship contract, would the writing suffice if it did not specifically

state the quantity to be distributed? Consider Wood v. Lucy, Lady Duff-Gordon at page 151. Does the implication of good faith in §2-306 help? See Lorenz Supply Co. v. American Standard, Inc., 419 Mich. 610, 358 N.W.2d 845 (1984) (the dissent makes a very strong argument that the good faith requirement and general language about the distributorship implies that the seller will meet the requirements of the distributor in good faith and this, therefore, satisfies the quantity requirement). (To the same effect is Advent Systems v. Unisys Corp., 925 F.2d 670, 13 UCC Rep. Serv. 2d 669 (1991).)

3. The Restatement comment quoted before *Crabtree* indicates that the degree of specificity depends upon the type of remedy sought. What type of remedy would demand more specificity?

4. Even though a once sufficient writing is later lost, that writing may be used to overcome the statute of frauds; Corbin §529.

5. The signature requirement occasionally frustrates a party trying to enforce a contract required to be in writing. Review the definition of "signed" in the UCC at §1-201. Would an initial placed on notes taken during a negotiation for a contract prove satisfactory? They would not according to the court in Vess Beverages, Inc. v. Paddington Corp., 941 F.2d 651 (8th Cir. 1991), because the initials simply indicated who attended and there was no "present intent to authenticate" the notes as the subscriber's own when he wrote the initials.

Problem 97

After Levy Pants orally agreed to hire Ignatius J. Reilly as its office manager for a five-year period, the president of the company wrote a letter to Ignatius's long-suffering mother. In part the letter stated: "Knowing of your distress at his idleness, we have agreed with him to employ him as our office manager, paying him $30,000 a year for a five-year period, starting at the first of this year." When the company fired Ignatius shortly thereafter, he sued. When the company pointed to the lack of a writing, Ignatius produced the letter sent by the company to his mother. To this the company replied that it was *not* the contract itself, and that the president of the company had no contractual intent when he signed the letter to a third person (i.e., the mother). Does the letter satisfy the statute, or is it defective because it is not the contract itself?

Problem 98

Elizabeth Bennett signed a contract with Jim Darcy to buy his house in Derbyshire and was astounded when he told her that he had changed his mind and no longer was of a mind to sell. She promptly filed suit against him. Darcy's lawyer asked him to review the negotiations and see if Darcy couldn't remember some detail actually agreed to by the parties but inadvertently left out of the agreement. Darcy then remembered a conver-

sation with Bennett in which he had agreed that if she would purchase the house at the agreed-upon price, he would improve the view by tearing down an ugly ice house on a nearby property he also owned. At the trial, in spite of the parol evidence rule (see the next chapter) and the objections of Bennett's lawyer, Darcy was permitted to testify as to the ice-house agreement, and, when called to the stand, Bennett confirmed his testimony. His attorney immediately moved to have the suit dismissed based on the statute of frauds. Should the judge grant the request?

IV. MITIGATING DOCTRINES AND EXCEPTIONS

A. *Restitution*

Problem 99

Bea Potter was hired by MacGregor Agricultural Enterprises as a bookkeeper for a two-year period; her salary was to be $24,000 a year. The contract was oral. After she had worked for a two-month period, she was wrongfully accused of stealing and was fired on the spot. When she brought suit, MacGregor defended on the basis of the lack of a writing. If this defense is successful, may she nonetheless recover for the two months she worked? Under what theory? How would her damages be measured?

B. *Part Performance*

WAGERS v. ASSOCIATED MORTGAGE INVESTORS
Washington Court of Appeals, 1978
19 Wash. App. 758, 577 P.2d 622

DORE, J. Plaintiff Ronald L. Wagers sought specific performance of an alleged agreement to purchase real estate lots in Kent, Washington or, in the alternative, for damages for breach of the agreement. Defendant Associated Mortgage Investors (hereinafter called AMI) moved to dismiss the plaintiff's first cause of action for specific performance which the court treated as a motion for summary judgment. The trial court entered partial summary judgment as a final judgment dismissing plaintiff's first cause of action for specific performance. . . .

Plaintiff Wagers was a building contractor with offices in Federal Way, Washington. In the spring of 1975 Wagers commenced negotiations with

Tom Benkert, a representative of AMI in Coral Gables, Florida, for the purchase of 104 building lots near Kent, Washington. Negotiations for the sale took place over a period ranging from the spring of 1975 through April of 1976. Benkert indicated that his principal (AMI) owned and controlled the property and had the power to sell to anyone it chose. There was some mention of other persons having an interest in the property but plaintiff was assured that AMI had the authority to make the sale as long as agreeable terms were reached. That on February 9, 1976 Wagers submitted an earnest money agreement to AMI to purchase the lots for $250,000 cash.

After Wagers mailed the executed earnest money agreement to AMI he continued to inquire as to when approval would be forthcoming. On March 29, 1976 Benkert telephonically advised plaintiff that the Board of Trustees of AMI had approved the earnest money agreement for an amended total cash sales price of $270,000. He further stated the signed earnest money agreement would be immediately returned to plaintiff through AMI's attorney in Seattle. In this conversation plaintiff was informed that there was only "one slight problem" with an individual who was "hedging a bit for more money on settlement of AMI from the sale proceeds; it was a matter of internal handling, however, and would not delay the close of the sale."

In a letter dated March 30, 1976, AMI's Seattle attorney wrote to plaintiff's attorney as follows:

> Dear Mr. Stevenson:
>
> Associated Mortgage Investors has indicated to us that the proposed sale to Mr. Wagers for $270,000 — $10,000 as forfeitable earnest money with the balance to be paid in cash within 90 days if the necessary financing can be arranged — is acceptable to AMI *subject to prior approval by its trustees and subject to its ability to arrange* for delivery of clear title. AMI is governed by its Board of Trustees and must have approval of the Board before it can sell the property. However, AMI's officers are confident that the trustees will approve the sale.
>
> Concerning the problems of clearing title, we attempted to explain to you during our recent phone conversation some of the complexities of the case. These complexities result in delay, but we do not anticipate any particular problem. On March 17, 1976, we wrote to the various parties having an interest in the property outlining the terms of the proposed sale and suggesting a division of the proceeds. We requested a response by Monday, March 29, 1976. All except one of the parties have now responded by indicating that the proposal is acceptable. The one remaining party has indicated that he is undertaking certain steps to determine whether the sale price is reasonable and has promised to respond by Monday, April 5, 1976.
>
> Thus, although we cannot promise that the proposed transaction will be closed, we are undertaking our best efforts to obtain the necessary approvals, and it is AMI's intent to sell the property to Mr. Wagers on the terms indicated if it can successfully arrange to clear title on terms acceptable to AMI.
>
> */s/ John H. Strasburger*

(Emphasis added.)

A few days later on April 6, 1976 the attorney for the plaintiff acknowledged Strasburger's letter of March 30 and wrote:

> Dear Mr. Strasburger:
>
> Thank you for your letter of March 30, 1976 concerning the *sale* of the above realty by your client, Associated Mortgage Investors (AMI), to Ron Wagers, my client.
>
> Your letter confirms Wagers' understanding with Mr. Tom Benkirk [sic], agent for AMI in Coral Gables, Florida, that the above described realty is *sold* to Wagers for $270,000.00, all cash on closing with $10,000.00 down, pending clearance by you of fee title. The *sale* is to be closed at Pioneer National Title Insurance Company here in Seattle under appropriate escrow instructions and within 90 days of AMI furnishing the preliminary title report.
>
> You are proceeding to clear the title and will advise me when this has been accomplished — hopefully within the next week.
>
> Relying on the above, *Wagers is proceeding to obtain the necessary funds for payment and preparing plans and schedules for completion of the tract.*
>
> Tom Benkirk [sic] advised Wagers in a phone conversation on March 29, 1976 that the *trustees of AMI had approved the terms of the above described sale. Therefore, please have the earnest money now in the hands of AMI executed and forwarded to me for my file and for Pioneer National Title Insurance Company. Also, forward to me AMI's appraisal on the property and engineer's report as promised by Tom Benkirk* [sic].
>
> Wagers advises that there may be a problem of the ownership of Lots 1 through 7 by AMI. He discussed this with Tom Benkirk [sic] who has agreed, if there is no ownership, to reduce the total sales price of $270,000.00 by $18,173.05 for the loss of the seven lots. This amount was arrived at by dividing $270,000.00 by 104 lots which gives a price of $2,596.15 for each lot or a total of $18,173.05.
>
> Please advise me when this sale can be moved into closing.
>
> */s/ Robert H. Stevenson*

(Emphasis added.)

AMI's Seattle counsel, upon receiving the above letter and obviously disagreeing, responded the following day April 7, 1976, as follows:

> Dear Mr. Stevenson:
>
> We have received your letter of April 6, 1976. As we stated in our prior letter, *it is not my understanding that the trustees have approved the sale since an agreement has not yet been received from all of the parties who have an interest in the property* concerning the sale and the proposed sale cannot be approved by the trustees until formal agreement has been received. We have contacted four different individuals connected with the property. Three have indicated that the sale appears to be acceptable. The fourth is still questioning the reasonableness of the sale price, but it appears that they will also consent. However, when we informed them of the sale, we stated that the sale price was $270,000. Your letter indicates that the sale price has been reduced. If this is the case, it will be necessary to recontact each of the individual parties.
>
> We are concerned that your letter may be designed to render AMI liable for any financing and other costs incurred by Mr. Wagers if the property is

not sold to Mr. Wagers. Therefore, we wish to clarify that although AMI is interested in Mr. Wagers' offer, he is proceeding at his own risk and AMI will not be responsible for any expenses he may incur. *Specifically, your letter indicates that you are confirming Mr. Wagers' understanding that the property has been "sold to Wagers." If this is Mr. Wagers' understanding, it is incorrect.* As previously indicated, any sale to Mr. Wagers is contingent upon approval of the Board of Trustees of AMI and approval of each of the individuals who have an interest in the property. We are continuing to exert our best efforts to obtain the necessary approvals on terms acceptable to AMI. *Until these necessary approvals on terms acceptable to AMI's trustees have been obtained, there is no binding and enforceable agreement.*

As we have previously indicated, AMI's officers are acting in good faith, but we felt it necessary to write this letter since your letter implied that the negotiations had now resulted in a binding agreement which is not yet the case.

/s/ John H. Strasburger

(Emphasis added.)

Issues

1. Whether plaintiff's unilaterally executed earnest money agreement, together with the letters exchanged between the parties' respective attorneys, constitute a sufficient writing of a sale of land to satisfy the statute of frauds?

2. Whether plaintiff's arrangement of financing for development of the subject of the sale constituted sufficient part performance to make the sale an exception to the statute of frauds?

Decision

ISSUE 1

Sales of land to be enforceable must ordinarily be in writing signed by the party to be charged. However, a writing is not always essential to the validity of the contract. An oral agreement can be equally effective and binding as a written one when the terms are reasonably established in writing by a series of documents and/or written memorandum which would establish the subject matter, consideration, identity of the parties and the terms of the agreement.

Plaintiff argues that the statute of frauds may be satisfied by various kinds of written memorandum. It may consist of one writing or several writings. It may also be pieced together out of separate writings since all that the statute requires is written evidence on which the whole agreement can be made out. Restatement of Contracts §208 (1932); Western Timber Co. v. Kalama River Lbr. Co., 42 Wash. 620, 85 P. 338 (1906); Alexander v. Lewes, 104 Wash. 32, 175 P. 572 (1918). Plaintiff contends that the earnest money agreement signed by Wagers and the letter of

defendant's attorney under date of March 30, 1976, together with plaintiff's attorney's answering letter of April 6, 1976, supplies the necessary written information to satisfy the statute of frauds.

Plaintiff and his attorney at all times were advised that the purchaser's earnest money agreement was subject to approval of the board of trustees as well as its ability to arrange for delivery of clear title.

Strasburger's letter of March 30 was written 1 day after plaintiff's earnest money agreement had expired without being accepted, signed and returned. His letter is replete with statements that the subject earnest money agreement was contingent upon the approval of the board of trustees and that there was a number of indications that there was pending trouble with clearing title. At this juncture plaintiff's attorney was obviously disturbed and tried to turn a unilaterally executed earnest money agreement into a consummated sale by answering Strasburger's letter referring to "the sale of the above realty by your client Associated Mortgage Investors to Ronald Wagers, my client." It is clear to the court that on April 6, 1976 plaintiff's attorney was still unsure as to the subject matter of the sale and was trying to establish a formula for reduction of the amount of the total purchase price in the event that title to seven lots might not be cleared. It may well be that the seven deleted lots were far more valuable than the remaining lots and there is no indication that the lots were of the value of $2,596.15 each, as provided for in plaintiff's letter.

Apparently the next day when defendant's attorney received plaintiff's attorney's letter of April 6, he immediately responded in his letter of April 7, 1976 wherein he stated in no uncertain terms that the sale had not been approved and again stating that one of the tenants in common was questioning the reasonableness of the sale price. He further stated that in the event the sale price of $270,000 was to be reduced, it would again require approval from all of the owners. In the same letter he also cautioned plaintiff's attorney not to incur any expenses on the basis that the sale had been consummated.

We hold that the buyer's unilaterally executed earnest money agreement, together with the letters exchanged between the buyer's and seller's attorneys, fail to establish an agreement between the parties on essential contract terms and, therefore, did not constitute a sufficient writing to satisfy the statute of frauds.

ISSUE 2

Part performance is a recognized exception of the requirement of the statute of frauds. One of the requirements of the doctrine of part performance is that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they may be accounted for by some other hypothesis they are not sufficient. Granquist v. McKean, 29 Wash. 2d 440, 187 P.2d 623 (1947).

The statute of frauds is a positive enactment to the effect that contracts of this nature to be valid and enforceable must be in writing. Courts of equity have no right any more than courts of law to disregard

the statute except where it is necessary to do so in order to prevent a gross fraud from being practiced. Granquist v. McKean, supra.

In Richardson v. Taylor Land & Livestock Co., 25 Wash. 2d 518, 171 P.2d 703 (1976), the principal elements involved in determining part performance are elucidated at page 528, 171 P.2d at page 709:

> The principal elements or circumstances involved in determining whether there has been sufficient part performance by a purchaser of real estate under an oral contract otherwise within the statute of frauds, are (1) delivery and assumption of actual and exclusive possession of the land; (2) payment or tender of the consideration, whether in money, other property, or services; and (3) the making of permanent, substantial, and valuable improvements, referable to the contract.
>
> There is a wide diversity of opinion, as shown by the adjudicated cases regarding the relative importance of these three elements. Where all three of them are united in a given instance, the strongest kind of case is thereby generally presented (Bendon v. Parfit, 74 Wash. 645, 134 P. 185), and, conversely, where none is shown, there is little to warrant a court of equity in decreeing specific performance. There is also a contrariety of opinion, as exemplified in the many cases on the subject, as to whether any single one of these elements is either an indispensable or an all-sufficient ingredient of part performance. As a matter of fact, in most of the cases where the doctrine of part performance has been successfully invoked, it will be found that at least two of the enumerated elements are present. It is also safe to say that of these elements, that of payment of consideration, when standing alone, is of less cogency than the others in determining whether there has been sufficient part performance to take the case without the operation of the statute of frauds. These several observations are fully confirmed by the encyclopedic treatises or restatements of the body of the law upon the subject, as found in 49 Am. Jur. 722 et seq., Statute of Frauds, §419 et seq.; 37 C.J.S. 755 et seq., Statute of Frauds, §248 et seq.; Notes (1936) 101 A.L.R. 923 to 1115.
>
> We can, therefore, assert with confidence that no positive rule has been, or can be, formulated for the government or decision of all cases indiscriminately, but that the determination of each case must depend upon the particular facts and circumstances involved therein.

See also Thompson v. Hunstad, 53 Wash. 2d 87, 91, 330 P.2d 1007 (1958), wherein it was stated on page 91, 330 P.2d on page 1009:

> One of the requirements of the doctrine of part performance is that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they may be accounted for on some other hypothesis, they are not sufficient.

The only act of "part performance" alleged by appellant is contained in Mr. Wagers's affidavit in which he states:

> Affiant told Mr. Beukert [sic] that he was arranging for the financing of the sale and wanted to start breaking ground as soon as possible. . . . In reliance on these conversations, affiant made arrangements for financing this sale with Citizens Federal Savings and Loan in Seattle.

We have none of the three principal elements or circumstances in this case to constitute part performance. At best we have arrangement for financing which presumably had been arranged or provided for before the earnest money agreement was signed. In any event the arrangement for financing was equally consistent with the earnest money agreement or with the decision to make an offer to increase the purchase price rather than a sale. We hold there was no part performance by the plaintiff to constitute an exception to the statute of frauds.

The doctrine of equitable estoppel is not applicable in this case.

Judgment affirmed.

RESTATEMENT (SECOND) OF CONTRACTS

§129. Action in Reliance; Specific Performance

A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement.

[Comment d to the section states in part:]

The promisee must act in reasonable reliance on the promise, before the promisor has repudiated it, and the action must be such that the remedy of restitution is inadequate. If these requirements are met, neither taking of possession nor payment of money nor the making of improvements is essential.

NOTES AND QUESTIONS

1. Would the plaintiff in *Wagers* have fared better under Restatement (Second) of Contracts §129?

2. Although as indicated by the present case, taking possession is one event often decided as part performance, *retention* of possession by one already in possession claimed under a different right or title is not part performance. See Bank of Alton v. Tanaka, 274 Kan. 443, 799 P.2d 1029 (1990).

3. Typically, payment does not serve as part performance for purposes of circumventing the statute of frauds unless the payment is in full. See, e.g., Marathon Oil Co. v. Collins, 744 N.E.2d 474 (Ind. App. 2001).

4. Part performance is not preparation to perform. See, for example, Mann v. White Marsh Properties, 321 Md. 111, 581 A.2d 819 (Md. 1990), holding that activities in having title to property searched, having plans prepared and reviewed for zoning compliance, and making arrangements for percolation test of soil were insufficient because such actions although consistent with a contract were also consistent with the absence of contract—steps that may have been taken preliminary to a contract.

5. The part performance exception does not allow for enforcement of an oral contract when the contract is for a performance that will take over one year or one in consideration of marriage. Comment d to §130 and comment d to §124. Nor do the courts typically use part performance to escape from the suretyship portion of the statute; see, e.g., Brown & Shinitzky Chartered v. Dentinger, 118 Ill. App. 3d 517, 455 N.E.2d 128 (1983). However, in the one year situation, *full* performance by a person of a promise to render services for over one year does serve to make an oral promise to pay enforceable.

Problem 100

Mary's Used Cars orally agreed to sell Harry a 1978 Special Corvette Pace Car for $4,000. Harry made a $300 down payment. When Harry went to pick up the car, he was told there was no contract because of the lack of a writing. When Harry pointed to UCC §2-201(3)(c), Mary's manager just laughed and offered to give him a bumper worth $300. Who wins? If he had paid by a check, would the check itself have satisfied the writing requirement (Mary's Used Cars would have indorsed it when it was cashed)?

C. Admissions

Problem 101

Scarlett decided to sell Tara to Rhett, and they entered into an oral contract that specified all of the details. At the closing she decided at the last moment that she just couldn't bear to go through with the deal, so she refused to sign the contract that he had had prepared. When he sued, she defended on the basis of the statute of frauds, although she took the witness stand and when shown the copy of the contract that she had refused to sign she readily admitted that it correctly reflected all of the terms of their oral agreement. As the judge, how would you rule on the statute of frauds issue? Was it unethical to plead the statute in such a case? See Triangle Marketing, Inc. v. Action Indus., Inc., 630 F. Supp. 1578, 1 U.C.C. Rep. Serv. 2d 36 (N.D. Ill. 1986) ("[T]o allow those who admit to a contract to use the statute of frauds as an insulator not only yields the 'wrong' result on the facts—which can always happen in litigation—but it also allows the litigant to thumb his or her nose at the court"); Corbin §320; Stevens, Ethics and the Statute of Frauds, 37 Cornell L.Q. 355 (1952).

NOTES

1. Section 2-201(3)(b) of the UCC provides that the statute of frauds cannot be used as a defense if there has been a court-related admission of

a valid contract. In Nebraska Builders Products Co. v. Industrial Erectors, Inc., 239 Neb. 744, 478 N.W.2d 257, 16 U.C.C. Rep. Serv. 2d 568 (1992), the court held that a statement by the manager of the defendant supplier referring to "the contract" was a sufficient admission under the UCC.

Though, historically, the common law rule was different from the UCC, nearly all jurisdictions now apply the admission exception. See Gibson v. Arnold, 288 F.3d 1242 (10th Cir. 2002) for a collection of cited cases utilizing the exception in non-UCC cases.

However, you should also be aware of some judicial reluctance to find an admission. For example, in a case much like the facts of Problem 101 the court held that trial testimony of putative seller of grain that he offered to sell a specific amount of grain at a specified price and that buyer agreed to buy on those terms was not an "admission" where (a) seller was responding to carefully worded questions by opposing counsel, which included numerous references to a "contract" and served to weave together a legal conclusion that he sold the grain rather than engaged in preliminary negotiatons, and (b) seller had always received a signed contract which he thought necessary to have an enforceable contract. Conagra, Inc. v. Nierenberg, 7 P.3d 369 (Mont. 2000).

2. A more difficult issue concerns implicit admissions arising from the nature of the pleadings. Certain responses to complaints, a demurrer, for example, does not contest the accuracy of the facts pleaded in the complaint. If the plaintiff pleads the existence of a contract, and the defendant files a demurrer, is that an admission of a contract that forbids the use of the statute of frauds defense? The majority and the dissent in the last-cited case differed on the effect that should be given to "technical admissions." Try to formulate their basis for disagreement given the major reason behind the statute of frauds: the prevention of fraud.

Problem 102

Artist Basil Hallward orally agreed to sell his five finest paintings at the rate of one a year for the next five years to Henry Wotton. The price was to be $10,000 for each painting. When the time came for delivery of the first painting, Basil couldn't bring himself to part with it. When Henry sued, Basil admitted the contract from the witness stand. Henry's attorney argued that this admission destroyed Basil's statute of frauds defense, but the other side pointed out that the contract could not be performed within one year and therefore the common law statute of frauds required a writing even if the UCC did not. How should this come out? See Rajala v. Allied Corp., 66 Bankr. Rptr. 582, 2 U.C.C. Rep. Serv. 2d 1203 (D. Kan. 1986). The 2003 revision of §2-201 resolves this problem by specifically providing that the one years rule does not apply in contracts for the sale of goods; new §2-201(4).

D. *Confirmations*

THOMSON PRINTING MACHINERY CO. v. B. F. GOODRICH CO.

United States Court of Appeals, Seventh Circuit, 1983
714 F.2d 744

CUDAHY, Circuit Judge. Appellant Thomson Printing Company ("Thomson Printing") won a jury verdict in its suit for breach of contract against appellee B. F. Goodrich Company ("Goodrich"). The district court concluded, however, that as a matter of law the contract could not be enforced against Goodrich because it was an oral contract, the Statute of Frauds applied and the Statute was not satisfied. Because we conclude that the contract was enforceable on the basis of the "merchants" exception to the Statute of Frauds, we reverse.

INTRODUCTION

Thomson Printing buys and sells used printing machinery. On Tuesday, April 10, 1979, the president of Thomson Printing, James Thomson, went to Goodrich's surplus machinery department in Akron, Ohio to look at some used printing machinery which was for sale. James Thomson discussed the sale terms, including a price of $9,000, with Goodrich's surplus equipment manager, Ingram Meyers. Four days later, on Saturday, April 14, 1979, James Thomson sent to Goodrich in Akron a purchase order for the equipment and a check for $1,000 in part payment.

Thomson Printing sued Goodrich when Goodrich refused to perform. Goodrich asserted by way of defense that no contract had been formed and that in any event the alleged oral contract was unenforceable due to the Statute of Frauds. Thomson Printing argued that a contract had been made and that the "merchants" and "partial performance" exceptions to the Statute of Frauds were applicable and satisfied. The jury found for Thomson Printing, but the district court entered judgment for Goodrich on the grounds that the Statute of Frauds barred enforcement of the contract in Thomson's favor. . . .

THE "MERCHANTS" EXCEPTION

A modern exception to the usual writing requirement is the "merchants" exception of the Uniform Commercial Code, Ohio Rev. Code Ann. §1302.04(B) (Page 1979) (UCC §2-201(2)), which provides:

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the [writing require-